

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1969

Volume I

*Summary records
of the twenty-first session
2 June—8 August 1969*

UNITED NATIONS



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New York, 1970



INTRODUCTORY NOTE

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

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

The Special Rapporteurs' reports discussed at the session and certain other documents, including the Commission's report to the General Assembly, are printed in volume II of this Yearbook.

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Mr. Anatoly P. Movchan, 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 990th meeting, held on 2 June 1969:

1. Relations between States and international organizations.
2. Succession of States and Governments:
 - (a) Succession in respect of treaties;
 - (b) Succession in respect of matters other than treaties.
3. State responsibility.
4. Most-favoured-nation clause.
5. Co-operation with other bodies.
6. Organization of future work.
7. Dates and places of the Commission's meetings in 1970.
8. Other business.

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part II Summary records of the eighteenth session	67.V.5
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1967, vol. I Summary records of the nineteenth session	E.68.V.1
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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE TWENTY-FIRST SESSION

Held at Geneva from 2 June to 8 August 1969

990th MEETING

Monday, 2 June 1969, at 3.20 p.m.

Chairman: Mr. José Maria RUDA
later: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Ignacio-Pinto, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Tabibi, Mr. Tammes, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Opening of the Session

1. The CHAIRMAN, after declaring open the twenty-first session of the International Law Commission, said that he had submitted the Commission's report on the work of its twentieth session to the Sixth Committee of the General Assembly on 3 October 1968. Subsequently, in accordance with the Commission's decision, he had given an account of the work it had accomplished during the twenty years since it had been established; that work had been praised by representatives of the various geographical groups in the General Assembly.

2. Comments had been made in the Sixth Committee on each of the topics on the Commission's agenda. On the topic "Relations between States and international organizations" there had been some general observations, and the draft articles so far prepared by the Commission¹ had been welcomed as a useful contribution to the study of a new sector of international law which differed in many respects from that of traditional inter-State relations. Various delegations had also commented on many of the individual articles of the draft.

3. The Sixth Committee had welcomed the fact that the International Law Commission had begun consideration of the topic "Succession of States and Governments". A number of representatives had approved of

the Commission's decision to divide the topic into three parts under the headings: "succession in respect of treaties"; "succession in respect of rights and duties resulting from sources other than treaties"; and "succession in respect of membership of international organizations".² While the decision to give priority to succession in respect of treaties had been approved, the view had also been expressed that work on succession in respect of membership of international organizations should begin as soon as a convention on relations between States and international organizations was adopted. In addition, it had been urged that succession of governments should also be studied.

4. With regard to the "most-favoured-nation clause", general satisfaction had been expressed at the Commission's commencement of the study of that important topic.

5. The Commission's decision to adopt a long-term programme of work had been noted by the General Assembly in its resolution 2400 (XXIII), by which it had also approved the Commission's decision to prepare, in accordance with article 18 of its Statute, a "new survey of the whole field of international law referred to in paragraph 99 of the Commission's report".

6. Delegations had stated that they would welcome a study by the Commission of the question of treaties concluded between States and international organizations or between two or more international organizations, if the General Assembly accepted the recommendation to that effect made by the United Nations Conference on the Law of Treaties.³

7. Many delegations had stressed the importance of Mr. Ago's suggestions concerning the final stage of the codification of international law⁴ and some had considered that the International Law Commission should be invited to study that question more thoroughly and submit its recommendations to the Sixth Committee. General Assembly resolution 2400 (XXIII) did not, however, refer to that problem. It recommended that the Commission should:

² *Ibid.*, chapter III, para. 34.

³ See Final Act of the United Nations Conference on the Law of Treaties (A/CONF.39/26), annex, resolution relating to article 1 of the Vienna Convention on the Law of Treaties.

⁴ See *Yearbook of the International Law Commission*, 1968, vol. II, document A/CN.4/205/Rev.1.

¹ See *Yearbook of the International Law Commission*, 1968, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

"(a) Continue its work on succession of States and Governments and relations between States and international organizations, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII);

"(b) Continue its study of the most-favoured-nation clause;

"(c) Make every effort to begin substantive work on State responsibility as from its next session, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)."

8. General approval of the methods of work so far adopted by the Commission had also been expressed.

9. A number of representatives had expressed support for the Commission's proposal, contained in its 1968 report, that the term of office of its members should be extended from five years to six or seven years.⁵ Some representatives had pointed out that the Commission had not specified whether its proposal referred to the term of office of its present members or of future members. Other representatives had opposed the proposal, but, as recorded in the report of the Sixth Committee, the majority of those who had spoken on the question had considered that it should be studied more thoroughly and that a decision on it should be postponed until a later session of the General Assembly.

10. Various delegations had expressed sympathy with the Commission's concern at the present situation regarding honoraria and *per diem*, and the proposed additional allowance to help special rapporteurs defray travel and incidental expenses in connexion with their work.⁶ On that point, operative paragraph 6 of General Assembly resolution 2400 (XXIII) merely noted that "the Secretary-General has under study the questions raised in paragraphs 98 (b) and 98 (c) of the report of the International Law Commission". The view had prevailed that the matter should be examined in the general context of the study of the question of honoraria and *per diem* which was being made by the Secretary-General and the Advisory Committee on Administrative and Budgetary Questions.

11. The Commission's decisions on the organization of its future work had been welcomed, but with regard to the proposed winter session in 1970, the General Assembly, in operative paragraph 3 of its resolution 2400 (XXIII), had decided "to defer a final decision until its twenty-fourth session".

12. The Sixth Committee had again approved the idea of holding seminars in connexion with the Commission's sessions.

13. In accordance with the Commission's decision the previous year, he had appointed Mr. Tabibi to attend, as observer for the Commission, the tenth session of the Asian-African Legal Consultative Committee in December 1968. He himself had attended, as observer for the Commission, the 1968 meeting of the Inter-American Juridical Committee and had sub-

mitted a report on it to the Commission (A/CN.4/215).

14. Through the Secretariat, he had tried to make arrangements for the Commission to be represented at the meetings of the European Committee on Legal Co-operation, but unfortunately, owing to professional commitments, that had not been possible.

15. He could not conclude his report on the past year's activities without expressing his satisfaction at the success of the United Nations Conference on the Law of Treaties, held at Vienna, and paying a tribute to the outstanding work done there by several members of the Commission, in particular Mr. Ago, the President of the Conference.

Election of Officers

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

17. Mr. USTOR proposed Mr. Ushakov, whose outstanding qualities as a writer on international law and as Director of the International Law Department of the Institute of Law of the Academy of Sciences of the Soviet Union so well fitted him for the task. The election of Mr. Ushakov as Chairman would be an appropriate tribute to his great country, the notable achievements of which in a comparatively short period of time owed much to the work of its scientists and scholars. As one of those men of learning, Mr. Ushakov had played a leading role in shaping the Soviet Union's outstanding contribution to the development of international law.

18. Mr. EL-ERIAN warmly supported that nomination. In addition to his personal qualities, Mr. Ushakov belonged to a country which had made some striking contributions to the progress of international law. The USSR had been the first State to proclaim the abolition of extra-territorial jurisdiction, and in publishing some of the secret treaties of the First World War it had acted in accordance with the principle of open diplomacy, which was reflected in the system of registration of treaties adopted first by the League of Nations and then by the United Nations.

19. Mr. AGO said that the success of the Vienna Conference was also a success for the Commission and an encouragement to it to pursue its work of codifying international law. He paid a tribute to those members of the Commission who had made a personal contribution to the work of the Conference, particularly Sir Humphrey Waldock, who had played an outstanding part in preparing the Vienna Convention on the Law of Treaties.

20. He supported the nomination of Mr. Ushakov for the office of Chairman of the Commission.

21. Mr. BARTOŠ also supported that nomination.

22. Sir Humphrey WALDOCK said he welcomed the nomination of Mr. Ushakov.

23. He thanked Mr. Ago for his kind words, but felt bound to stress the very great contributions made to the success of the Conference on the Law of Treaties by Mr. Yasseen as Chairman of the Drafting Committee and Mr. Elias as Chairman of the Committee of the Whole. Unfortunately, he had not been able to attend

⁵ *Ibid.*, Report of the Commission to the General Assembly, para. 98 (a).

⁶ *Ibid.*, para. 98 (b).

the last few days of the Conference, when serious difficulties had arisen and Mr. Ago, its President, assisted by the Legal Counsel of the United Nations, had done so much to help to save the work of the Commission.

24. Mr. NAGENDRA SINGH said he fully supported the nomination of Mr. Ushakov.

Mr. Ushakov was unanimously elected Chairman and took the Chair.

25. The CHAIRMAN thanked the Commission for his election and said that he regarded it as a mark of esteem for the Soviet Union and for Soviet law.

26. He called for nominations for the office of First Vice-Chairman.

27. Mr. YASSEEN said he wished to place on record the great debt owed by the Vienna Conference to Mr. Ago, its President, to Sir Humphrey Waldock, the Expert Consultant, who had always intervened to great effect, and to Mr. Elias, who had evolved the final compromise solution.

28. He proposed Mr. Castañeda as First Vice-Chairman.

29. Mr. RUDA supported the nomination of Mr. Castañeda, the distinguished Latin American jurist.

30. Mr. EL-ERIAN also supported that nomination; as Special Rapporteur, he welcomed the fact that Mr. Castañeda would be called upon to act as Chairman of the Drafting Committee.

Mr. Castañeda was unanimously elected First Vice-Chairman.

31. Mr. CASTAÑEDA thanked the members for his election.

32. The CHAIRMAN called for nominations for the office of Second Vice-Chairman.

33. Mr. RAMANGASOAVINA proposed Mr. Nagendra Singh.

34. Mr. TABIBI seconded that proposal.

Mr. Nagendra Singh was unanimously elected Second Vice-Chairman.

35. Mr. NAGENDRA SINGH thanked the members for his election.

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

37. Mr. CASTRÉN proposed Mr. Eustathiades.

38. Sir Humphrey WALDOCK seconded that proposal.

Mr. Eustathiades was unanimously elected Rapporteur.

Adoption of the Agenda

39. The CHAIRMAN invited the Commission to consider its provisional agenda (A/CN.4/211).

40. Mr. BARTOŠ said he would like the Commission to be in a position to discuss certain questions connected with its Chairman's report to the twenty-third session of the General Assembly, such as the holding of winter sessions. There was perhaps no need to make that

question a separate item of the agenda, but the Commission might agree to discuss under item 6 (organization of future work) or item 8 (other business).

41. The CHAIRMAN suggested that the Commission should adopt the provisional agenda, on the understanding that the matter to which Mr. Bartos had referred could be taken up under items 6 or 8.

It was so agreed.

Statement by the Legal Counsel

42. Mr. STAVROPOULOS (Legal Counsel) drew the Commission's attention to the following resolution, which had been adopted by the United Nations Conference on the Law of Treaties at the close of its second session:

TRIBUTE TO THE INTERNATIONAL LAW COMMISSION

The United Nations Conference on the Law of Treaties,

Having adopted the Vienna Convention on the Law of Treaties on the basis of the draft articles prepared by the International Law Commission,

Resolves to express its deep gratitude to the International Law Commission for its outstanding contribution to the codification and progressive development of the law of treaties.

43. In his opinion, the Vienna Convention on the Law of Treaties was one of the greatest and most important works of codification ever undertaken by the United Nations—possibly even more important than the Conventions on the Law of the Sea. It had been adopted by 79 votes to 1, with 19 abstentions, and two countries whose representatives had been absent during the voting had subsequently indicated their intention to sign. The International Law Commission's contribution to that Convention had been most impressive; the draft prepared by it had exceeded all expectations and many of the amendments made during the Conference had been prompted by political rather than purely legal considerations.

44. The success of the Conference had been due in no small measure to the presence of a number of members of the Commission: Mr. Ago had served brilliantly as President of the Conference, Mr. Elias had played a key role as Chairman of the Committee of the Whole, and Mr. Yasseen had shown much patience and skill as Chairman of the Drafting Committee. Special mention should be made of Sir Humphrey Waldock, the Expert Consultant, whose outstanding personal qualities of modesty and moderation, as much as his immense knowledge, had made him the very heart of the Conference.

45. Lastly, he said that there was some possibility of another conference on the law of the sea being held in three years or so; he hoped that the Commission could be relied on to produce a draft for that conference.

46. The CHAIRMAN said that the Commission was grateful to the Vienna Conference for its resolution.

The meeting rose at 4.45 p.m.

991st MEETING*Tuesday, 3 June 1969, at 10.15 a.m.**Chairman:* Mr. Nikolai USHAKOV

Present: Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218; A/CN.4/L.118 and Add.1 and 2)

[Item 1 of the agenda]

1. The CHAIRMAN invited Mr. El-Erian, the Special Rapporteur, to introduce his fourth report on Relations between States and international organizations (A/CN.4/218).

2. Mr. EL-ERIAN (Special Rapporteur) said that all the members of the Commission could be proud of the successful completion of the long years of work on the law of treaties. He paid a tribute to the Legal Counsel and to the staff of the Office of Legal Affairs, particularly the Codification Division, for their part in that work and for their assistance and co-operation, which was of such great value to all special rapporteurs.

3. Introducing his fourth report on Relations between States and international organizations, he explained that it consisted mainly of draft articles on the facilities, privileges and immunities of permanent missions to international organizations; the text of those articles had been revised to bring them into line with the terminology adopted by the Commission for articles 1 to 21, which it had provisionally adopted at the previous session and which dealt with permanent missions in general. A number of new articles had been included in response to suggestions made by members. One of those articles would be article 49 (Consultations between the sending State, the host State and the organization). The text of that article, which would be reproduced in document A/CN.4/218/Add.1, read:

Article 49

Consultations between the sending State, the host State and the organization

1. Consultations shall be held between the sending State, the host State and the organization on any question arising out of the application of the present articles. Such consultations shall in particular be held as regards the application of articles 10, 16, 43, 44, 45 and 46.

2. The preceding paragraph is without prejudice to provisions concerning settlement of disputes contained in the present articles or other international agreements in force between States or between States and international organizations or to any relevant rules of the organization.

4. It would be recalled that, at the previous session, when the Commission had provisionally adopted

article 10 (Appointment of the members of the permanent mission) and article 16 (Size of the permanent mission),¹ some members had suggested that the references in the commentaries to consultations between the sending State, the host State and the organization concerned should be incorporated in the articles themselves. Such consultations would serve to overcome the difficulties which could arise because of the inapplicability to multilateral diplomacy of the institution of *agrément*, declarations of *persona non grata* and the rule of reciprocity. On reflection, he had decided to introduce a general article on that subject and, since the difficulties would arise mainly in connexion with the application of article 10 (Appointment of the members of the permanent mission), article 16 (Size of the permanent mission), article 43 (Non-discrimination), article 44 (Obligation to respect the laws and regulations of the host State), article 45 (Professional activity) and article 46 (Modes of termination), a specific reference to those articles had been included in paragraph 1 of his proposed general article 49.

5. In his third report he had submitted draft articles dealing with delegations to organs of international organizations or to conferences convened by international organizations, and with permanent observers from non-member States accredited to international organizations.² Those draft articles were of a purely tentative character; they had been submitted in order to enable the Commission to decide the preliminary question whether the draft articles were to be confined to permanent missions to international organizations, or whether their scope was to be broadened to include the delegations and permanent observers in question. At its previous session, the Commission had been of the opinion "that no decision should be taken on that question until it had had an opportunity to consider those articles";³ in view of that decision he had included the articles in his fourth report as Parts II and III.

6. The Sixth Committee of the General Assembly had discussed various points that had a bearing on the draft articles on representatives of States to international organizations, and he had therefore included in chapter I of his fourth report (A/CN.4/218) a section C entitled "Summary of the Sixth Committee's discussion, at the twenty-third session of the General Assembly, on the question of relations between States and international organizations" and a section D entitled "Summary of the Sixth Committee's discussion, at the twenty-third session of the General Assembly, on the question of a 'draft Convention on Special Missions'".

7. During the discussion on special missions, various points had been raised regarding article 6 (Sending of special missions by two or more States in order to deal with a question of common interest); those points had a particular bearing on the question of delegations to conferences (A/CN.4/218, para. 14).

¹ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

² *Ibid.*, document A/CN.4/203, Parts III and IV.

³ *Ibid.*, Report of the Commission to the General Assembly, para. 28.

8. The question had also been raised whether there should be a single set of privileges and immunities for all special missions, or different sets of privileges and immunities for different categories of special missions (A/CN.4/218, para. 18). The United Kingdom delegation had proposed that the Commission's articles should apply to "ministerial" special missions, and that only functional immunities should be enjoyed by other special missions, which would be regarded as "standard" special missions (A/CN.4/218, para. 20). The United Kingdom had also proposed the inclusion of a new article on conferences (A/CN.4/218, para. 21).

9. At a previous session the Commission had authorized him to request, through the Secretariat, the comments of the specialized agencies and the International Atomic Energy Agency, and to consult those agencies in order to obtain material from them on certain points which had arisen in their practice. That material had been provided and would be published in a revised edition of the Secretariat paper on the subject (A/CN.4/L.118). Since the agencies had provided information, it would be logical to enable them to make a further contribution by submitting comments on the draft articles adopted by the Commission; their comments could be taken into account, together with those made by governments, when the Commission came to prepare the final text of the draft articles.

10. With regard to the arrangement of the draft articles, he said that in his fourth report the articles concerning permanent observers from non-member States would immediately follow those dealing with permanent missions. The articles on delegations to organs of international organizations and to conferences would follow. That arrangement was a reversal of the order followed in his third report. The reasons for the reversal were both theoretical and practical: the theoretical reason was that permanent observers were not engaged in *ad hoc* diplomacy, so that their treatment followed logically after that of permanent missions; the practical reason was that the privileges and immunities of observers had hitherto remained almost entirely unregulated by international law. The position regarding delegations to organs of international organizations and to conferences convened by international organizations was quite different: the privileges and immunities applicable to them were regulated by the Convention on the Privileges and Immunities of the United Nations⁴ and the Convention on the Privileges and Immunities of the Specialized Agencies.⁵

11. He suggested that the Commission should begin consideration of his report by examining the draft articles on the facilities, privileges and immunities of permanent missions to international organizations (Part II, section II). When it had dealt with them, it could proceed to examine the draft articles on permanent observers and on delegations to organs of international organizations and to conferences.

12. Mr. BARTOŠ said he wished to associate himself with those members of the Commission who, at the

previous meeting, had expressed their satisfaction at the results achieved by the Vienna Conference on the Law of Treaties. The new Convention crowned the Commission's work on that topic with success and would be a landmark in the history of international law. Four members of the Commission—Sir Humphrey Waldock, Mr. Ago, Mr. Elias and Mr. Yasseen—had made an outstanding contribution to the success of the Conference. Praise was also due to the other members of the Commission who had taken part in it, to the Legal Counsel, representing the Secretary-General, and to the Conference Secretariat.

13. At the previous meeting the Legal Counsel had referred to the possibility of a third conference on the law of the sea. He (Mr. Bartoš) thought that, if such a conference was to be held, the Commission or its officers, in consultation with the Legal Counsel and the Secretariat, should rearrange the programme of work as soon as possible, so that the Commission could submit a carefully prepared draft completing the existing Conventions on the law of the sea.

14. With regard to the topic of relations between States and international organizations, he supported the proposal that the Commission should start by considering the facilities, privileges and immunities of permanent missions to international organizations, and then take up the other matters to which the Special Rapporteur had referred.

The meeting rose at 11.15 a.m.

992nd MEETING

Wednesday, 4 June 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218)

[Item 1 of the agenda]

(continued)

GENERAL DEBATE

1. Mr. USTOR said he wished to associate himself with those members of the Commission who had expressed their great satisfaction at the results achieved by the Vienna Conference on the Law of Treaties. The adoption of the Vienna Convention on the Law of

⁴ United Nations, *Treaty Series*, vol. 1, p. 16.

⁵ *Op. cit.*, vol. 33, p. 262.

Treaties was an event of the greatest importance for the whole process of codification and progressive development of international law; it was also a great encouragement and a good omen for the future work of the International Law Commission. He commended those members of the Commission, past and present, who had participated in the preparation of the draft articles, in particular Sir Humphrey Waldock, whose splendid contribution as Special Rapporteur in the Commission and as Expert Consultant at the Conference had been invaluable.

2. There was one aspect of the Vienna Conference which should be mentioned in the Commission, because it had a bearing on future codification work. It was to be regretted that the Conference had failed to include in the Convention a provision on, and a definition of, general multilateral treaties. An important group of States and an equally important school of thought considered that that omission marked a failure, because they believed that the rule of universal participation in general multilateral treaties was part of contemporary international law.

3. In its 1962 draft, the Commission had adopted, in article 8, a provision on participation in general multilateral treaties and had stated in its commentary that "It was unanimous in thinking that these treaties because of their special character should, in principle, be open to participation on as wide a basis as possible".¹

4. That idea and the unanimous thinking of the Commission had been mentioned time and again at the Conference with great insistence, but with curious results. On the one hand, the Conference had accepted the idea in principle and had adopted a Declaration in which it expressed its conviction that multilateral treaties dealing with the codification and progressive development of international law or other subjects of general interest should be open to universal participation.² On the other hand, the Conference had refused to put that principle into effect; the final clauses of the Convention followed the old restrictive pattern. The adoption of the principle of universality by the Conference was of the greatest importance for the work of codification and progressive development of international law, however, and sooner or later the practice would have to yield to the force of that principle.

5. Mr. NAGENDRA SINGH congratulated the Special Rapporteur on his fourth report (A/CN.4/218). The Commission had discussed at its last session the question whether it should include in the draft articles provisions concerning delegations to organs of international organizations and to conferences convened by international organizations, and provisions concerning permanent observers from non-member States accredited to international organizations. Since the Sixth Committee of the General Assembly had raised that question, he thought the Commission should inform the Committee whether it intended such delegations and observers to

be included in the present topic, to form a separate topic or to be included in the topic of special missions.

6. While it was too early for the Commission to reach any definite conclusion on the matter, it should, before the end of the present session, give the Sixth Committee a clear idea of the scope it thought the present study should have. He himself was convinced that the subject of permanent observers from non-member States was closely linked with that of permanent missions and should be included in the study. On the other hand, the subject of delegations to international conferences convened by international organizations was a very extensive one and should be dealt with in a separate chapter, since it was obviously a separate matter altogether. Most international conferences were convened under the auspices of some international organization, and the Commission should therefore take a definite stand on how and when that topic was to be codified.

7. He proposed that, before their final adoption, the draft articles should be submitted to the specialized agencies and to the IAEA, since their comments would be of the greatest value.

8. Mr. TAMMES thanked the Special Rapporteur for his lucid introduction to his fourth report. He drew attention to the fact that while draft article 22 in that report laid down that "The organization and the host State shall accord to the permanent mission the facilities required for the performance of its functions...", article 23, paragraph 2, stated that "The host State and the organization shall also, where necessary, assist permanent missions in obtaining suitable accommodation for their members". That would seem to place a legal obligation on the organization and on the host State. The obligation might seem to be a reasonable one, but it raised the general question whether the draft articles were intended to be signed and ratified by organizations as independent subjects of international law. If it was not intended to place organizations in such a sovereign position, he thought the references to them in articles 22 and 23 should be omitted. It was true that certain obligations for international organizations were set forth in the Convention on the Privileges and Immunities of the United Nations,³ but that Convention had been concluded between the members of a single international organization constituting a group which could be identified with the organization itself, namely, the United Nations.

9. The CHAIRMAN said it would be better, for the time being, to discuss representation in general, without reference to particular articles. The Special Rapporteur would later be asked to introduce each article separately.

10. Mr. KEARNEY, after congratulating the Special Rapporteur on his very able report, said he agreed that permanent observers should be dealt with in the draft articles. The procedure to be followed in dealing with delegations to international conferences convened by international organizations was a more difficult question, however. The United Kingdom delegation had submitted amendments on that question in the Sixth Committee

¹ See *Yearbook of the International Law Commission, 1962*, vol. II, p. 168, para. (2).

² See Final Act of the United Nations Conference on the Law of Treaties, document A/CONF.39/26, annex.

³ United Nations, *Treaty Series*, vol. 1, p. 16.

of the General Assembly, in connexion with the draft convention on special missions (A/CN.4/218, para. 21). In his opinion, the Commission should decide whether the present draft articles were to be supplemented by a series of articles dealing with delegations to international conferences convened by international organizations. That would be better than leaving the question to be dealt with by the Sixth Committee in the context of special missions, since that Committee did not yet have any adequate foundation on which to work out a proper set of provisions.

11. While appreciating the Chairman's suggestion that the Commission should confine itself at present to a general discussion, he hoped that the Legal Counsel would give members the benefit of his views on the point raised by Mr. Tammes concerning articles 22 and 23.

12. The CHAIRMAN, speaking as a member of the Commission, congratulated the Special Rapporteur on his excellent report. He agreed that it would be better to place the part dealing with permanent observers from non-member States accredited to international organizations immediately after the part relating to permanent missions to international organizations. With regard to the suggestion that the articles should not be accompanied by commentaries, he thought that that would have no disadvantages so far as the work of the Commission was concerned; but when the draft articles on permanent missions to international organizations were submitted to the General Assembly, commentaries should be included, even where the text of the articles was very close to that of the Vienna Convention on Diplomatic Relations or that of the draft convention on special missions. Consequently, the Special Rapporteur should in any case prepare commentaries on the draft articles on relations between States and international organizations.

13. Mr. EL-ERIAN (Special Rapporteur), summing up the discussion, said that the question of permanent observers from non-member States accredited to international organizations did not appear to raise any difficulties; the Commission was in agreement that it should be taken up in connexion with the present topic and at the present stage. Permanent missions were a part of permanent diplomacy, not of *ad hoc* diplomacy, which included international conferences and delegations to such conferences.

14. The question of delegations to organs of international organizations and to conferences convened by international organizations was a much more difficult one. In previous discussions, the Commission had preferred not to commit itself on that question; at its last session, for example, it had decided not to take any decision until it had had an opportunity to consider the draft articles.⁴

15. It was necessary to distinguish between three types of delegation. First, there were delegations to organs

forming an integral part of an international organization. Secondly, there were delegations to conferences convened by international organizations; such conferences were legally distinct from organs of international organizations, since, although their rules of procedure were usually modelled on those of the General Assembly, their membership consisted of sovereign States which could always adopt their own rules of procedure. Thirdly, there were delegations to international conferences convened by States; at the last session, some members had expressed the view that such conferences constituted a separate topic and had questioned whether the Commission should include them in the topic of relations between States and international organizations.

16. The question was further complicated, as Mr. Kearney had pointed out, by the fact that the United Kingdom had submitted draft amendments to the Sixth Committee of the General Assembly, which were still pending. The present trend in the Sixth Committee seemed to favour the approach taken by the Commission in regard to special missions. When the Sixth Committee had discussed article 6 of the draft on special missions at the last session of the General Assembly, Mr. Bartoš, the Special Rapporteur on that topic, had explained that it comprised the regulation of matters of common interest to a limited number of States. Hence it seemed that neither the Commission nor the Sixth Committee intended to take up the question of international conferences in connexion with the topic of special missions. He therefore agreed with Mr. Nagendra Singh that the Commission should take a preliminary decision concerning delegations to organs of international organizations and to conferences convened by international organizations. At present, most international conferences were convened under the auspices of international organizations and conferences convened by States were in the minority, so it would hardly be logical to deal with conferences convened by States before settling the question of conferences convened by international organizations.

17. Furthermore, the regulation of the status of delegations to international conferences was not an aspect of bilateral diplomacy and it should not be dealt with as part of the topic of special missions. The topic of special missions in fact constituted an appendix to inter-State bilateral diplomacy and the Commission had decided to complete that subject by codifying the law of special missions. The question of delegations to international conferences was one of multilateral, collective and parliamentary diplomacy: it was not clear to him whether the Commission should take it up at the present stage together with permanent missions, or later on as a chapter in the draft articles on relations between States and international organizations, or possibly as part of a separate topic comprising the law of international conferences in general.

18. The Commission seemed to be in agreement that the provisional draft articles should be submitted to the specialized agencies and to the IAEA for their comments, which could be taken into account when the draft was put into its final form. Furthermore, he hoped that the present highly satisfactory co-operation with the

⁴ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, para. 28.

legal advisers of the United Nations, the specialized agencies and the IAEA would continue, so that the Commission would also have the benefit of their views before preparing its final draft.

19. Mr. YASSEEN said he had read the Special Rapporteur's clear, comprehensive and precise report with great interest. With regard to the scope of the draft articles which the Commission had been asked to prepare, his view was that, after completing consideration of the part dealing with permanent missions, on which considerable progress had already been made, the Commission should establish the rules governing the status of permanent observers from non-member States accredited to international organizations, so that there would be a complete set of rules on representation in international organizations. As to the part dealing with delegations to organs of international organizations, the Commission should review the rules on the matter stated in certain conventions which had been concluded, but which many countries had not yet ratified, with a view to adapting them to present international circumstances.

20. He did not think that international conferences convened by international organizations or held under their auspices formed part of the topic which the Commission was studying. International conferences were sovereign bodies which were not dependent on the United Nations, and some of the States represented at them were not members of the convening organization. Such conferences therefore formed a separate topic and the Commission might be asked to treat them accordingly. Admittedly, during the discussion on special missions in the Sixth Committee, at the twenty-third session of the General Assembly, some delegations had expressed the desire that the question of international conferences should be made the subject of a draft of articles, but in general the Sixth Committee had taken the view that a preliminary study should be made of the rules involved. Hence it would be inappropriate for the Commission to study the matter in connexion with the draft articles now before it.

21. Mr. USTOR said he wished to deal with only one of the general issues raised in connexion with the Special Rapporteur's excellent report. He fully agreed with the view that the draft should include articles on permanent observers. The part which dealt with that subject should begin with an introductory article fulfilling, for permanent observers, the purpose served for permanent missions by article 6 (Establishment of permanent missions).⁵ The introductory article would specify which States had the right to send permanent observers. Where the organization was of a universal character, the rule should be that all States which were not members of the organization had the right to send permanent observers. That rule would be in accordance with the principle of universality, which had recently been endorsed by the United Nations Conference on the Law of Treaties.

22. Mr. STAVROPOULOS (Legal Counsel) said that during the Sixth Committee's discussion on the draft convention on special missions, a new article on the

subject of conferences had been proposed. He understood that that proposal was not likely to be adopted and, in view of the danger that the question of conferences might not be dealt with at all, it would perhaps be useful for the Commission to include, in its report on the present session, a passage indicating its interest in the subject. The Sixth Committee would then probably decide that the Commission should be invited to deal with it.

23. A conference convened by the United Nations was not a subsidiary organ of the Organization and did not report to the General Assembly. It had been said that a conference was sovereign, but it might perhaps be more correct to describe it as semi-sovereign, because such matters as the date and place of meeting and the composition of the conference were decided by the General Assembly.

24. The question of conferences convened by States should also receive attention. It was not usual for important international conferences to be convened otherwise than under the auspices of an international organization, but such conferences were sometimes convened by States and raised problems in international law.

25. For those reasons, it was desirable that the Commission should be empowered to examine the question of conferences.

26. He wished to make a comment on article 22 (General facilities) and article 23 (Accommodation of the permanent mission and its members), which contained references to the organization concerned. Although those references were not absolutely indispensable, they were very useful for practical reasons. The primary responsibility for granting facilities was borne by the host State, but the organization concerned could not ignore the problem. For example, the Housing Service of the United Nations in New York co-operated with the host State in assisting delegations to solve their housing problems. Since that was the real situation, it was appropriate to include a reference to the organization in articles 22 and 23, thereby emphasizing that the granting of facilities was not the exclusive responsibility of the host State.

27. At the previous session, during the discussion on the draft article dealing with general facilities, he had drawn attention to the clause which required an organization to "accord to the permanent mission the facilities quired for the performance of its functions", and had expressed the hope that that clause would not be interpreted as meaning that the organization assumed the obligation to provide facilities for which it had no provision in its budget.⁶ To guard against any such interpretation, the Commission might wish to point out, in its commentary on article 22, that it followed from article 3 that the granting of facilities to a permanent mission by an international organization was subject to the relevant rules of the organization, in particular those concerning budgetary and administrative matters. A statement to that effect in the commentary was necessary in order to

⁵ *Ibid.*, chapter II, section E.

⁶ See *Yearbook of the International Law Commission*, 1968, vol. I, p. 97, para. 59.

avoid misunderstandings between organizations and permanent missions.

28. In that connexion, he drew attention to a discrepancy in the wording used in articles 22 and 23. Article 22 began with the words "The organization and the host State . . .", whereas article 23, paragraph 2, read: "The host State and the organization . . .". He thought that the second formula was preferable to the first, because the main burden rested on the host State; from his experience he could say that the principal role of the organization was to assist in securing action on the part of the host State.

29. Sir Humphrey WALDOCK said that if the question of representatives to international conferences were not dealt with either in the context of special missions or in the context of permanent missions, there was a danger that it might not be dealt with at all.

30. When the Commission had first engaged in considering the topic of relations between States and international organizations, it had envisaged a large project dealing with the whole range of the subject. Subsequently, however, it had decided to confine its work to the privileges and immunities of permanent missions. By doing so, the Commission had limited its work to what constituted a branch of diplomatic law and the draft articles now under consideration represented a stage in the codification of diplomatic law, rather than a codification of relations between States and international organizations.

31. If the Commission decided to ask for a mandate to deal with the question of representatives to international conferences, it should first determine the scope of the new topic. It had the choice between a general examination of the whole of the law of international conferences and the more limited task of filling a gap in diplomatic law by dealing only with the question of representatives to international conferences.

32. The question of international conferences was one of wide scope. He recalled that, when the Commission had examined the law of treaties, it had found it necessary to lay down a residuary rule, applicable to international conferences, regarding the adoption of the text of a treaty. The need to include such a provision in the draft on the law of treaties showed the impact of the law of international conferences on other branches of international law.

33. Mr. CASTRÉN thanked the Special Rapporteur for his very clear and comprehensive report. He supported the Special Rapporteur's suggestion that the Commission should ask international organizations for their comments on the draft articles, as it was permitted to do by its Statute.

34. It was clear from the discussion and from the Special Rapporteur's remarks that the rules on permanent observers accredited to international organizations should be placed immediately after the rules on permanent representatives.

35. On the question whether the Commission's study should also deal with delegations to organs of international organizations and to conferences convened by international organizations or by States, he considered

that, in the light of the General Assembly's instructions, the Commission should confine itself to delegations to organs of international organizations. To go further, it would need a wider mandate from the General Assembly.

36. In any case, the provisional rules already set out by the Special Rapporteur could provide a useful basis for defining the situation of all kinds of delegations, whether permanent missions, delegations to organs or delegations to conferences convened by international organizations or even by States, for they all had much in common.

37. Mr. USTOR said that the work of codification of diplomatic law had begun with the bilateral aspects of that law, such as diplomatic relations and special missions. The Commission was now engaged in the first phase of the study of multilateral diplomatic law, which related to permanent missions and permanent observers accredited to international organizations. That part of multilateral diplomatic law corresponded to the topic of sedentary bilateral diplomacy covered by the 1961 Vienna Convention on Diplomatic Relations.

38. After the Commission completed its work on permanent missions and permanent observers, it would have to study the questions of *ad hoc* multilateral diplomacy and examine the legal position of delegations to organs of international organizations. For practical reasons, however, it was desirable not to treat the subject of delegations to conferences separately from that of delegations to organs of organizations, since the position of those two types of delegation was in fact almost identical.

39. Mr. REUTER congratulated the Chairman and officers on their election and expressed his appreciation of the Special Rapporteur's fourth report.

40. Like Mr. Ustor, he thought it would be useful to establish a logical system of diplomatic law. After bilateral diplomatic relations and consular relations, the subjects of the Vienna Conventions of 1961 and 1963, the next topic to be dealt with should be that of multilateral relations between States at international conferences. The diplomatic law of international organizations should be dealt with afterwards, for reasons of history and logic. International organizations had introduced a new element into inter-State relations because, unlike conferences, they had a status of their own. For practical reasons, however, he agreed that the Commission should not go beyond its instructions without referring the matter to the General Assembly.

41. After listening to the comments by the Legal Counsel on articles 22 and 23 of the draft, he thought it rather disturbing that the obligations of the organization and those of the host State were placed on the same level in those two articles, though their extent and nature were in fact very different. It might be possible to get over that difficulty simply by making a drafting change; for example, a proviso might be inserted in the articles making it clear that the organization and the host State were each required to grant the facilities and assistance in question within the limits of their competence and even perhaps within the limits of their

resources. In any case it would be difficult to retain articles 22 and 23 in their present form.

42. Mr. EL-ERIAN (Special Rapporteur) said that a number of important points of substance had been raised in connexion with conferences. Attention had also been drawn to an important practical consideration, namely, the danger that the matter might be left unregulated because it had not been dealt with either in the draft articles on special missions or in the draft articles on permanent missions.

43. He did not think there was any need to request an extension of the Commission's instructions on the matter. The exact limits of the topic "Relations between States and international organizations" had never been precisely laid down by the General Assembly and the Commission itself was in the best position to decide what matters it should include.

44. The Commission had first adopted a broad approach to the topic, but had subsequently decided, for practical reasons, to give priority to the diplomatic law aspect. The treatment of the question of permanent missions would serve to complete the codification of diplomatic law.

45. He noted that there was general agreement on the desirability of dealing with permanent observers. With regard to delegations to organs of organizations and to conferences, he had confined the draft articles he had prepared to conferences convened by international organizations; they did not cover conferences convened by States. It should be remembered that section 11 of the Convention on the Privileges and Immunities of the United Nations linked representatives to organs of the United Nations with representatives to conferences convened by the United Nations.

46. The late Mr. Sandström, the first Special Rapporteur on *ad hoc* diplomacy, had included provisions on the organization of congresses and conferences in his report, and had pointed out that a conference convened by the United Nations "is, in a way, a prolongation of the United Nations Organization, and it can be argued that such a conference ought to be regulated in the same way as the meeting of an organ of the United Nations and not as an ordinary congress or conference".⁷ That remark strengthened the practical point made by Mr. Ustor regarding the desirability of regulating the status of delegations to conferences in the same manner as that of delegations to organs of organizations, despite the legal differences between the two categories.

47. The Commission was now called upon to decide whether to deal solely with the privileges and immunities of delegations, or with the whole range of the law, organization and procedure of diplomatic conferences.

48. A brief reference to the history of the subject would perhaps shed some light on that question. The Committee of Experts for the Progressive Codification of International Law which had been appointed by the League of Nations to prepare for the Codification Conference held at the Hague in 1930, had set up at

its first session, in 1925, a Sub-Committee to examine the possibility of formulating rules to be recommended for the procedure of international conferences and the conclusion and drafting of treaties, and a report had been submitted on the subject by the Sub-Committee's Rapporteur.⁸ No action had, however, been taken on the matter by the League of Nations.

49. The United Nations, for its part, had begun to evolve a pattern for the organization and procedure of international conferences. There had grown out of the rules of procedure worked out by organs of the United Nations and by the specialized agencies a substantial body of rules and regulations concerning the organization and procedure of diplomatic conferences, which had become known as "multilateral" or "parliamentary" diplomacy.

50. In particular, the Secretary-General of the United Nations had carried out important preparatory work on the method of work and procedures to be adopted by the first United Nations Conference on the Law of the Sea, in response to the request made to him in General Assembly resolution 1105 (XI). The memorandum on the subject⁹ contained provisional rules of procedure, which had been adopted by the first and second United Nations Conferences on the Law of the Sea in 1958 and 1960, the Conference on Diplomatic Intercourse and Immunities in 1961, the Conference on Consular Relations in 1963 and the Conference on the Law of Treaties held in 1968 and 1969, with few variations.

51. As to the articles on congresses and conferences drafted by Mr. Sandström and included in his report, the Commission had decided that in view of the links with the topic of relations between States and international organizations it would be "difficult to undertake the subject of 'diplomatic conferences' in isolation". It had accordingly decided not to deal with diplomatic conferences for the time being.¹⁰

52. For his part, he thought that if the Commission were to delay consideration of the privileges and immunities of delegations to conferences until it took up the question of conferences as a whole, there would be a real danger of the matter not being considered at all. He therefore suggested that, when the Commission had completed its consideration of the subjects of permanent missions and permanent observers, it should examine the draft articles he had prepared on the privileges and immunities of delegations to organs of international organizations and to conferences convened by such organizations. A decision on that subject at the present session would not create any difficulties for the Sixth Committee, since the United Kingdom amendment before that Committee related to conferences convened by States. Moreover, such a decision would serve a practical purpose, since the Sixth Committee might decide not to take up the question of conferences convened by States until the Commission had examined

⁸ League of Nations publication No. C.196. M.70. 1927. V.

⁹ *United Nations Conference on the Law of the Sea, 1958, Official Records*, vol. I, p. 172.

¹⁰ See *Yearbook of the International Law Commission, 1960*, vol. II, p. 179, para. 33.

⁷ *Yearbook of the International Law Commission, 1960*, vol. II, p. 111, para. 41.

the more frequent case of conferences convened by international organizations.

53. In conclusion, he recommended that the Commission should provisionally decide to complete its work on diplomatic law by taking up the subject of delegations to organs of international organizations and to conferences convened by such organizations. By submitting draft articles on that subject, the Commission would be able to obtain the views of the Sixth Committee and to elicit comments from governments.

54. Mr. STAVROPOULOS (Legal Counsel) said he agreed with the Special Rapporteur that the question of conferences convened by the United Nations came within the Commission's mandate. The Convention on the Privileges and Immunities of the United Nations specified, in section 11, that "Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations" enjoyed privileges and immunities "while exercising their functions and during their journey to and from the place of meeting". The Convention thus placed on the same footing delegations to organs of the United Nations and delegations to conferences convened by the United Nations. The position was different with regard to conferences convened by States otherwise than under the auspices of an international organization, and the United Kingdom amendment to the draft convention on special missions related exclusively to such conferences.

55. The CHAIRMAN said the general discussion had shown that the members of the Commission were agreed that the topic of relations between States and international organizations covered the legal position of permanent missions to international organizations, the legal position of permanent observers accredited to international organizations and the legal position of delegations from member States to organs of international organizations. There was, however, a difference of opinion on whether, in dealing with that topic, the Commission should also consider the legal position of representatives of States to conferences convened by international organizations, or whether that subject should constitute a separate part of international law or perhaps be included in the law of conferences.

56. He suggested that the Commission should postpone its decision on that point until it had concluded its work on permanent missions and permanent observers.

It was so agreed.

The meeting rose at 12.45 p.m.

993rd MEETING

Thursday, 5 June 1969, at 11.5 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Ignacio-Pinto,

Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasovina, Mr. Reuter, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218 and Add.1)

[Item 1 of the agenda]

(continued)

GENERAL DEBATE *(continued)*

1. The CHAIRMAN said it seemed that Mr. El-Erian might be hindered in his work if, as had been decided at the end of the previous meeting, the Commission deferred its decision on whether or not the draft should deal with representatives of States to conferences convened by international organizations. He therefore proposed that the Commission should now decide, provisionally, that the draft would deal with the status of such representatives.

2. Mr. TABIBI said that conferences constituted a separate subject which required thorough study. That study should cover the subject of representatives to conferences, whether convened by an international organization or not. It might be advisable not to burden the Special Rapporteur with that additional task; the Commission should concentrate for the present on permanent missions and permanent observers.

3. Mr. CASTAÑEDA supported the Chairman's suggestion. There were, no doubt, certain theoretical differences between representatives to an organ of an international organization and representatives to a conference convened by an international organization, but for practical purposes—and it was practical considerations which should prevail in the current study—it was hardly possible to draw a distinction between those two categories of representatives from the point of view of diplomatic law, especially in respect of the privileges and immunities which should be accorded them.

4. Several existing conventions contained provisions applying to both representatives to organs and representatives to conferences. For example, in the Convention on the Privileges and Immunities of the United Nations, article IV, section 11, specified the privileges and immunities to be enjoyed by "Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations".¹

5. Examples from the past and modern instances both showed that there was no fundamental difference between an organ of an international organization and a conference convened by such an organization. For instance, at the twenty-third session of the General Assembly, the Sixth Committee had turned itself into

¹ United Nations, *Treaty Series*, vol. 1, p. 20.

a conference of plenipotentiaries to consider the draft convention on special missions. The reverse also occurred: it was not unknown for an international conference to wish to become something more than the sum of its participants and to act like an organ or even an organization. At the first Hague Conference,² for example, when, in the absence of agreement on the text of a convention, some States had wished to adopt a declaration on compulsory arbitration, the question had arisen whether it would be a declaration by the States which had agreed to make it, or a declaration by the Conference.

6. A provisional decision along the lines recommended by the Chairman would make the discussion on the draft under consideration more fruitful and save the Commission from having to reopen the discussion later with the same arguments.

7. The CHAIRMAN emphasized that the provisional decision he had suggested concerned procedure rather than substance. It was merely a matter of authorizing the Special Rapporteur to prepare, and include in his draft, a chapter on representatives to conferences convened by international organizations. That provisional decision would not bind the Commission with regard to substance and would not prevent it from discussing the question separately, or asking the General Assembly for instructions.

8. Mr. BARTOŠ said he supported the Chairman's suggestion, without taking a position on the substance of the question. In his opinion, there was no difference between a conference convened by an international organization and a conference convened by States. Any conference was an *ad hoc* international organization.

9. In principle, he shared Mr. Castañeda's opinion. At the first Hague Conference, the participating States and the Conference itself had certainly formed a group constituting a provisional organization. At the twenty-third session of the General Assembly, the Sixth Committee had indeed turned itself into a conference, since a State which was not a Member of the United Nations and hence was not represented in the General Assembly, had been allowed to take part in the discussions on special missions.³

10. Mr. RAMANGASOAVINA said he would welcome the addition to the draft of a chapter on delegations to conferences convened by international organizations, after the chapters dealing with permanent representatives and permanent observers, whose functions were very similar and had the same purpose. Although delegations to such conferences were of a slightly different character, the draft could certainly not ignore them, for they were very common.

11. Mr. YASSEEN said he was still not convinced that it would be desirable to include conferences in the topic under consideration. The fact that a conference was convened by an international organization did not

alter its character. A conference was a sovereign body, whether convened by an international organization or by States, and the subject of international conferences in general was of sufficient importance to warrant separate study.

12. It was highly debatable whether the Sixth Committee of the General Assembly had turned itself into a conference the previous year. In his opinion, as a participant, it had not ceased to be the Sixth Committee of the General Assembly; it had merely been instructed to examine one particular matter among others.

13. He also found it difficult to separate the procedural aspect from the substance of the question. If, after asking the Special Rapporteur to prepare the chapter on representatives to conferences convened by international organizations, the Commission found the substance of it unacceptable, the Special Rapporteur would have wasted his efforts.

14. Mr. RUDA said that the issue under discussion had considerable practical importance for the future application of the draft articles. Without expressing any opinion on the substance, he thought that the Special Rapporteur should prepare draft articles on representatives to organs of international organizations and to conferences convened by international organizations. When the Commission had examined those articles, it could take a final decision. The work of the Special Rapporteur would be useful in any case, and would show that the Commission had studied the question thoroughly.

15. Mr. NAGENDRA SINGH said there were good reasons for including the subject of representatives to international conferences convened by international organizations. One reason was that if that subject was not dealt with at the present stage, when the Commission was working on the codification of diplomatic law, there was a danger that it would be completely neglected. It would not be advisable to postpone consideration of the matter until the whole subject of conferences was examined, because that might well involve a long delay. The Special Rapporteur, despite heavy commitments, had expressed his willingness to deal with it and the Commission should avail itself of that offer.

16. It might perhaps be true that conferences constituted a separate subject, quite distinct from relations between States and international organizations, but the diplomatic law aspects of that subject were very relevant to the topic now before the Commission; if those aspects were ignored at the present stage, a gap would remain in the codification of diplomatic law. It was important to note that concern had been expressed in the Sixth Committee on that point.⁴

17. The Legal Counsel had expressed the view that the position of representatives to conferences convened by international organizations was covered by the Commission's instructions on the topic of relations between States and international organizations.

² International Peace Conference, 1899.

³ See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 85, document A/7375, para. 5.

⁴ See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 84, document A/7370, para. 36.

18. Mr. USTOR said that, from the theoretical point of view, it would be perfectly feasible to undertake a separate study of the whole subject of international conferences, whether convened by an international organization or not.

19. In practice, the Commission should take it that the Special Rapporteur had prepared draft articles on the privileges and immunities of representatives to organs of international organizations and was willing to prepare a set of draft articles on representatives to conferences convened by international organizations. Those two types of representatives enjoyed practically the same status and it would be convenient for the Special Rapporteur to deal with them together.

20. Mr. IGNACIO-PINTO said that the conditions under which delegations acted on behalf of their States at international conferences, whether convened by States or by an international organization, unquestionably belonged to diplomatic law and fell within the topic which the Commission was now studying. He was in favour of including in the draft a chapter—or an addendum—on representation at international conferences, which would make it possible to take up that part of the topic again at a later stage and go into it more fully.

21. Mr. CASTRÉN confirmed his statement at the previous meeting, which coincided with the views of Mr. Yasseen. He was not, however, opposed to the Commission's asking the Special Rapporteur to prepare articles on representatives to conferences convened by international organizations. For although they were not identical, the rules applying to such representatives and those applying to representatives to organs of international organizations were nevertheless sufficiently similar for the work to be of some value.

22. Mr. KEARNEY said he had been impressed by Mr. Yasseen's comment concerning the difficulty of separating the substance of the matter from the procedural issue now under discussion. That difficulty was increased by the fact that there could well be a difference between the privileges and immunities enjoyed by representatives to conferences and those enjoyed by permanent representatives. Like all the members of the Commission, he had attended a large number of conferences and he was not at all sure what privileges he had enjoyed on those occasions; but they had certainly not been full diplomatic privileges and immunities. Nevertheless, for practical reasons, he was prepared to concur in a study of the subject being made by the Special Rapporteur.

23. Mr. REUTER said he supported the Chairman's proposal, which was perfectly clear and based on practical grounds; but he fully reserved his position on the questions of substance, some of which were important and could be finally decided only by governments.

24. Sir Humphrey WALDOCK said that at the previous meeting the Special Rapporteur had made a strong case for a preliminary examination of the privileges and immunities of representatives to conferences convened by international organizations. When a conference was

convened by the United Nations, arrangements were normally made by the Secretariat with the host country and the Convention on the Privileges and Immunities of the United Nations would apply. It was thus clear that there was a link between the case of representatives to such conferences and that of permanent representatives. For that reason, in addition to the practical one mentioned by Mr. Ustor, he urged that the Special Rapporteur should be invited to undertake the study in question. The work would still be useful, even if, on examination, the Commission ultimately decided that the question could not conveniently be codified as part of the topic of relations between States and international organizations.

25. Mr. TABIBI explained that he had had no intention of opposing the idea of a study by the Special Rapporteur, if the latter was prepared to undertake the task. The only point he had wished to make was that the Commission should, at an early stage, make a thorough study of the whole field of international conferences, which was a separate subject, more akin to special missions or *ad hoc* diplomacy than to the topic of relations between States and international organizations.

26. The CHAIRMAN proposed that the Commission should authorise the Special Rapporteur to draft a chapter on the legal status of delegations of States to international conferences convened by international organizations, on the understanding that the Commission would take no decision of substance on the matter until it had examined that chapter.

It was so decided.

ARTICLES 22 AND 23

27.

Article 22

General facilities

The organization and the host State shall accord to the permanent mission the facilities required for the performance of its functions, having regard to the nature and task of the permanent mission.

Article 23

Accommodation of the permanent mission and its members

1. The host State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its permanent mission or assist the latter in obtaining accommodation in some other way.

2. The host State and the organization shall also, where necessary, assist permanent missions in obtaining suitable accommodation for their members.

28. Mr. EL-ERIAN (Special Rapporteur), introducing articles 22 and 23, pointed out that those articles were preceded in his report by general comments intended to show the basis of the privileges and immunities accorded to permanent missions to international organizations. When the Commission had prepared its final text of the draft articles on diplomatic intercourse and immunities, the corresponding section had also been

preceded by general comments on the rationale of privileges and immunities, which referred to the "extritoriality" theory, the "representative character" theory and the "functional necessity" theory.⁵ Although the Commission had held at that time that the privileges and immunities of diplomatic agents were based mainly on their "representative character", it had recognized that they were also based on "functional necessity". He had therefore deemed it appropriate to refer, in paragraphs 5 and 6 of his general comments, to the particular characteristics of the privileges and immunities of permanent missions to international organizations.

29. Paragraph 7 explained that since the privileges and immunities of permanent missions to international organizations were analogous to, if not identical with, those of diplomatic bilateral missions, the articles thereon were modelled on the corresponding provisions of the Vienna Convention on Diplomatic Relations. As that point had been dealt with at the previous session in connexion with permanent missions in general, the paragraph seemed to call for no discussion. But although in his opinion it was unnecessary to provide an independent and detailed commentary on each article, he agreed with the Chairman that the final draft should include a commentary on each article which would serve to emphasize the differences between its text and that of the Vienna Convention.

30. Article 22 (General facilities) was based on article 25 of the Vienna Convention on Diplomatic Relations⁶ and article 22 of the draft articles on special missions. The reference to the "nature and task of the permanent mission" was not included in article 25 of the Vienna Convention, but a mission to the United Nations, for example, obviously had much broader functions than one sent to a more specialized international organ. On that point, questions had been raised by Mr. Tammes and Mr. Kearney; the former, in particular, had questioned the advisability of imposing an obligation on the organization, since in his opinion it was doubtful whether it could become a party to the convention on relations between States and international organizations. Nevertheless, while the United Nations and the specialized agencies had not formally acceded to the 1946 Convention on the Privileges and Immunities of the United Nations, the prevailing view was that the organizations concerned were "parties" to that Convention in the sense in which that term was used in section 30.⁷ He had not, therefore, considered it necessary to discuss the theoretical question whether the organization would accede to the convention or not; that question might be dealt with in the final clauses, or possibly in a resolution to be adopted by the General Assembly. But since section 30 of the 1946 Convention laid down that, if a difference arose between the United Nations and a Member regarding the rights of representatives, a request must be made for an advisory opinion, it should be made clear that there were

precedents for assigning an obligation direct to the organization.

31. With regard to article 23, the Legal Counsel had reiterated the doubts he had expressed at the last session concerning paragraph 2, in which the organization, as well as the host State, was called upon to assist permanent missions in obtaining suitable accommodation for their members. He agreed that that article should include a paragraph making it clear what the organization's obligations would be.

32. The Legal Counsel had also pointed out a discrepancy between article 22, which referred to "the organization and the host State", and article 23, paragraph 2, which referred to "the host State and the organization". He (the Special Rapporteur) had reversed the order in article 23, paragraph 2, because it was normally the host State which played the principal part in obtaining accommodation for missions, while the organization merely provided the necessary information, as was done, for example, by the Housing Service at United Nations Headquarters. Article 22, on the other hand, set out the general principles governing the facilities to be accorded to permanent missions, which in his opinion were primarily the responsibility of the organization. He agreed, however, that it would be an improvement if both articles referred to "the host State and the organization".

33. Mr. CASTAÑEDA said he thought the Special Rapporteur had been fully justified in supplementing the article of the Vienna Convention on Diplomatic Relations on which article 22 was modelled, by adding a phrase which made the extent of the obligations of the organization and the host State dependent on the nature and task of the permanent mission. There was no doubt that the organization had obligations to permanent missions, but since its obligations and those of the host State were not the same, it might perhaps be appropriate to use different terms to state their existence. The English words "shall accord", used in article 22, were appropriate in the case of the host State, but not in that of the organization, which might not be legally in a position to provide certain facilities. He therefore proposed that instead of one sentence there should be two, one referring to the obligations of the host State, using the words "shall accord", and the other to the obligations of the organization, couched in different terms to be chosen by the Drafting Committee.

34. He had no objection to the present wording of article 23, but thought it might perhaps be desirable to mention the locality in which the premises of the permanent mission must be situated if they were to enjoy the tax exemption provided for in article 25.

35. Mr. RUDA, after congratulating the Special Rapporteur on section II of his report, said he wished to make three points. First, section II had its theoretical basis in Article 105 of the United Nations Charter. Second, it was clear that the permanent missions in question were not accredited to the host State, but to the international organization, which was a separate entity having its own legal personality. Third, the Special Rapporteur had been correct in saying that the privileges

⁵ See *Yearbook of the International Law Commission*, 1958, vol. II, pp. 94 and 95.

⁶ United Nations, *Treaty Series*, vol. 500, p. 108.

⁷ *Op. cit.*, vol. 1, p. 30.

and immunities of permanent missions to international organizations were analogous to, if not identical with, those of diplomatic bilateral missions. The responsibility for providing general facilities therefore properly devolved on the international organization as well as on the sending State.

36. With regard to article 22, he agreed that the details of the facilities to be accorded by the organization to the permanent mission should be left to the final clauses of the convention. He had some doubts about the wording of the article, however. The Special Rapporteur had stated that it was based both on article 25 of the Vienna Convention on Diplomatic Relations and on article 22 of the draft on special missions; but a comparison of the three texts showed that it was based on article 22 of the draft on special missions and not on article 25 of the Vienna Convention. The latter article, which was much more concise and categorical, laid down that "The receiving State shall accord full facilities for the performance of the functions of the mission" and said no more, whereas article 22 of the draft on special missions took particular account of the temporary character of the mission by including the words "having regard to the nature and task of the special mission". Since missions to international organizations had the characteristic of permanence in common with bilateral diplomatic relations, he did not understand why the Special Rapporteur had followed the draft on special missions rather than the Convention on Diplomatic Relations.

37. The Special Rapporteur's article 23, on the other hand, followed the text of article 21 of the Vienna Convention as closely as possible, and he was in full agreement with it.

38. Mr. CASTRÉN said he approved of the ideas underlying the introductory paragraphs to section II of the draft articles. He also approved of draft articles 22 and 23 as a whole, but thought it would be well to make their present wording less categorical. The Special Rapporteur had already agreed to reverse the order of the words "host State" and "organization" in article 22, as proposed by the Legal Counsel at the previous meeting. Perhaps he could also accept some wording for the article to the effect that the organization assumed its obligations "subject to its relevant rules", or any other formula which the Drafting Committee saw fit to adopt.

39. He agreed with Mr. Ruda that article 22 should be more closely modelled on article 25 of the Vienna Convention on Diplomatic Relations and not on article 22 of the draft on special missions. There was full justification for adding a phrase making the extent of the obligations of the organization and the host State dependent on the nature and task of the permanent mission, but in the French text the words "*sont tenus d'accorder*" at the beginning of the sentence should be replaced by the word "*accordent*" as in article 25 of the Vienna Convention. A similar amendment should be made to article 23, paragraph 2, by replacing the words "*doivent . . . aider*" by "*aideront*".

40. Mr. KEARNEY said he could agree to the general

thesis and philosophy expounded by the Special Rapporteur in his introduction to articles 22 and 23.

41. At the previous meeting he had asked the Legal Counsel whether, in his opinion, it was necessary to include references to the organization, and the latter had expressed the view that such references were desirable. He (Mr. Kearney) thought it would be possible to draft the articles in such a way as to permit references to the obligations of the organization without raising the question whether it should or should not become a party to the convention. For example, a disclaimer might be added as a second paragraph to article 22, which might read: "Paragraph 1 shall not affect the obligation of the organization to assist a permanent mission in obtaining the facilities required for the performance of its functions". However, the same problem would arise in connexion with article 49 concerning consultations between the sending State, the host State and the organization. In that case the disclaimer method would not suffice, because it was essential to make provision for the right of the organization to participate in the consultations; the organization would be the party which, under the pertinent headquarters agreement, was in direct treaty relationship with the host State. In his view, the Commission should approach the problem on the assumption that the organization would necessarily be a party to the convention.

42. Article 22 was satisfactory, subject to a few minor drafting changes; for example, the first line might be revised to read: "The host State and, within the limits of its competence, the organization . . ." The final phrase, "having regard to the nature and task of the permanent mission", brought out the fact that a permanent mission was a more specialized operation than a full-scale diplomatic mission, which was not restricted to an international organization. He did not think that language raised any particular problems.

43. As to article 23, while aware that the language of paragraph 1 was to be found in the two Vienna Conventions, on diplomatic and consular relations, he wondered whether it would not be desirable to delete the words "by the sending State", since that would tend to facilitate the acquisition of property by the permanent mission.

44. Mr. RAMANGASOAVINA said he approved of the ideas expressed in draft articles 22 and 23, but could not accept wording which placed the obligations of the organization and those of the host State on an equal footing, since there was an essential difference between them. The host State had, in fact, the same obligations to permanent missions as it had to the organization, and it was bound to provide both of them with the necessary means for fulfilling their functions; but the obligations of the organization to permanent missions related to the results to be achieved by those missions. That difference in character should be made clear by dividing the paragraph into two separate sentences, one dealing with the obligations of the host State and the other with those of the organization.

The meeting rose at 12.55 p.m.

994th MEETING*Friday, 6 June 1969, at 10.10 a.m.**Chairman: Mr. Nikolai USHAKOV*

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

**Relations between States
and international organizations**

*(A/CN.4/218 and Add.1)**[Item 1 of the agenda]**(continued)*

ARTICLE 22 (General facilities) and

ARTICLE 23 (Accommodation of the permanent mission and its members)¹ *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of articles 22 and 23 in the Special Rapporteur's fourth report (A/CN.4/218).

2. Mr. BARTOŠ said he saw no objection to the general wording of articles 22 and 23, which stated rules that, with the adoption of the two Vienna Conventions, had become rules of general international law.

3. It was both necessary and desirable that the obligations of organizations should be stated in the draft articles, for even if organizations did not sign or ratify the convention which the draft articles were intended to form, the obligations stated in the convention would still have moral force, if not legally binding force, for them.

4. Relations between organizations and their member States were governed by the internal rules or constituent instruments of the organizations and, generally speaking, organizations had always fulfilled their obligations in that respect; but it was useful to confirm those obligations in a convention. Moreover, the facilities which organizations were required to accord to permanent missions were not only of a practical nature; organizations had sometimes to ensure observance of the privileges and immunities of a mission or even its access to the territory. The idea that organizations had obligations to permanent missions certainly had a place in the draft articles. The Commission should next consider whether it ought not to introduce into the first twenty-one articles the idea that organizations had obligations to each other.

5. With regard to the question whether the host State should be mentioned before the organization or vice versa, in article 22 it would be better to mention first the host State, on which the obligations mainly devolved. In article 23, paragraph 2, it was the organization that

was mainly responsible and so it should logically be mentioned first, but for the sake of uniformity it would be better to keep to the same order as in article 22.

6. He approved of the use of the words "in accordance with its laws" in article 23, paragraph 1. On the other hand, he would prefer to see the word "acquisition" replaced by the word "possession", because the acquisition of real property by a foreign Government was not regulated in the same way by the internal law of all States. It would also be preferable to replace the words "by the sending State" by the words "for account of the sending State", since the property was sometimes acquired by a third party, the sending State being only the beneficiary. It could be left to the Drafting Committee to find suitable wording, on the understanding that the essential point was to ensure that, in practice, the sending State had no difficulty in obtaining the necessary premises for its permanent mission.

7. Mr. USTOR said that the facilities, privileges and immunities provided for in section II applied to the permanent missions of States to international organizations, other than the permanent mission of the host State. He suggested that that point be mentioned either in the draft articles or in the commentary.

8. Article 22 covered two kinds of facilities: those accorded to the permanent mission by the host State and those accorded by the organization. Obviously, the host State had to accord facilities to the permanent missions of all sending States, while the organization had to accord them to that of the host State as well. As Mr. Castañeda had proposed, article 22 should logically be divided into two parts, one concerning the obligations of the host State and the other those of the organization.

9. Article 23 was based on the corresponding articles of the Vienna diplomatic and consular Conventions,² but while paragraph 1 referred to accommodation for the permanent mission, paragraph 2 referred to accommodation for the members of the mission. The question therefore arose whether the obligations of the host State under those two paragraphs were identical. He himself thought that they were, and that the problem was mainly one of drafting. For example, paragraph 2 might say merely: "The same provision as in paragraph 1 shall apply to members of permanent missions". In any case, some explanation should be included in the commentary to make it clear whether the obligations of the host State to the permanent mission and to the members of the mission were the same.

10. Mr. TAMMES said he agreed with paragraphs 1-7 of the Special Rapporteur's general comments on section II, particularly his reference to the "functional necessity" theory. When he had expressed doubts about the inclusion of a reference to the legal obligation of the organization, he had not had in mind a purely theoretical discussion; such discussions had already been held at previous sessions and were summarized in the Special Rapporteur's second report.³

² United Nations, *Treaty Series*, vol. 500, p. 106, article 21 and vol. 596, p. 286, article 30.

³ See *Yearbook of the International Law Commission, 1967*, vol. II, pp. 137 and 138, paras. 25-28.

¹ See previous meeting, para. 27.

11. There was no doubt that international organizations could have legal obligations; that was evident from numerous agreements concluded in the past. The problem that caused him concern was whether such organizations could have legal obligations without their consent. If their consent was required, it would be necessary at some stage to consider the question whether they were parties to the convention.

12. As the Special Rapporteur had pointed out, it was not normally the task of the Commission to draft the final clauses of a convention, but some guidance by the Commission would surely be appropriate, since a rather special kind of final clause would be necessary. A standard final clause, such as that concerning ratification in article 51 of the Vienna Convention on Diplomatic Relations, would not serve the purpose, since the clause required would deal with a mixed group of unequal parties. If the Commission believed that the convention would create an obligation for organizations automatically and without their consent, some clarification was called for. Certain obligations for the organization were already laid down in article 17, paragraph 3, concerning notifications,⁴ in articles 22 and 23, concerning facilities and accommodation, and in article 49 concerning consultations; those obligations were modest, reasonable and, as the Legal Counsel had said, reflected general practice in some respects, even at the present time.

13. In his opinion, the 1946 Convention on the Privileges and Immunities of the United Nations,⁵ in view of the close relationship between the membership of the United Nations and the States parties to the Convention, did not constitute a sound precedent for the automatic imposition of obligations. Section 30 of that Convention, in particular, to which reference had been made during the discussion, was not very helpful, since in it the United Nations appeared as a party to a dispute and not as a party to a convention. In order to throw some light on the practical aspects of that problem, he hoped that comments would be forthcoming from the international organizations themselves, and that a reference to the need for such comments would be included in the Commission's report.

14. Mr. AGO said that on the whole he approved of the Special Rapporteur's report, the comments it contained and the principles on which it was based.

15. With regard to articles 22 and 23, however, he must draw attention to the danger of placing the obligations of the host State and those of the organization on the same footing. As drafted, the articles gave the impression that those obligations were the same and that they were in some sense joint obligations. But that was not so; the obligations of organizations and of the host State differed considerably, both as to their object and as to their source, and they could vary from one organization to another. The wording should bring out that difference.

16. The obligation set out in article 23, paragraph 2, was reasonable for the host State, but not for the organization, which might have no power in the matter. The Commission should consider what would happen if a member of a permanent mission was unable to find accommodation and demanded that the organization either provide him with accommodation or pay him an indemnity if the rent was too high. There again the impression of a joint obligation, which was what the wording conveyed, was dangerous. It would be better if the two articles referred only to the obligations of the host State and merely mentioned that the organization must help missions to secure the fulfilment of those obligations by the host State, without mentioning the other facilities that the organization was required to grant.

17. Sir Humphrey WALDOCK said he would not have thought there were such serious dangers in the juxtaposition, in articles 22 and 23, of the obligations of the host State and the organization as Mr. Ago had suggested; he recognized, however, that there was a general trend in the Commission, supported in particular by Mr. Castañeda, in favour of separating those obligations, and he agreed with that solution.

18. His own opinion was that those articles should, in substance, adhere as closely as possible to the texts of the Vienna diplomatic and consular Conventions. Some interesting observations had been made concerning the property aspects of article 23, but he still thought the Commission should follow the two Vienna texts which already existed. The English text of articles 22 and 23 was broad and non-technical, and he could not share the misgivings expressed by Mr. Kearney and Mr. Bartoš. In particular, the word "acquisition" in article 23, paragraph 1, was a quite general term, and he saw no sufficient reason to depart from the language of the existing conventions in the absence of any evidence of difficulties having arisen in the application of the Vienna text.

19. He did not share the difficulties expressed by some speakers concerning the exact status of the organization in relation to the draft articles; after all, the Commission was not concerned with producing a convention to be acceded to by organizations, but was trying to state what was the general international law concerning permanent missions to international organizations. He would have thought, therefore, that articles 2 and 3 of the text adopted at the last session would have answered the objections expressed by Mr. Ago. At present, the Commission was merely concerned with stating general principles; the question of whether international organizations would accede to the convention in the future was a separate one to be considered at a later stage.

20. Mr. YASSEEN said he did not think the Commission could consider at that stage whether the convention it was preparing would impose obligations on international organizations; the question whether the convention could be invoked against international organizations was bound up with the question who was the legislator for the international community. Nevertheless, since the draft dealt with relations between States and

⁴ Op. cit., 1968, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

⁵ United Nations, *Treaty Series*, vol. 1, p. 16.

international organizations, it should specify what the rights and obligations of those organizations were; otherwise it would be of little use.

21. Article 22 could be accepted as it stood. The facilities to be accorded by the organization and the host State were clearly distinct. Permanent missions had a task to perform, and the organization and the host State must help them to perform it, each to the extent of its obligations. No confusion between the two classes of obligations was possible. For example, the permanent mission could not ask the host State to provide it with documents or information concerning the work of the organization, and, conversely, it would not approach an organization on questions of inviolability of persons or premises. Since article 22 could only be interpreted in the sense he had indicated, it was hardly even necessary to add a qualifying phrase such as "each to the extent of its obligations".

22. Certain drafting improvements might perhaps be desirable, however. In particular, in the French text the words "*sont tenus d'accorder*" might be replaced by the word "*accordent*", which would be in conformity with the wording of article 25 of the Vienna Convention on Diplomatic Relations. The Drafting Committee might also examine the phrase "having regard to the nature and task of the permanent mission", since although permanent missions certainly had different tasks, their nature appeared to be same.

23. With regard to article 23, he thought the obligations of the host State regarding the premises of the permanent mission and the accommodation of its members were exactly the same as those of a receiving State to a diplomatic mission. By allowing an international organization to be established in its territory, the host State accepted the consequences. Article 23 should reproduce exactly the provisions of article 21 of the Vienna Convention on Diplomatic Relations, applying them to the host State.

24. The organization itself was in a different position in that respect. It was true that many organizations had set up a housing service which, by providing addresses and by other means, helped permanent missions to obtain offices and apartments; such assistance was useful and was appreciated, but it was rather of an accessory nature and was certainly not an obligation to be mentioned in an international convention. The assistance given by an international organization to its member States in their relations with the host State could be the subject of a general rule authorizing the organization to apply to the host State and ask it to fulfil its obligations in a particular case, if the member State concerned had already exhausted all the resources at its disposal. But no specific obligation should be imposed on the organization regarding the premises of the permanent mission and the accommodation of its members.

25. Mr. AGO said he welcomed Mr. Yasseen's last remark, from which it followed that all mention of the organization should be deleted from article 23. He would also urge that the two classes of obligations, those of the host State and those of the organization, should be separated in article 22. As had already been pointed out, the organization had obligations to all its

members, including the host State if it was a member. But the essential purpose of articles 22 and 23 was to specify the obligations of the host State to other States members of the organization. Even if it was true that article 22 should logically be interpreted as establishing two separate sets of obligations, why should the Commission retain an ambiguous text that might give rise to difficulties? It would be better for article 22 to deal only with the obligations of the host State.

26. The idea of making a separate article stating certain general obligations of the international organizations should be considered; but those obligations would go beyond, and be quite different from, the very specific obligations now stated in articles 22 and 23. If the Commission decided to draft such an article it should study the question further and try to avoid vague terms such as "facilitate".

27. Mr. REUTER said he entirely agreed with Mr. Ago. The obvious solution to the drafting problem in article 22—to add a parenthetical clause such as "each in so far as it is concerned"—would not be sufficient.

28. The question of the extent to which the organization guaranteed its members that all member States would fulfil their obligations was a very complex and delicate one. He remembered the difficulty that had arisen in France when an international organization established in that country had intervened to support the request of a member State whose Government was no longer recognized by France. It would be better to deal with the obligations of the organization in a separate article.

29. Mr. TABIBI said he had no difficulty in accepting the texts of articles 22 and 23, since they were clearly based on the corresponding articles of the Vienna diplomatic and consular Conventions and on the draft articles on special missions. If the Commission were to depart too far from the principles accepted in the Vienna Conventions, that would inevitably lead to difficulties in the interpretation, if not in the application, of those Conventions.

30. He had no doubts concerning the obligation of the host State referred to in article 22, but he agreed with Mr. Ago that the organization was hardly in a position to accord "facilities" to the permanent mission.

31. On the other hand, he could not agree with Mr. Yasseen that the reference to the organization in paragraph 2 of article 23 should be deleted; the assistance which the organization was called upon to provide to the permanent mission under that paragraph could be very useful, since the organization itself could draw on a wide experience of local laws, federal laws and the like, not possessed by its individual members. He was confident that articles 22 and 23 would be acceptable if the Drafting Committee could amend them to separate the obligations of the host State from those of the organization.

32. He agreed with Mr. Ustor that the Drafting Committee should not neglect the problem of the permanent mission of the host State itself.

33. The CHAIRMAN, speaking as a member of the

Commission, said he agreed with those members who thought it preferable to separate clearly, in the articles, what concerned the host State and what concerned the organization. He would even go a little further, since, in his view, the organization was morally bound not only to assist member States to obtain all the facilities they required, but also to ensure that they enjoyed all the privileges and immunities laid down in the convention.

34. It would probably be advisable to include a separate article on that subject in the draft, but the article should state a right of the organization rather than an obligation, since the essential purpose of the convention was to bind States. Some organizations might become parties, but not necessarily all, in which case it would be difficult for the convention to impose obligations on them. The general rule stated in such an article, which the Special Rapporteur might begin to draft, would render unnecessary the provisions concerning the international organization now contained in article 22 and article 23, paragraph 2, since they would then only weaken the general rule.

35. As they stood, articles 22 and 23 were incomplete, for the organization too should assist the permanent mission in the acquisition of premises, a matter dealt with in article 23, paragraph 1.

36. He wondered what justification there could be for including the phrase "having regard to the nature and task of the permanent mission", at the end of article 22. That phrase tended to weaken the general rule and in any case, was not to be found in the corresponding provision of the Vienna Convention on Diplomatic Relations. It would be better to follow the model of article 25 of that Convention as closely as possible and, in particular, to reproduce the words "accord full facilities".

37. Mr. EL-ERIAN (Special Rapporteur), summing up the discussion, said he would deal first with the general question whether the draft articles should assign legal obligations to international organizations. His task had been considerably facilitated by the remarks of some members, in particular the very pertinent remark by Sir Humphrey Waldock that the Commission was concerned with formulating the substance of the general law of international organizations. The process whereby an organization became technically bound was a separate question on which the Commission might consider making a recommendation at some stage.

38. In the early days of the United Nations, when the Convention on the Privileges and Immunities of the United Nations had been formulated, that question had been avoided, probably because at the time the treaty-making capacity, and to some extent the corporate existence, of international organizations were not as clearly and fully recognized as they were now. The International Court of Justice had made an important contribution to such recognition in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*.⁶

39. The recent United Nations Conference on the

Law of Treaties, in its resolution relating to article 1 of the Vienna Convention on the Law of Treaties, had recommended to the General Assembly that it refer to the International Law Commission the study of "the question of treaties concluded between States and international organizations or between two or more international organizations".⁷ When the Commission undertook that study, it would no doubt consider the question of the manner in which international organizations became legally bound by treaty obligations.

40. The point had been made by Mr. Bartoš that, even if an organization did not actually become a party to the convention, the fact that most of its member States were parties would create for it a moral obligation to observe the provisions of the treaty. As far as the Convention of 1946 was concerned, the Secretary-General had always held that the United Nations considered itself a party; that view was supported by a statement by the Legal Counsel to which he had referred in his third report.⁸

41. Even if the final clauses of the future convention on relations between States and international organizations did not make provision for accession by international organizations, the competent organ of an organization could still adopt a resolution whereby it assumed the obligations created by the convention.

42. His reply on the point raised by Mr. Castañeda⁹ was that article 20, adopted at the previous session, dealt with the question of offices of the permanent mission in localities other than that in which the seat or an office of the organization was established. The obligations of the host State under article 23 should therefore be interpreted as covering the offices of a permanent mission located in accordance with the provisions of article 20.

43. With regard to the drafting of article 22, to meet the point raised by both Mr. Ruda and the Chairman, he would bring the wording into line with that of the Vienna Convention on Diplomatic Relations by introducing the adjective "full" before "facilities".

44. He was not in favour of introducing into article 22 the qualification "within the limits of its competence" suggested by Mr. Kearney; as had been pointed out by Sir Humphrey Waldock, the position was made clear by articles 3 and 4.

45. He could accept the suggestion that the reference to the organization be separated from the reference to the host States; that would largely dispose of the issue raised by Mr. Kearney, by making it clear that the obligations of the host State and those of the organization were not on the same footing.

46. In the commentary on articles 22 and 23, a reference would be made to such matters as budgetary limitations, which had been mentioned by the Legal Counsel in the course of the discussion.

⁷ See Final Act of the United Nations Conference on the Law of Treaties, document A/CONF.39/26, annex.

⁸ See *Yearbook of the International Law Commission*, 1968, vol. II, document A/CN.4/203, chapter I, para. 13.

⁹ See previous meeting, para. 34.

⁶ *I.C.J. Reports* 1949, p. 174.

47. With regard to the interpretation of the concluding phrase of article 22, "having regard to the nature and task of the permanent mission", Mr. Kearney had suggested that there were differences between a diplomatic mission accredited to a State and a permanent mission to an international organization.¹⁰ He had not had any such difference in mind when drafting article 22; he had used the phrase in question to express an idea that was not very different from that expressed in the concluding phrase of article 16: "... the needs of the particular mission and the circumstances and conditions in the host State".

48. He had been impressed by the points made regarding the ambiguities that might arise from the use of such words as "nature" and "task". The purpose of those words was to indicate that the facilities to be granted differed according to the nature of the permanent mission and its needs. There was a great difference between a permanent mission accredited to an organization of general competence, like the United Nations, and a permanent mission accredited to a technical organization with a very limited field of activity. As between permanent missions to the United Nations, there was also a difference between the mission of a permanent member of the Security Council, which in practice was also a mission to all the other principal organs of the United Nations, and the mission of a State which did not have the whole range of responsibilities of a permanent member of the Security Council. If the Commission favoured dropping the words "having regard to the nature and task of the permanent mission", he would suggest that an explanatory passage be included in the commentary, on the lines of paragraph (6) of the commentary on article 16.

49. With regard to article 23, he could not accept Mr. Kearney's suggestion that the words, "by the sending State", in paragraph 1 should be deleted. Such a departure from the text of the corresponding article of the Vienna Convention on Diplomatic Relations could lead to difficulties of interpretation. Again, a reference to the sending State was important in the context since, even if the premises of the permanent mission were acquired in the name of the permanent representative, they were held on behalf of the sending State. The reference to the sending State would cover all the different situations that could arise.

50. A number of members had suggested that articles 22 and 23 should be redrafted so as to separate the obligations of the host State from those of the organization, and he was prepared to accept that idea. An alternative solution suggested by Mr. Reuter, which deserved consideration by the Drafting Committee, was to insert the words "each in so far as it is concerned", after the words "the organization and the host State".

51. It had also been proposed that the reference to the organization should be dropped from article 22, and the Chairman had suggested the introduction of a new article setting forth the right of an organization to secure fulfilment by the host State of its obligations concerning the facilities, privileges and immunities to be accorded to the sending State and its permanent mission. His

own view was that a distinction should be made between that right and the obligations of the organization under articles 22 and 23; hence the addition of the proposed new article would not be a substitute for the references to the organization in articles 22 and 23.

52. With regard to the scope of the term "facilities", he agreed with Mr. Bartoš that it covered not only technical and administrative facilities, but also facilities of a political character. That point could be brought out in the commentary.

53. He agreed with Mr. Ustor that the relations of the host State with its own permanent mission to the organization fell outside the scope of articles 22 and 23. Those articles dealt with relations between the host State and the permanent missions of other States members of the organization. But the obligation of the organization to assist in the matter of facilities applied to all permanent missions, including that of the host State.

54. He considered it necessary to retain the reference to the organization in article 23, paragraph 2, because the organization was expected to assist permanent missions in obtaining suitable accommodation for their members. There was already a practice in the matter and it was necessary to consolidate that practice. Moreover, as Mr. Tabibi had pointed out, some organizations, such as the United Nations, had accumulated a wealth of experience concerning the complex legal and other problems raised by local legislation and practice regarding ownership and occupation of premises. Consequently, the facilities offered by the housing services of organizations should continue to be available to permanent missions.

55. His drafting of article 23 had been generally supported, although some members had expressed doubts as to the need to differentiate between the accommodation of the permanent mission, dealt with in paragraph 1, and the accommodation of its members, dealt with in paragraph 2. There was, however, a strong case for that differentiation, which was also made in the corresponding article of the Vienna Convention on Diplomatic Relations. The premises of a permanent mission were acquired on a more or less permanent basis, often by purchase, whereas the accommodation of the members of the mission was of a more temporary character and usually took the form of leased apartments; it was therefore useful to keep the two cases separate. Another reason was the need to specify, in the first case, that the host State had a duty to facilitate the acquisition of premises "in accordance with its laws". It was only if the internal law of the host State permitted a foreign State to own property in its territory that the host State would be required to provide assistance in the purchase of premises. The case contemplated in paragraph 2 was that of members of a permanent mission securing the lease of suitable accommodation; in that case, the organization had a role to play through its housing services and the information it could provide.

56. He proposed that articles 22 and 23 be referred to the Drafting Committee with the changes which he had accepted. The Drafting Committee could consider the question of including, either at the beginning or at the

¹⁰ *Ibid.*, para. 42.

end of the chapter, a separate article of a general character setting forth the right of the organization to secure fulfilment by the host State of its obligations concerning the facilities, privileges and immunities to be accorded to the sending State and its permanent mission.

57. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed that articles 22 and 23 should be referred to the Drafting Committee as proposed by the Special Rapporteur.

*It was so agreed.*¹¹

ARTICLES 24 TO 26

58. Article 24

Inviolability of the premises of the permanent mission

1. The premises of the permanent mission shall be inviolable. The agents of the host State may not enter them, except with the consent of the head of the mission.

2. The host State is under a special duty to take all appropriate steps to protect the premises of the permanent mission against any intrusion or damage and to prevent any disturbance of the peace of the permanent mission or impairment of its dignity.

3. The premises of the permanent mission, their furnishings and other property thereon and the means of transport of the permanent mission shall be immune from search, requisition, attachment or execution.

Article 25

Exemption of the premises of the permanent mission from taxation

1. The sending State and the head of the permanent mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the permanent mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State or the head of the permanent mission.

Article 26

Inviolability of archives and documents

The archives and documents of the permanent mission shall be inviolable at any time and wherever they may be.

59. Mr. EL-ERIAN (Special Rapporteur) said he had grouped articles 24 to 26 together and had attached a joint commentary to them because all three related to certain immunities and exemptions concerning the premises of the permanent mission and its archives and documents. There was general recognition of the duty of the host State to ensure the inviolability of the premises, archives and documents of permanent missions, and in paragraph (2) of the commentary he had quoted a significant passage from a letter by the Legal Counsel on the subject.

60. In paragraphs 3, 4 and 5 of the commentary, he had referred to the relevant provisions of various headquarters agreements and of the Convention on the Privileges and Immunities of the United Nations. Under those provisions, the property and assets of the United Nations and of the specialized agencies, wherever located and by whomsoever held, were immune from search, requisition, confiscation, expropriation or any other form of interference, whether by executive, administrative, judicial or legislative action.

61. The replies of the United Nations and the specialized agencies to the questionnaires sent to them had shown that there was general recognition of the principle of exemption of the premises of permanent missions from taxation. He had therefore included a provision on the subject in article 25.

The meeting rose at 12.55 p.m.

995th MEETING

Monday, 9 June 1969, at 3.10 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Ruda, Mr. Tabibi, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218 and Add.1)

[Item 1 of the agenda]

(continued)

ARTICLE 24 (Inviolability of the premises of the permanent mission)

ARTICLE 25 (Exemption of the premises of the permanent mission from taxation) and

ARTICLE 26 (Inviolability of archives and documents)¹
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of articles 24 to 26 in the Special Rapporteur's fourth report (A/CN.4/218).

2. Mr. NAGENDRA SINGH said that the articles closely followed the corresponding articles of the Vienna Convention on Diplomatic Relations² and reflected sound State practice with respect to both *lex lata* and *de lege*

¹¹ For resumption of the discussion, see 1014th meeting, para. 1.

¹ See previous meeting, para. 58.

² United Nations, *Treaty Series*, vol. 500, pp. 106 and 107, articles 22-24.

ferenda. He therefore proposed that they be referred to the Drafting Committee without further discussion.

3. Mr. KEARNEY said he wondered whether article 24, paragraph 1, should be modelled on article 22 of the Vienna Convention on Diplomatic Relations or on article 25 of the draft articles on special missions.³ The latter was substantially identical with article 22 of the Vienna Convention except for an additional sentence concerning the consent of the head of the mission, which read: "Such consent may be assumed in case of fire or other disaster requiring prompt protective action." That clause had been added because a special mission, owing to its indefinite duration, would in all probability occupy office space in a hotel or apartment building, where the danger of fire or other disaster would make it necessary to take immediate action to protect other people in the same premises. In drafting the articles on special missions, some members of the Commission had indicated their intention to equate a permanent mission to an international organization with a diplomatic mission. While he agreed with the principle of inviolability, he thought that it should not be followed slavishly and that the possibility of danger, which according to his own experience was very real both in New York and in Geneva, should not be overlooked.

4. The CHAIRMAN, speaking as a member of the Commission, said that the words "head of the mission" in article 24, paragraph 1, and article 25, paragraphs 1 and 2, should be replaced by the words "permanent representative", in order to keep to the terminology used in the articles the Commission had adopted the previous year.⁴ Subject to that reservation, he was in favour of retaining the present wording of the articles, which was based on the text of the corresponding articles of the Vienna Convention, and not referring in them to fire and other disasters or to cases of *force majeure*.

5. Mr. EL-ERIAN (Special Rapporteur) said he noted that Mr. Kearney favoured the inclusion in article 24, paragraph 1, of a sentence similar to that contained in article 25, paragraph 1, of the draft articles on special missions, which would provide that consent might be assumed in case of fire or other disaster requiring prompt protective action.

6. There had been a long discussion on that point in 1958 in connexion with the draft articles on diplomatic relations; some members had pointed out the absurdity of not permitting immediate protective action in case of fire, while others had been more concerned with strengthening the principle of inviolability. Paragraph (4) of the commentary on article 25 of the draft on special missions read: "The last sentence of paragraph 1 of article 25 provides that the necessary consent to enter the premises protected by inviolability may be assumed in case of fire or other disaster requiring prompt protective action. The Commission added this provision to the draft on the proposal of certain Governments,

although it was opposed by several members of the Commission as they considered that it might lead to abuses." Hence, while sympathizing with the practical difficulties referred to by Mr. Kearney, he, as Special Rapporteur, had the impression that the majority of the Commission was opposed to the inclusion of any provision which would tend to weaken the principle of inviolability.

7. He agreed with the Chairman that the words "head of the mission" in article 24, paragraph 1, and in article 25, paragraphs 1 and 2, should be replaced by the words "permanent representative".

8. Mr. EUSTATHIADES said he thought that, while there was no need to refer expressly to special circumstances such as fire or other disasters, cases of *force majeure* should be mentioned, even if only indirectly in the commentary. If they were not specially mentioned they would not be understood to be covered, since *force majeure* was not unquestionably a general principle of law and, moreover, when the question of circumstances constituting *force majeure* had arisen, there had been a tendency to argue that the principle of inviolability was sacrosanct. A reference in the commentary would remove all risk of ambiguity.

9. Mr. AGO said he could not agree with the Chairman's suggestion that the words "head of the mission" should be replaced by the words "permanent representative", in order to conform to the terminology used in the first twenty-one articles approved by the Commission; it was the contrary that should be done. The permanent representative to an international organization was not always the head of the permanent mission and several members of a permanent mission might be permanent representatives to different organizations. It was therefore preferable to refer to the person in charge of the mission unequivocally as "head of the mission".

10. The CHAIRMAN said he agreed with Mr. Ago on the principle, but thought it better to keep to the same terminology throughout the draft articles, even if it were subsequently decided to alter it.

11. Mr. EL-ERIAN (Special Rapporteur) said that at the previous session it had been suggested that the draft articles should refer to "the head of the mission" in order to bring them into line with the corresponding provisions of the Vienna Convention on Diplomatic Relations. But since twenty-one articles using the term "permanent representative" had already been approved, it would be difficult to make any change at the present time. At the second reading of the draft articles, the Commission might perhaps reconsider the matter after eliciting the views of Governments on that term.

12. Mr. CASTRÉN said that when the Sixth Committee had considered the Commission's draft on special missions on the first reading, at the twenty-third session of the General Assembly, it had declined to admit any exception to the rule of the inviolability of the premises of permanent missions other than cases in which the head of the mission gave his consent or it was impossible to reach him in an emergency. The Drafting Committee should bear that in mind if it was decided to amend the text.

³ See *Yearbook of the International Law Commission*, 1967, vol. II, p. 360.

⁴ *Op. cit.*, 1968, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

13. Mr. EL-ERIAN (Special Rapporteur) said that if the Commission so agreed, he would include a paragraph in his commentary on the lines suggested by Mr. Eustathiades.

14. The CHAIRMAN said that Mr. Ustor, who was unable to be present, had asked him to inform the Commission that he had certain objections to article 25, paragraph 2, and would like to state his views on that provision later. He suggested that articles 24, 25 and 26 be meanwhile referred to the Drafting Committee.

It was so agreed.⁵

15. The CHAIRMAN suggested that in order to speed up its work the Commission should consider the subsequent articles of the draft without each one being introduced by the Special Rapporteur, since all the articles were largely modelled on the Vienna Conventions or other conventions drawn up by the Commission. The Special Rapporteur, who had agreed to his suggestion, would merely point out the passages where he had departed from those conventions and explain why he had done so.

It was so agreed.

ARTICLE 27

16.

Article 27

Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure to all members of the permanent mission freedom of movement and travel in its territory.

17. Mr. RUDA said he had no comments on article 27, which reproduced the provisions of article 26 of the Vienna Convention on Diplomatic Relations. He suggested that the article be referred to the Drafting Committee.

18. Mr. EUSTATHIADES said he wondered whether the special case referred to in paragraph (3) of the commentary, which was an aspect of the problem of reciprocity, did not belong to article 43, on non-discrimination, since non-discrimination and reciprocity were not the same.

19. Mr. EL-ERIAN (Special Rapporteur) agreed that the problem of reciprocity was dealt with in article 43 and should be discussed in connexion with that article. He had referred to restrictions on the movements of members of permanent missions in paragraphs (2) and (3) of his commentary in order to reflect the factual situation at the present time.

20. Mr. EUSTATHIADES said the question was whether or not the special case of *de facto* reciprocity considered in paragraph (3) of the commentary went beyond the rule of non-discrimination stated in article 43.

21. Mr. EL-ERIAN (Special Rapporteur) said he still thought that article 27 should be based on article 26 of the Vienna Convention on Diplomatic Relations,

and that all problems of reciprocity should be discussed in connexion with article 43.

22. Mr. BARTOŠ said there was a difference between non-reciprocity and discrimination. Non-reciprocity was when country A did not accord to the nationals and institutions of country B the same treatment as country B accorded to the nationals and institutions of country A, whereas discrimination was when a country took a position against the nationals and institutions of another country as a reprisal. Mr. Eustathiades had therefore been right to raise the question and the answer should be sought in article 43 on non-discrimination.

23. Mr. KEARNEY suggested that the problem might be solved by deleting paragraph (3) of the commentary; that paragraph was not a full statement of the situation, since restrictions on the movements of the representatives in question were imposed for reasons of national security.

24. Sir Humphrey WALDOCK said that the problem raised in paragraph (3) of the commentary was a very delicate one; he agreed with Mr. Eustathiades that it could not be solved by a mere reference to article 43 on non-discrimination. Paragraph (3) seemed to refer to the possibility of reciprocity in the treatment of diplomatic representatives on the one hand and representatives on permanent missions to international organizations on the other. That in itself seemed to raise a delicate legal issue, but it was to be noted that there were countries not having any general international organizations in their territory which imposed restrictions on the movements of members of diplomatic missions.

25. Mr. EL-ERIAN (Special Rapporteur) said that the relation between the possibility of reciprocity and the question of freedom of movement had been discussed by the Commission in connexion with the draft articles on special missions, but no reference to it had been included in the commentary. He was prepared to delete paragraph (3) of the commentary if the Commission considered it advisable.

26. Mr. RUDA suggested that article 27 be referred to the Drafting Committee.

It was so agreed.⁶

ARTICLE 28

27.

Article 28

Freedom of communication

1. The host State shall permit and protect free communication on the part of the permanent mission for all official purposes. In communicating with the Government and the diplomatic missions, consulates and special missions of the sending State, wherever situated, the permanent mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the host State.

⁵ For resumption of the discussion, see next meeting, para. 1 and 1015th meeting, para. 20.

⁶ For resumption of the discussion, see 1017th meeting, para. 16.

2. The official correspondence of the permanent mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

3. The bag of the permanent mission shall not be opened or detained.

4. The packages constituting the bag of the permanent mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the permanent mission.

5. The courier of the permanent mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the permanent mission may designate couriers *ad hoc* of the permanent mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the permanent mission's bag in his charge.

7. The bag of the permanent mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a courier of the permanent mission. By arrangement with the appropriate authorities, the permanent mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

28. Mr. EL-ERIAN (Special Rapporteur) said that the text of article 28 closely followed that of article 27 of the Vienna Convention on Diplomatic Relations, except for two minor differences which were explained in paragraphs (4) and (5) of the commentary. The provisions of the article were in full conformity with existing practice.

29. Mr. YASSEEN said he thought that in the matter under consideration there was a perfect analogy between the situation of diplomatic missions and that of permanent missions. He therefore approved of the article, the terms of which had been established by the Vienna Convention on Diplomatic Relations, and proposed that it be referred to the Drafting Committee.

30. The CHAIRMAN, speaking as a member of the Commission, said that the phrase "By arrangement with the appropriate authorities", at the beginning of the last sentence of paragraph 7, was not to be found in the Vienna Convention on Diplomatic Relations and he wondered why the Special Rapporteur had thought it necessary to introduce it.

31. Mr. EL-ERIAN (Special Rapporteur) replied that the phrase in question was taken from paragraph 7 of article 28 of the draft on special missions; but no explanation of the reasons for its inclusion was given in the commentary to that article.

32. Mr. KEARNEY said he did not see how a member of a permanent mission could take possession of the bag without making arrangements with the appropriate authorities; such arrangements would be necessary before he could approach the ship or aircraft.

33. The CHAIRMAN said that, although the provi-

sion might be of some value for special missions, which were not permanent, the same was not true of permanent missions, which concluded such arrangements once and for all, not on each occasion.

34. Mr. YASSEEN said he feared that the phrase in question might give the impression that the very existence of the right depended on the conclusion of an arrangement, whereas that did not appear to be the Special Rapporteur's view. It was true that the assistance or authorization of the competent authorities was necessary for access to an aircraft, but the purpose of the arrangement was simply that the host State should facilitate for the permanent mission the exercise of a right recognized independently of the arrangement.

35. Mr. BARTOŠ said that the phrase had been added to the draft articles on special missions at the request of various delegations, which had pointed out that the authorities of the host State did not always know all the members of special missions by sight and that a problem of public order was involved. The problem did not, however, arise for permanent missions to international organizations, any more than it did for diplomatic missions. It would be better to keep to the text of the Vienna Convention, and he was therefore in favour of deleting the phrase "By arrangement with the appropriate authorities".

36. Mr. KEARNEY said he would have no objection to the deletion of those words provided that the difference between permanent missions and special missions in that respect was explained in the commentary. It should also be made clear in the commentary that the omission of those words did not imply that a member of a permanent mission could, for example, proceed to an aircraft at an airport without observing the normal precautions.

37. Mr. EUSTATHIADES said he too thought that the same solution should be adopted for permanent missions as for diplomatic missions. But since the articles on special missions had now been drafted with the phrase in question, the commentary should clearly bring out Mr. Yasseen's point that the administrative arrangements to be made by permanent missions with the host State did not affect the substance of the right accorded to them. It could also be stated in the commentary that while special missions might make *ad hoc* arrangements, permanent missions would, in principle, have general arrangements concluded once and for all.

38. Mr. EL-ERIAN (Special Rapporteur) said it was evident that there was general agreement to drop the words "By arrangement with the appropriate authorities". A passage would be included in the commentary explaining that permanent missions concluded general arrangements, whereas the arrangements made by special missions were of an *ad hoc* character.

39. With regard to the point raised by Mr. Yasseen, he did not think there was any danger of the right itself being made dependent on the arrangements referred to in the last sentence of paragraph 7. The right was stated unconditionally in the first sentence of the paragraph; the second sentence stated the duty of the per-

manent mission to give a clear indication that the bag contained official material. The arrangements of a practical character which were provided for in the last sentence clearly did not qualify the right in any way. Hence he did not think there was any need to explain that point in the commentary.

40. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 28 to the Drafting Committee.

It was so agreed.⁷

ARTICLE 29

41.

Article 29

Personal inviolability

The persons of the permanent representative and of the members of the diplomatic staff of the permanent mission shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

42. Mr. BARTOŠ said that that very important article had caused a great stir in the Sixth Committee during the examination of the draft articles on special missions. One delegation had even proposed that personal inviolability should not be recognized and that the matter should be left to the competent authorities. The majority had, however, been against that proposal.

43. The CHAIRMAN suggested that article 29 be referred to the Drafting Committee.

It was so agreed.⁸

ARTICLE 30

44.

Article 30

Inviolability of residence and property

1. The private residence of the permanent representative and the members of the diplomatic staff of the permanent mission shall enjoy the same inviolability and protection as the premises of the permanent mission.

2. Their papers, correspondence and, except as provided in paragraph 3 of article 31, their property, shall likewise enjoy inviolability.

45. Mr. NAGENDRA SINGH proposed that article 30 be referred to the Drafting Committee.

46. Mr. BARTOŠ said that his comments on article 30 were the same as those he had made on article 29.

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

It was so agreed.⁹

⁷ For resumption of the discussion, see 1017th meeting, para. 51.

⁸ For resumption of the discussion, see 1018th meeting, para. 1.

⁹ For resumption of the discussion, see 1018th meeting, para. 4.

ARTICLE 31

48.

Article 31

Immunity from jurisdiction

1. The permanent representative and the members of the diplomatic staff of the permanent mission shall enjoy immunity from the criminal jurisdiction of the host State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the host State unless they hold it on behalf of the sending State for the purposes of the permanent mission;

(b) an action relating to succession in which the permanent representative or a member of the diplomatic staff of the permanent mission is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the permanent representative or a member of the diplomatic staff of the permanent mission in the host State outside his official functions.

2. The permanent representative and the members of the diplomatic staff of the permanent mission are not obliged to give evidence as witnesses.

3. No measures of execution may be taken in respect of a permanent representative or a member of the diplomatic staff of the permanent mission except in cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a permanent representative or a member of the diplomatic staff of the permanent mission from the jurisdiction of the host State does not exempt him from the jurisdiction of the sending State.

49. Mr. KEARNEY said he noted that article 31 reproduced the terms of article 31 of the Vienna Convention on Diplomatic Relations. He proposed that it be supplemented by introducing at the end of paragraph 1 the following further exception:

“(d) an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person in question.”

That text appeared in the corresponding paragraph 2 of article 31 (Immunity from jurisdiction) of the draft on special missions. The Commission had introduced it because of the concern expressed by many Governments at the difficulties which arose in traffic accident cases as a result of diplomatic immunity.

50. Before including that provision in the draft on special missions, the Commission had considered a variety of legal and practical problems, one of which was the situation created when an insurance company took shelter behind the diplomatic immunity of an insurance holder involved in a traffic accident. The new provision had been inserted not because of the functional requirements of special missions, but in recognition of a general problem of international life. The problem had not been adequately dealt with in the Vienna Convention on Diplomatic Relations, as was clear from the numerous complaints which had since been received

about the consequences of diplomatic immunity for claims arising out of traffic accidents.

51. Mr. NAGENDRA SINGH said he supported Mr. Kearney's proposal. The new sub-paragraph would be a valuable addition to the draft on permanent missions. It stood to reason that a member of a permanent mission who was involved in a traffic accident while driving for his own private purposes should not enjoy diplomatic immunity.

52. Mr. CASTRÉN said he supported the text proposed by the Special Rapporteur. It would be dangerous to add the provision that had been included in the draft on special missions. There was a closer analogy between diplomatic missions and permanent missions to international organizations than there was between such permanent missions and special missions.

53. Mr. YASSEEN said he regretted that he could not approve of the addition of the proposed sub-paragraph (d) to article 31, paragraph 1. The Commission should not depart from the text of the Vienna Convention on Diplomatic Relations. The position of permanent missions in that respect was practically identical with that of diplomatic missions, and as diplomatic missions enjoyed the immunity in question, it should also be accorded to permanent missions. In practice, the problem was not very serious, since third party insurance was compulsory in nearly all host States.

54. Mr. BARTOŠ said that he too thought it was the text of the Vienna Convention on Diplomatic Relations which should be followed, rather than that of the future convention on special missions. Moreover, article 44 provided, as did the Convention on Diplomatic Relations, that persons enjoying such privileges and immunities had a duty to respect the laws and regulations of the host State. In the case of diplomatic relations, that provision had already been interpreted as including the duty of a diplomat to observe the compulsory insurance rule.

55. It should also be remembered that, in the Sixth Committee, there had been strong opposition to members of the mission being made subject to the jurisdiction of the host State, even for traffic accidents, since that might be dangerous in certain cases. The view stated by Mr. Yasseen was thus entirely correct and corresponded to that expressed at the General Assembly the previous year.

56. Mr. TABIBI said he appreciated Mr. Kearney's concern over the problem of claims arising out of traffic accidents, but it was better to keep the same régime as the Vienna Convention on Diplomatic Relations, because of the close similarity between diplomatic missions and permanent missions. If any difference were established between the two types of mission, complications would arise with regard to implementation. The tasks of the members of the two types of mission were similar, and often the same individual belonged both to a diplomatic mission and to a permanent mission. It was difficult to see how two different régimes could be applied simultaneously to the same person.

57. The Commission had introduced an exception for

traffic accident claims into the draft on special missions because those missions were subject to a different régime. In the circumstances, the best solution was to apply the Vienna régime, subject, of course, to the duty of the persons concerned to respect the laws and regulations of the host State, as stipulated in article 44.

58. Mr. RUDA said that he too was against including the proposed additional sub-paragraph (d). Apart from the reasons given by other members, actions for damages could arise out of accidents caused otherwise than by vehicles and there was no valid reason to treat such actions differently.

59. He therefore supported the retention of article 31 as it stood, on the understanding that it was qualified by article 44.

60. Mr. RAMANGASOAVINA said it was normal to accord, in principle, the same privileges and immunities to members of permanent missions as to members of diplomatic missions. Nevertheless, the problem of traffic accidents might not be so insignificant as Mr. Yasseen maintained. For though it was true that third party insurance was compulsory in most States, the State was its own insurer, so that government vehicles were not insured through an insurance company. The victim of an accident caused by a vehicle belonging to the sending State would have the greatest difficulty in obtaining compensation for injury if the vehicle was insured by that State itself and not with a local insurance company. The situation would only be otherwise if the vehicle was the personal property of a member of the permanent mission and had been insured locally. He was therefore in favour of adding the proposed sub-paragraph (d).

61. It was true that that would mean treating members of diplomatic missions differently from members of permanent missions, but it should be remembered that, with the multiplication of international organizations, many more people would be protected than in the case of diplomatic missions.

62. Perhaps, however, article 44, interpreted as indicated by Mr. Bartoš, would overcome the objection regarding the difficulty of obtaining compensation for accident victims.

63. Mr. KEARNEY said he had realized that his proposal would not receive unanimous support. The difficulties arising from diplomatic immunity were very real, however, and the last speaker had pointed out one of them.

64. From his own experience, he could say that in the United States of America, as also in the United Kingdom, many of the problems arose from the fact that an insurance company could not be directly sued by the victim of a traffic accident; it was the insured party who was primarily liable and, unless he could be sued, the victim was left without a remedy. Consequently, where an insured motorist enjoyed diplomatic immunity, it was possible for the insurance company to shelter behind that immunity and not satisfy the claim.

65. Mr. YASSEEN said it would be better to amend

certain national insurance laws than to confirm inequalities in regard to such situations.

66. The CHAIRMAN, speaking as a member of the Commission, said he approved of the text proposed by the Special Rapporteur, having regard, in particular, to the provision in article 33 of the draft, which had been adopted by the 1961 Vienna Conference in its resolution II,¹⁰ but had not been included in the text of the Vienna Convention on Diplomatic Relations. In his view, that provision would be sufficient to solve the problems raised by traffic accidents.

67. Mr. EL-ERIAN (Special Rapporteur) said that the question of traffic accidents had given rise to a good deal of controversy at the 1961 Vienna Conference, which had not incorporated any provision on the subject in the Convention on Diplomatic Relations, but had passed a resolution recommending that the sending State should waive immunity in order to facilitate the settlement of claims for damages arising out of such accidents.

68. In the present draft, he had included an article 33 relating to civil claims in general. That article required the sending State to waive immunity in respect of civil claims in the host State "when this can be done without impeding the performance of the functions of the permanent mission". The article added that "when immunity is not waived, the sending State shall use its best endeavours to bring about a just settlement of the claims". Those provisions would establish an obligation, instead of making a mere recommendation like the resolution adopted by the 1961 Vienna Conference.

69. The difficulties to which Mr. Kearney had drawn attention were very real; insurance problems could be extremely complex, and followed no uniform pattern. The general opinion was that no exception should be made to the principle stated in article 31, and he noted that that opinion was shared by six out of the nine members who had spoken during the present discussion.

70. He suggested that, considering the provisions of articles 33 and 44, article 31 should be retained without the proposed addition.

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

*It was so agreed.*¹¹

The meeting rose at 6.5 p.m.

¹⁰ See *United Nations Conference on Diplomatic Intercourse and Immunities, 1961, Official Records*, vol. II, p. 90.

¹¹ For resumption of the discussion, see 1018th meeting, para. 7.

996th MEETING

Wednesday, 11 June 1969, at 10.10 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eusta-

thiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218 and Add.1)

[Item 1 of the Agenda]

(continued)

ARTICLE 25 (Exemption of the premises of the permanent mission from taxation)¹ (*resumed from the previous meeting*)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's fourth report (A/CN.4/218). Before it took up article 32, Mr. Ustor, who had been unable to be present when the Commission had discussed article 25, wished to state his views on that article.²

2. Mr. USTOR said he was aware that article 25 was modelled on the corresponding provision of the 1961 Vienna Convention on Diplomatic Relations³ and that it broadly reflected existing international practice in the matter. Nevertheless, he wished to draw attention to the inequality which would result from the provisions of paragraph 2 of the article, as between a State which was able to buy property to house its mission or mission staff, and a State which was obliged to lease premises for that purpose.

3. If the sending State had sufficient funds to purchase premises for its mission, they would be exempt from taxation under article 25. But paragraph 2 of the article ruled out such exemption if the premises were leased, since in most countries it was the owner who was liable for the tax, no matter whether he occupied the premises himself or leased them to another person. Consequently, the owner of premises leased to a sending State or to the head of its permanent mission would naturally take the tax into account when fixing the rent, so that the poorer sending States would indirectly pay a tax which was not paid by the richer ones. The Commission should consider whether it was possible to incorporate in article 25 an element of progressive development which would eliminate that unsatisfactory inequality.

4. In the Commission's 1958 draft on diplomatic intercourse and immunities, the article on exemption of mission premises from tax had consisted of only one paragraph which made it clear that the exemption applied to the premises "whether owned or leased".⁴ A similar text had been adopted as article 32 in the

¹ See 994th meeting, para. 58.

² See previous meeting, para. 14.

³ *United Nations, Treaty Series*, vol. 500, p. 108, article 23.

⁴ *Yearbook of the International Law Commission, 1958*, vol. II, p. 96, article 21.

Commission's 1960 draft on consular intercourse and immunities, and the following explanation had been attached in paragraph (2) of the commentary: "The exemption to which this article relates is an exemption *in rem* affecting the actual building acquired or leased by the sending State... In point of fact, if this provision was interpreted as according exemption from taxation only to the sending State and head of consular post, but not to the building as such, the owner could charge these taxes and dues to the sending State or head of post under the contract of sale or lease, and the whole purpose which this exemption sets out to achieve would in practice be defeated."⁵

5. Unfortunately, the 1961 Vienna Conference had taken a different stand and had adopted the amendment which had become paragraph 2 of article 23 of the Vienna Convention on Diplomatic Relations. The same course had been followed by the 1963 Vienna Conference and a similar provision had been included in the corresponding article of the Vienna Convention on Consular Relations.⁶ The poor States had thus been treated worse than the rich ones.

6. It was interesting to note, however, that the inequality in question did not represent a universal practice. In Vienna, the Austrian authorities and the legal advisers of the International Atomic Energy Agency appeared to have reached a more liberal solution, to judge from the following passage in paragraph (3) of the Special Rapporteur's commentary on article 35: "In the case of IAEA, no taxes are imposed by the host State on the premises used by missions or delegates, including rented premises and parts of buildings."

7. For those reasons, he wished to place on record his opposition to paragraph 2 of article 25 and suggested that the Special Rapporteur consider the point after having made, with the aid of the Secretariat, a study of the real situation in such cities as New York, Geneva and Vienna. The Commission might consider at a later stage whether the situation could be corrected.

8. Mr. EL-ERIAN (Special Rapporteur) said he would consider the point carefully and try to decide whether additional information should be sought and whether article 25 should be amended or its commentary supplemented.

9. Mr. KEARNEY said it might assist the Special Rapporteur if he mentioned his only personal experience of any refund or rebate of tax in respect of premises leased. When serving with the United States Embassy in London, he had found that a diplomatic agent who leased an apartment could make a claim to the local tax authorities and receive a refund of the tax included in the rental paid by him under his lease. It would be desirable to ascertain whether that practice was general.⁷

⁵ *Op. cit.*, 1960, vol. II, pp. 163 and 164.

⁶ United Nations, *Treaty Series*, vol. 596, p. 288, article 32.

⁷ For resumption of the discussion, see 1016th meeting, para. 42.

ARTICLE 32

10.

Article 32

Waiver of immunity

1. The immunity from jurisdiction of permanent representatives or members of the diplomatic staff of permanent missions and persons enjoying immunity under article 39 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by a permanent representative, by a member of the diplomatic staff of a permanent mission or by a person enjoying immunity from jurisdiction under article 39 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.

11. Mr. NAGENDRA SINGH proposed that article 32 be referred to the Drafting Committee.

12. The CHAIRMAN, speaking as a member of the Commission, asked why the words "permanent representatives" and "permanent missions" were in the plural in paragraph 1; it would have been more natural to have put them in the singular. In paragraph 3, it would be better to say "by the permanent representative" than "by a permanent representative".

13. Mr. USTOR asked whether he was correct in assuming that the rule in paragraph 2 that waiver must always be express applied also to article 31, paragraph 2, which exempted the permanent representative and the members of the diplomatic staff of the permanent mission from the obligation to give evidence as witnesses.

14. Mr. EL-ERIAN (Special Rapporteur) said that that assumption was correct, although perhaps the privilege provided for in article 31, paragraph 2, might not strictly come under the heading of immunity from jurisdiction. He would include a passage in the commentary to explain the point.

15. The drafting points raised by the Chairman could be referred to the Drafting Committee.

16. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 32 to the Drafting Committee.

*It was so agreed.*⁸

ARTICLE 33

17.

Article 33

Consideration of civil claims

The sending State shall waive the immunity of any of the persons mentioned in paragraph 1 of article 32 in respect of civil claims in the host State when this can be done without impeding the performance of the functions of the permanent

⁸ For resumption of the discussion, see 1019th meeting, para. 45.

mission, and when immunity is not waived, the sending State shall use its best endeavours to bring about a just settlement of the claims.

18. Mr. EL-ERIAN (Special Rapporteur) said that he had already explained the purpose of article 33 during the discussion on claims arising out of traffic accidents.⁹ He had also explained his decision to include an article on the subject, instead of a recommendation such as had been adopted by the 1961 Vienna Conference in its resolution II.¹⁰

19. Mr. EUSTATHIADES said he noticed that the French version of article 33 followed the French version of article 42 of the draft on special missions. Whereas resolution II of the Vienna Conference on Diplomatic inter course and Immunities said, "*l'Etat accréditant applique tous ses efforts à obtenir un règlement équitable du litige*", the two articles to which he had referred provided that "*l'Etat d'envoi s'efforcera d'aboutir à un règlement équitable du litige*". The latter translation of the English expression "shall use its best endeavours" was weaker than the Vienna translation and in his view it would be better to adopt the Vienna version.

20. Mr. EL-ERIAN (Special Rapporteur) said he was grateful to Mr. Eustathiades for drawing attention to the fact that article 33 was in fact modelled on article 42 of the draft on special missions.¹¹

21. In view of his decision, which he considered justified, to treat the matter in an article rather than in a resolution, he had thought that the language should be that of a provision in a convention rather than a recommendation.

22. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 33 to the Drafting Committee.

*It was so agreed.*¹²

ARTICLE 34

23.

Article 34

Exemption from social security legislation

1. Subject to the provisions of paragraph 3 of this article, the permanent representative and the members of the diplomatic staff of the permanent mission shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the host State.

2. The exemption provided for in paragraph 1 of this article shall also apply to persons who are in the sole private employ of a permanent representative or of a member of the diplomatic staff of the permanent mission, on condition:

(a) That such employed persons are not nationals of or permanently resident in the host State, and

⁹ See previous, meeting, para. 67 *et seq.*

¹⁰ See *United Nations Conference on Diplomatic Intercourse and Immunities, 1961, Official Records, vol. II, p. 90.*

¹¹ See *Yearbook of the International Law Commission, 1967, vol. II, p. 365.*

¹² For resumption of the discussion, see 1020th meeting, para. 6.

(b) That they are covered by the social security provisions which may be in force in the sending State or a third State.

3. The permanent representative and the members of the diplomatic staff of the permanent mission who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the host State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article does not exclude voluntary participation in the social security system of the host State where such participation is permitted by that State.

5. The provisions of the present article do not affect bilateral and multilateral agreements on social security which have been previously concluded and do not preclude the subsequent conclusion of such agreements.

24. Mr. TABIBI said that article 34 was modelled on article 33 of the Vienna Convention on Diplomatic Relations. He suggested that it be referred to the Drafting Committee.

*It was so agreed.*¹³

ARTICLE 35

25.

Article 35

Exemption from dues and taxes

The permanent representative and the members of the diplomatic staff of the permanent mission shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) Indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) Dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the permanent mission;

(c) Estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 41;

(d) Dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State;

(e) Charges levied for specific services rendered;

(f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 25.

26. Mr. KEARNEY said he was aware that the wording of sub-paragraph (f) was taken from the corresponding provision of the Vienna Convention on Diplomatic Relations,¹⁴ but he found the final proviso, "subject to the provisions of article 25", somewhat confusing. All his efforts to read the sub-paragraph in conjunction with article 25 had not enabled him to ascertain which dues and taxes were covered by the exemption and which were not. Nor had he been able to determine the exact relationship between the provision in sub-paragraph (f) and that in sub-paragraph (e); in the matter of mortgage dues, it was possible to go back

¹³ For resumption of the discussion, see 1020th meeting, para. 24.

¹⁴ *United Nations, Treaty Series, vol. 500, p. 114, article 34,*

and forth between the provisions of article 25 and those of article 35 without being able to determine whether those dues were payable or not.

27. Mr. EL-ERIAN (Special Rapporteur) said he would examine the point raised by Mr. Kearney and try to include a suitable passage on it in the commentary.

28. Mr. CASTAÑEDA said that article 35 raised problems of legal drafting. The article dealt with an exception to the general rule, but itself contained an exception to the exception and that made its structure very complicated. Perhaps the Drafting Committee could find a simpler way of putting it.

29. Mr. YASSEEN said that, even though the drafting was not wholly satisfactory, every effort should be made to adopt texts which closely followed those already adopted at Vienna.

30. The CHAIRMAN suggested that article 35 be referred to the Drafting Committee.

*It was so agreed.*¹⁵

ARTICLE 36

31. *Article 36* *Exemption from personal services*

The host State shall exempt the permanent representative and the members of the diplomatic staff of the permanent mission from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

32. Mr. YASSEEN said that article 36 was based on article 35 of the Vienna Convention on Diplomatic Relations. He suggested that it be referred to the Drafting Committee.

*It was so agreed.*¹⁶

ARTICLE 37

33. *Article 37* *Exemption from Customs duties and inspection*

1. The host State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all Customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

(a) Articles for the official use of the permanent mission;

(b) Articles for the personal use of a permanent representative or a member of the diplomatic staff of the permanent mission or members of his family forming part of his household, including articles intended for his establishment.

2. The personal baggage of a permanent representative or a member of the diplomatic staff of the permanent mission shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by

the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. Such inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

34. Mr. EL-ERIAN (Special Rapporteur) said that article 37 was based on article 36 of the Vienna Convention on Diplomatic Relations. In paragraphs (3) and (4) of the commentary he had cited the provisions of the United States Code of Federal Regulations and the Swiss Customs Regulations which dealt with the exemption from Customs duties and inspection of permanent representatives to the United Nations at New York Headquarters and at the Geneva Office. In paragraph (5) he had given some information on the position at FAO and UNESCO headquarters.

35. The CHAIRMAN suggested that article 37 be referred to the Drafting Committee.

*It was so agreed.*¹⁷

ARTICLE 38

36. *Article 38* *Acquisition of nationality*

Members of the permanent mission not being nationals of the host State, and members of their families forming part of their household, shall not, solely by the operation of the law of the host State, acquire the nationality of that State.

37. Mr. EL-ERIAN (Special Rapporteur) said that exemption from the automatic operation of the nationality laws of the host State had been the subject of an article in the 1958 draft on diplomatic intercourse and immunities.¹⁸ The 1961 Vienna Conference, however, had decided not to include an article on the subject in the Convention, but to deal with it in a separate Optional Protocol.¹⁹

38. He had thought it desirable to include an article on the subject in the present draft, without prejudging the question whether its provisions should be retained in the convention or put into an optional protocol. That point could be decided by the conference or other body which would ultimately adopt the convention.

39. Mr. YASSEEN said that the article was essential and should form an integral part of the convention, despite the fact that the Vienna Conference had preferred to deal with the matter in a separate protocol. It should not be possible for the host State, by its own legislation, to impose its nationality on persons who, with their families, were in its territory only to perform an international function.

40. It was a matter that could affect not only members of the permanent representative's family, but the

¹⁵ For resumption of the discussion, see 1020th meeting, para. 28.

¹⁶ For resumption of the discussion, see 1020th meeting, para. 39.

¹⁷ For resumption of the discussion, see 1020th meeting, para. 49.

¹⁸ See *Yearbook of the International Law Commission*, 1958, vol. II, p. 101, article 35.

¹⁹ See *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vol. II, pp. 88 and 89.

permanent representative himself. Such a situation might arise where the laws of the host State provided that, after a specified period of residence, a person would recover the nationality of that State when he had lost it as a result of having voluntarily acquired another nationality.

41. Mr. CASTAÑEDA said it might perhaps be desirable to have a longer and more explicit commentary on the article. The soundness of the rule was not in doubt, but it would be wise to specify the circumstances in which the problem had arisen or might arise, and thus provide an explanation of why it had been thought necessary to include the rule in the text of the convention itself.

42. Mr. RUDA said he supported the Special Rapporteur's proposal for an article on the acquisition of nationality. But since the point had given rise to extensive discussion at both the 1961 and the 1963 Vienna Conferences, the commentary should be expanded to explain the Commission's reasons for including the article.

43. Mr. BARTOŠ said that the Special Rapporteur had been right to make into a mandatory rule a principle which previously had merely been embodied in an optional protocol, but the Commission ought to explain why it considered that step necessary, since there might still be some people who opposed it. The commentary should draw attention to the way the principle had gained ground since the adoption of the Optional Protocol to the Vienna Convention on Diplomatic Relations. For instance, it might say how many States had signed the Optional Protocol and how many had ratified it. That would make it clear that the Protocol had already acquired a certain standing in international law and that, in proposing that the principle be adopted as an actual legal rule, the Commission was merely giving added force to an idea that was already accepted in practice.

44. Mr. RAMANGASOAVINA said that questions of nationality could arise, for example, in cases of State succession. When part of a territory was incorporated in a new State, that State might confer its nationality by law on all persons resident there at the time of the incorporation. The article was useful, but the commentary should be expanded to provide a full explanation of the problem.

45. Mr. CASTRÉN said he agreed with the previous speakers. At the 1961 Vienna Conference most delegations had been prepared to include the rule in the text of the Convention itself. It had only been because of the opposition of certain countries, mainly Latin American, that the Conference had decided to put it in a separate Protocol.

46. Mr. IGNACIO-PINTO said he agreed that the Commission should now go a step further. It should base its article on the 1961 Optional Protocol, but should explain in the commentary why it had decided that the rule should be included as an article of the draft convention itself. It was not right that a diplomat should be at the mercy of local law.

47. Mr. EL-ERIAN (Special Rapporteur) said that the important principle stated in article 38 was evidently acceptable to all members. There was also general agreement that it should be stated in the form of an article and that the commentary should be expanded.

48. He would therefore draft a commentary reproducing the explanations given by the Commission in its commentary on the corresponding article of the 1958 draft on diplomatic intercourse and immunities, and giving an account of the circumstances in which the 1961 Vienna Conference had decided to adopt the separate Optional Protocol concerning Acquisition of Nationality. The commentary would state that the Optional Protocol had entered into force on 24 April 1964, and would list the States parties to it.

49. In support of the Commission's recommendation that the provision should form an integral part of the draft, he would include in the commentary an argument based on the difference between the Convention on Diplomatic Relations and the present draft with regard to the scope of application. The Optional Protocol concerning Acquisition of Nationality was intended to apply to bilateral relations between the more than sixty States parties to the 1961 Vienna Convention on Diplomatic Relations. The provisions of article 38, on the other hand, were intended to apply only to the small number of States which were hosts to international organizations. The need for flexibility to accommodate certain countries, which had induced the 1961 Vienna Conference to adopt a separate Optional Protocol, did not arise in the present instance.

50. He proposed that article 38 be referred to the Drafting Committee on the understanding that the commentary would be expanded as he had suggested.

51. The CHAIRMAN said that, if there were no further comments, he would assume that the Commission agreed to adopt the Special Rapporteur's proposal.

*It was so agreed.*²⁰

ARTICLE 39

52.

Article 39

Persons entitled to privileges and immunities

1. The members of the family of a permanent representative or of a member of the diplomatic staff of the permanent mission forming part of his household shall, if they are not nationals of the host State, enjoy the privileges and immunities specified in articles 29 to 37.

2. Members of the administrative and technical staff of the permanent mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 29 to 36, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in article 37, paragraph 1, in respect of articles imported at the time of first installation.

²⁰ For resumption of the discussion, see 1020th meeting, para. 53.

3. Members of the service staff of the permanent mission who are not nationals of or permanently resident in the host State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in article 34.

4. Private staff of members of the permanent mission shall, if they are not nationals of or permanently resident in the host State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the permanent mission.

53. Mr. EL-ERIAN (Special Rapporteur) said he would like to draw particular attention to paragraphs (2) and (3) of his commentary on article 39.

54. Mr. NAGENDRA SINGH said he was glad the Special Rapporteur had not used the term "private servants", which was objectionable and was not as comprehensive as "private staff".

55. He entirely agreed with the text of the article, which rightly followed that of article 37 of the Vienna Convention, and he proposed that it be referred to the Drafting Committee.

56. Mr. EUSTATHIADES said that the effect of article 39, which was modelled on article 37 of the 1961 Vienna Convention, was to extend the range of persons enjoying privileges and immunities. Although that had been done in the case of multilateral diplomatic relations, it was doubtful whether such an extension was equally appropriate for permanent missions, whose privileges and immunities were solely a matter for the State in which the headquarters of the organization was situated. Efforts should therefore be made to ascertain more precisely the existing practice of host States in the matter and the views of States regarding the extension of the régime of privileges and immunities.

57. Mr. USTOR said that Mr. Eustathiades had made a sound point, inasmuch as international practice in the matter was not so precisely developed as was assumed in the article. Apart from that consideration, however, the Commission should retain article 39, since it was engaged not only in the codification but also in the progressive development of international law. It was desirable to assimilate the staff of permanent missions to the staff of diplomatic missions and to adopt a provision which would allow members of the family of the permanent representative to enjoy the same privileges and immunities as members of the family of a diplomatic representative.

58. Mr. EL-ERIAN (Special Rapporteur) said that the important point raised by Mr. Eustathiades had given rise to controversy in the Commission on earlier occasions. In going further than the Commission with respect to the privileges and immunities of administrative staff, the Conference on Diplomatic Intercourse and Immunities had shown a trend towards more generous treatment. Some countries which had acceded to the Vienna Convention had made reservations to article 37, while others had entered objections to those reserva-

tions. He agreed with Mr. Ustor, however, that the Commission should take a firm stand and retain the present text of article 39, even if objections were to be expected from certain Governments.

59. Mr. CASTAÑEDA said that article 39 enhanced the importance of article 38 by providing that the privileges and immunities specified in articles 29 to 37 were granted to the persons entitled to claim them "if they are not national of the host State". If it were not for article 38, the children of permanent representatives born in the host State and considered to be its nationals would not be able to enjoy privileges and immunities. Where multilateral diplomatic relations were concerned, it was possible to avoid appointing a diplomat to a country where he might find himself in a difficult situation for that reason, but the same was not true of permanent delegations to international organizations, whose headquarters were permanently established in one country. The Special Rapporteur had therefore been right in proposing the rules set out in article 39.

60. The CHAIRMAN suggested that the Commission refer article 39 to the Drafting Committee.

It was so agreed.²¹

ARTICLE 40

Article 40

Nationals of the host State and persons permanently resident in the host State

1. Except in so far as additional privileges and immunities may be granted by the host State, a permanent representative or a member of the diplomatic staff of the permanent mission who is a national or a permanent resident of that State or is, or has been, its representative, shall enjoy immunity from jurisdiction, and inviolability, only in respect of official acts performed in the exercise of his functions.

2. Other members of the staff of the permanent mission and private staff who are nationals or permanent residents of the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

62. Mr. EL-ERIAN (Special Rapporteur) said that article 40 reproduced article 38 of the Vienna Convention on Diplomatic Relations, with the necessary drafting changes. He drew the Commission's attention to paragraph (2) of his commentary on the article, in which he referred to the note on nationality of members of a permanent mission contained in his third report.²²

63. The CHAIRMAN suggested that the Commission refer article 40 to the Drafting Committee.

It was so agreed.²³

²¹ For resumption of the discussion, see 1022nd meeting, para. 1.

²² See *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/203, chapter II, part II, section I, following article 9.

²³ For resumption of the discussion, see 1022nd meeting, para. 45.

ARTICLE 41

64.

*Article 41**Duration of privileges and immunities*

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the host State.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the permanent mission, immunity shall continue to subsist.

3. In case of the death of a member of the permanent mission the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the permanent mission not a national or permanent resident of the host State or a member of his family forming part of his household, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the host State was due solely to the presence there of the deceased as a member of the permanent mission or as a member of the family of a member of the permanent mission.

65. Mr. KEARNEY said he found no particular difficulties in article 41, although the English text of paragraph 4 might be improved. He was, however, concerned about the fact that so far the draft articles did not contain any clause which specified when the functions of the person enjoying privileges and immunities came to an end, as mentioned in paragraph 2.

66. Mr. EL-ERIAN (Special Rapporteur) said that article 46 (A/CN.4/218/Add.1) explained when the functions of a permanent representative or a member of the diplomatic staff of the permanent mission came to an end. The question could be taken up in connexion with that article.

67. The CHAIRMAN, speaking as a member of the Commission, said that the words "from the moment when his appointment is notified to the host State", at the end of paragraph 1, should be replaced by the words "from the moment when the organization has notified his appointment to the host State." Article 17, adopted by the Commission in 1968,²⁴ provided that notifications were to be made by the sending State to the organization and that the organization was then to transmit those notifications to the host State. The article did say that the sending State might also transmit notifications to the host State, but that was purely optional.

68. Mr. AGO said he thought it might be possible to cover both direct and indirect notifications by using some

flexible form of words such as "from the moment when the appointment has been brought to the knowledge of the host State", or whatever other wording the Drafting Committee might decide to adopt.

69. Mr. EL-ERIAN (Special Rapporteur) said he agreed with Mr. Ago.

70. Mr. STAVROPOULOS (Legal Counsel) said that in his experience it had never been the practice for the sending State to notify the host State when it despatched a permanent representative to an international organization in the territory of the host State. In the case of the United Nations, the sending State notified the Secretary-General, and the latter then notified the competent authorities of the host State.

71. Mr. EL-ERIAN (Special Rapporteur) suggested that, since the point related to article 17 concerning notifications, it should be dealt with at the second reading of that article.

72. Mr. STAVROPOULOS (Legal Counsel) pointed out that article 17, paragraph 4 provided that "The sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article". Accordingly, while the sending State was permitted to notify the host State, it did not appear that it was under any obligation to do so.

73. Mr. AGO said that if the sending State was required to send notifications to the organizations, then the date on which the privileges and immunities would take effect should be the date on which the notification was communicated by the organization to the host State. The Legal Counsel should send his comments on the point to the Commission, so that it could take them into account during the second reading.

74. Mr. RUDA said that paragraph (4) of the Commission's commentary on article 17 quoted the "Decision of the Swiss Federal Council concerning the legal status of permanent delegations to the European Office of the United Nations and to other international organizations having their headquarters in Switzerland", of 31 March 1948. Paragraph 4 of that Decision provided that: "The establishment of a permanent delegation and the arrivals and departures of members of permanent delegations are notified to the Political Department by the diplomatic mission of the State concerned at Berne. The Political Department issues to members of delegations an identity card (*carte de légitimation*) stating the privileges and immunities to which they are entitled in Switzerland." But since paragraph (5) of the commentary went on to say that the practice of the specialized agencies regarding the procedure for notification varied and was far from systematized, it was obvious that the problem was one that called for reflection on the part of the Commission.

75. Mr. BARTOŠ said that in his view the article should provide for both possibilities—notification through the organization and direct notification—so as to allow for differences in practice between one country and another, for instance, the United States of America and the Swiss Confederation.

76. Mr. USTOR said that the main point of article 41 was in paragraph 1, which stated that every person—

²⁴ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

entitled to privileges and immunities was to enjoy them from the moment he entered the territory of the host State. Enjoyment of those privileges and immunities would therefore seem to be independent of any kind of notification. There was, to be sure, a minor problem if the person appointed as permanent representative was already resident in the host State, since it was obvious that the latter could not accord any privileges and immunities to him until it had received notification of his appointment. Mr. Ago's suggestion should satisfy the majority of the Commission.

77. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the situation of a person arriving from abroad and the situation of a person already in the territory of the host State were different, because the former enjoyed privileges and immunities from the moment of his arrival, whereas the latter could not enjoy them until the organization had notified his appointment to the host State, and that formality could be a source of delay. The two situations should be placed on the same footing.

78. Mr. EL-ERIAN (Special Rapporteur) said that if the Commission agreed, he would prepare a fresh draft of article 41 taking account of that point.

79. The CHAIRMAN suggested that the Commission authorize the Special Rapporteur to prepare a fresh draft of article 41 and refer it to the Drafting Committee.

*It was so agreed.*²⁵

80. Mr. AGO said he would like to ask the Legal Counsel what happened in practice when a person appointed to a permanent mission arrived in the host State before the organization had notified his appointment to that State.

81. Mr. STAVROPOULOS (Legal Counsel) said that the United Nations had always maintained that permanent representatives should enjoy their privileges and immunities from the moment of their arrival, even if notification of their appointment was not received until later. Permanent representatives always arrived bearing credentials addressed to the Secretary-General, who subsequently notified the host State and requested that the necessary privileges and immunities be accorded to them. Such notification was merely a matter of practical convenience and was not a legal obligation of the organization. In the case of United Nations headquarters, of course, the host State was aware of the appointment of permanent representatives because, under its regulations, they were required to apply for a visa before entering United States territory.

82. Mr. BARTOŠ said that in practice few difficulties arose. Even so, the article would have to be drafted with great care.

83. Mr. KEARNEY said that Mr. Bartoš had pointed out the practical problems involved in determining the time when privileges and immunities commenced. Regardless of what the Commission decided to include

in article 41, as a practical matter the host State would be unable to assure certain privileges and immunities until the permanent representative and the organization had complied with the necessary formalities. Exemption from sales tax was an obvious example.

84. The host State would, to some extent, be aware of the arrival of a member of a permanent mission when he passed through immigration controls or the like, but if he was already resident in its territory there was no practical way, except notification, by which the host State could begin to accord him privileges and immunities. He hoped that the Special Rapporteur would bear those problems in mind.

85. Mr. EL-ERIAN (Special Rapporteur) said that the Drafting Committee would take all those problems into consideration.

The meeting rose at 1.5 p.m.

997th MEETING

Thursday, 12 June 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218 and Add.1; A/CN.4/L.118)

[Item 1 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to consider article 42 in the Special Rapporteur's fourth report (A/CN.4/218).

ARTICLE 42

2.

Article 42

Duties of third States

1. If a permanent representative or a member of the diplomatic staff of the permanent mission passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying

²⁵ For resumption of the discussion, see 1023rd meeting, para. 53.

the permanent representative or member of the diplomatic staff of the permanent mission or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the passage of members of the administrative and technical or service staff of a permanent mission, and of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the host State. They shall accord to diplomatic couriers who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the host State is bound to accord.

4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to *force majeure*.

3. Mr. BEDJAOUI said he approved of the substance of the article and had only a few minor comments to make.

4. First, he thought it would be better if article 41 were placed after article 42 and perhaps after article 43 as well, since articles 42 and 43 defined some of the privileges and immunities whose duration was dealt with in article 41.

5. Secondly, although he was aware that they occurred both in the Vienna Convention on Diplomatic Relations and in the draft on special missions, he was not clear as to the purpose of the clause "which has granted him a passport visa if such visa was necessary" in paragraph 1, or of the parallel clause "who have been granted a passport visa if such visa was necessary" in paragraph 3. He thought those clauses could very well be deleted.

6. Thirdly, what was the purpose of specifying that immunities were to be accorded to a permanent representative passing through the territory of a third State "while proceeding to take up or to return to his post, or when returning to his own country?". Presumably, it was to exclude all the other reasons for which he might be in the territory of a third State, such as taking a holiday; but he did not lose his status as a diplomat if he took a holiday. That clause, too, seemed unnecessary and could be deleted.

7. He would not, however, press any of those suggestions and was prepared to support the opinion of the Special Rapporteur and of the Commission.

8. Mr. EL ERIAN (Special Rapporteur) said that in the Vienna Convention on Diplomatic Relations the article on the duties of third States came after the article on the duration of privileges and immunities,¹ whereas in the draft articles on special missions the order was reversed: the article on transit through the territory of a third State came before the article on the duration of privileges and immunities.² He was prepared

to accept Mr. Bedjaoui's suggestion and to reverse the order of articles 41 and 42 in the present draft.

9. With regard to Mr. Bedjaoui's second point, the clause concerning the granting of a passport visa related to the status of the member of a permanent mission rather than to the question of his admission to the territory of the third State. In paragraph (3) of the commentary on article 42 he had pointed out that the Secretariat study on practice referred to the special problem which might arise when access to the country in which a United Nations meeting was to be held was only possible through another State, and said that "While there is little practice, the Secretariat takes the position that such States are obliged to grant access and transit to the representatives of member States for the purpose in question" (A/CN.4/L.118, Part I.A. para. 173). In paragraph (2) of its commentary on article 43 of the draft on special missions, the Commission had also made it clear that that article was not concerned with the question of the admission of representatives, but rather with the regulation of their status once they were admitted. The paragraph stated that "... the Commission wished to show that a third State is not obliged to give its consent to the transit of special missions and their members through its territory".

10. Mr. TABIBI suggested that, in connexion with paragraph 3 of the article, it might be useful to include in the commentary a reference to the conventions of the Universal Postal Union and the International Telecommunication Union.

11. Mr. CASTAÑEDA said that when the Commission had drafted the corresponding articles of the 1961 Vienna Convention and of the draft on special missions, it had not intended to lay down an obligation for third States to authorize transit; it had merely wished to regulate the status of diplomats in transit. There, the situation of permanent missions and of persons engaged in bilateral diplomacy was completely different. The purpose of article 42 was to ensure, in the interests of the organization, that the permanent representative would be able to rejoin his post or return to his country without hindrance. The situation should therefore be reviewed in the light of Mr. Bedjaoui's comments, and the fundamental question of the transit State's obligation to grant a visa should now be considered.

12. The CHAIRMAN, speaking as a member of the Commission, said that the clause "which has granted him a passport visa if such visa was necessary" left the third State free to grant or not to grant permission to pass through its territory. It would be better to retain the clause so as to bring out clearly that both possibilities existed.

13. Mr. EL ERIAN (Special Rapporteur) said that Mr. Castañeda had rightly pointed out that the case of transit through the territory of a third State of diplomats engaged in bilateral diplomacy was different from the case of transit of members of permanent missions to international organizations.

14. In the latter case, it was necessary to distinguish between three situations: first, where the member of the

¹ United Nations, *Treaty Series*, vol. 500, pp. 118-120, articles 39 and 40.

² See *Yearbook of the International Law Commission*, 1967, vol. II, pp. 365 and 366, articles 43 and 44.

permanent mission was the national of a State which had special arrangements with the third State; secondly, where such arrangements with the third State did not exist, but it was not necessary to pass through its territory; and thirdly, where the member of the permanent mission, being a national of a land-locked State, was obliged to pass through the territory of the third State.

15. There was perhaps a case in positive international law, by virtue of Articles 104 and 105 of the United Nations Charter, for imposing on third States the obligation to permit transit. Since the question belonged to the progressive development of international law, it was for the Commission to decide whether a positive obligation existed, or whether international law did not yet impose it.

16. Mr. YASSEEN said it would be hard to make the grant of a visa an obligation in positive law. In practice, there were no instances in which a permanent representative could only take one route to rejoin his post or to return to his country. With the assistance of the Special Rapporteur and the Drafting Committee, an attempt should be made to find some formula which was in accordance with actual experience in international life.

17. Sir Humphrey WALDOCK said he shared the doubts expressed by Mr. Yasseen, since he could hardly imagine a case in which a third State would render access to the host State impossible. If third States were recognized as having such a right, however, it would be necessary to consider the situation in which a member of a permanent mission was considered *persona non grata* by a third State.

18. He himself felt strongly that the right of transit should be made obligatory, but in the present state of international practice it was hardly possible to go so far. More problems were involved than the mere right of transit; it was necessary, for example, to consider the difference between the obligations of third States which were members of the organization and the obligations of those which were not. The Commission should reflect further on the problem.

19. Mr. EUSTATHIADES said that a better idea of the subject-matter of the article would be given if its title were changed to something like "Transit and official communications through the territory of a third State".

20. Mr. EL-ERIAN (Special Rapporteur), said that Mr. Casteñeda, Mr. Eustathiades and Sir Humphrey Waldock had done much to reveal the complexity of the problem; he thought that the Drafting Committee should take their observations into consideration and that, whatever it might decide, the commentary on article 42 should include a summary of the present discussion which would help to elicit the views of governments.

21. The CHAIRMAN suggested that the Commission refer article 42 to the Drafting Committee with a request that it prepare a fresh draft on the basis of the discussion.

*It was so agreed.*³

³ For resumption of the discussion, see 1023rd meeting, para. 59.

ARTICLE 43

22.

Article 43

Non-discrimination

In the application of the provisions of the present articles, no discrimination shall be made as between States.

23. Mr. EL-ERIAN (Special Rapporteur) said that article 43 reproduced paragraph 1 of article 50 of the draft on special missions⁴ which in turn reproduced, with the necessary drafting changes, paragraph 1 of article 47 of the Vienna Convention on Diplomatic Relations.⁵ As he had pointed out in the commentary, article 43 did not include paragraph 2 of article 47 of the Vienna Convention, which referred to two cases in which, although an inequality of treatment was implied, no discrimination occurred, since the inequality of treatment was justified by the rule of reciprocity.

24. Mr. YASSEEN said that the Special Rapporteur had been right to reproduce only paragraph 1 of article 47 of the Vienna Convention on Diplomatic Relations, since the reciprocity rule could scarcely be applied in the case of permanent missions. That fact should be emphasized in the commentary, where it should be made clear that reciprocity was not one of the host State's obligations towards the organization.

25. With regard to the wording of the article, he thought that instead of "no discrimination shall be made" it would be better to say "the host State shall not discriminate".

26. Mr. BEDJAOUI said he entirely agreed with the Special Rapporteur's decision not to reproduce paragraph 2 of article 47 of the Vienna Convention, which dealt with reciprocity. Privileges and immunities must depend on function, and relations between organizations and their member States, which belonged to multilateral diplomacy, had nothing to do with bilateral diplomacy. Hence the extension or restriction of privileges and immunities on the basis of reciprocity had no place in the article.

27. He agreed that the words "no discrimination shall be made" should be altered.

28. Mr. RUDA said that the Special Rapporteur had been right to omit the second paragraph of article 47 of the 1961 Vienna Convention, which applied only to bilateral relations and not to relations between States and international organizations. Article 43 should be based squarely on the principle of the equality of States.

29. Like some other members, however, he thought that the present draft failed to make clear whether it was both the host State and the organization or the host State alone which was obliged to refrain from discrimination. He was also uncertain whether the rule "no discrimination shall be made as between States" was intended to apply only to member States of the organization.

⁴ See *Yearbook of the International Law Commission*, 1967, vol. II, p. 367.

⁵ United Nations, *Treaty Series*, vol. 500, p. 122.

30. Mr. EUSTATHIADES said that he too thought it should be clearly stated who had the duty not to practise discrimination.

31. He doubted, however, whether an article on non-discrimination was really necessary in the draft if the intention was merely to state the principle of non-discrimination. The rule of non-discrimination had been included in the Vienna Convention and in the draft on special missions precisely in order to specify the cases in which discrimination was not regarded as taking place, for instance, when there was no reciprocity or when more favourable treatment was extended. It was hard to say what the term "non-discrimination" meant when removed from the context of the other paragraphs of article 47 of the Vienna Convention.

32. Mr. CASTRÉN said he approved of both the substance and the drafting of article 43. The Special Rapporteur had been right not to include the remaining provisions of the corresponding article of the Vienna Convention and of the draft on special missions.

33. In his view, the phrase "no discrimination shall be made" covered the organization, the host State and third States; but if necessary all three could be mentioned.

34. Like Mr. Ruda, he thought it should be made clear at the end of the sentence what States were referred to by the expression "as between States".

35. Mr. TABIBI said that the Special Rapporteur had been right to exclude the second paragraph of article 47 of the Vienna Convention, since article 43 related to the question of non-discrimination, but not to that of reciprocity. Its purpose was to ensure both the smooth operation of the convention itself and a satisfactory international relationship based on the principle of the equality of States.

36. With regard to the phrase "no discrimination shall be made as between States", he preferred that general formula, since it would apply not only to the host State, but also to all member States of the organization throughout the world.

37. Mr. CASTAÑEDA said that the Special Rapporteur had been right to confine his text to paragraph 1 of article 47 of the 1961 Vienna Convention.

38. The wording "no discrimination shall be made" was not very satisfactory, but it would not be enough just to insert the words "by the host State", since the obligation applied to the organization too. A more appropriate formula was needed.

39. Mr. YASSEEN said he agreed that some formula must be found to cover all the parties incurring obligations under the convention, in other words the host State, the organization, and perhaps third States.

40. With regard to Mr. Ruda's point that it should be made clear what States were referred to at the end of the sentence, the convention might even provide that certain categories of States had a lesser status, without thereby introducing discrimination; on the other hand, if the same treatment were accorded to States which did not have the same status, there would be dis-

crimination. The important point was to eliminate any discrimination between States in the same category.

41. Mr. RAMANGASOAVINA said that all members seemed to be in agreement on the principle of article 43 and on the fact that it was not necessary to add the exceptions included in the corresponding article of the Vienna Convention.

42. However, instead of a vague negative wording like "no discrimination shall be made", since it was merely a question of drawing attention to an established principle, it would be better simply to say "... States shall ensure strict application of the principle of non-discrimination." That formula would express the fundamental idea of the article.

43. Mr. BARTOŠ said he was afraid that the simple laconic sentence which constituted the article was not adequate to express a principle as important as that of non-discrimination. Without an absolutely clear definition, there was a danger that those who felt they were the object of discrimination would be encouraged to put forward exaggerated claims and that those who practised discrimination would have the right to decide whether a particular act was or was not discriminatory. It was therefore important to rely on already existing texts, and it was all the more important to find a satisfactory formula because the principle involved was a frequent source of disputes between States. He agreed with Mr. Yasseen that it was essential to state precisely between which States there must be no discrimination.

44. The CHAIRMAN, speaking as a member of the Commission, said it should be specified at the end of the sentence that there should not be discrimination "between States members of the organization".

45. The article might, moreover, be supplemented by a provision to the effect that where, by custom or agreement, the host State extended more favourable treatment to a member State of the organization, that should not be regarded as discrimination.

46. Mr. YASSEEN said that privileged treatment could be considered as non-discriminatory provided it did not affect the rights of other member States.

47. Mr. TABIBI said that to add the words "member States of the organization" would create a problem, since in many cases the host State was not a member of the organization. It would be better, in his opinion, to leave the wording of article 43 flexible.

48. He agreed that host States sometimes accorded special treatment to certain member States of an organization, but those cases were largely a matter of protocol as practised in bilateral relations, and did not constitute discrimination within the meaning of the present article.

49. Mr. RAMANGASOAVINA said he feared that the negative wording used by the Special Rapporteur for article 43 would make it possible to conclude, *a contrario*, that discrimination was permitted in the application of other conventions. By the same reasoning, any explanations given might have a restrictive effect, for if it were said that some particular treatment was not considered to be discriminatory, it might be argued, *a contrario*, that any other treatment which involved an

exception to the equality rule was discriminatory. If the article provided that States must ensure respect for the principle of non-discrimination, that general formula would emphasize that the principle must be applied.

50. Mr. CASTAÑEDA said he was not in favour of any formula that would open the way for differences in treatment that would not be considered discriminatory.

51. With regard to Mr. Yasseen's comment, he doubted whether it was even conceivable that more favourable treatment could be accorded to one State without affecting the situation of other States in any way, especially where privileges and immunities were concerned. The ideas of reciprocity and of special relations between two States had no place in relations between States and international organizations; they belonged exclusively to bilateral diplomacy. If those ideas were included, there would be a danger of creating situations that were incompatible with the basic principle of the sovereign equality of States.

52. Sir Humphrey WALDOCK said he fully agreed with Mr. Castañeda that it would be unwise to open the door to special privileges in relations between States and international organizations, since in such relations the situation was different from what it was in bilateral diplomacy.

53. Mr. CASTRÉN said he had the same doubts about the advisability of adding an explanatory paragraph. He preferred the text as it stood.

54. Mr. EUSTATHIADES said he thought the discussion confirmed the view he had already expressed. Either the Commission would be led to state that certain practices did not constitute discrimination, or, if it confined itself to stating the principle only, the value of the provision would be doubtful, to say the least, and difficulties might possibly arise in certain situations such as those coming under article 27 or when States members of the organization were not recognized by the host State. Several members had spoken in favour of including additional particulars; Mr. Ramagasoavina had proposed stating the principle more rigorously. The discussion seemed to confirm that the concept of non-discrimination should be either more fully explained or not mentioned at all.

55. Mr. TSURUOKA said it was not the principle itself of non-discrimination that was in question, either in the present articles or in any other convention or rule of international law. The question was whether an article should be devoted to the principle. And since the Commission did not seem ready to take a final position on the matter, the Drafting Committee would have to consider whether or not it would be wise to include an article of that kind in the convention. If so, the wording of the article should be flexible so that it would be easily adaptable to real and evolving situations.

56. What was involved was mainly the acts or behaviour of the host State. Since the host State stood alone against a multitude of member States which might criticize its decisions, it was reasonable to assume that it would only act if it was convinced that it was not going against the will of the majority of member States. That

was a reliable guarantee against abuses by the host State, and an argument in favour of omitting such an article. While he would not formally propose the deletion of the article, he would urge that possible cases of discrimination in the application of the articles of the convention be studied in the light of that consideration.

57. Mr. USTOR said he strongly supported the idea embodied in article 43. It was necessary to include an article on non-discrimination in the present draft, if only to prevent difficulties of interpretation, bearing in mind the inclusion of such an article in the Vienna Conventions of 1961 and 1963.

58. He was opposed to the inclusion of any exceptions in the form of a second paragraph. In fact, he was not satisfied with paragraph 2 (a) of article 47 of the Vienna Convention on Diplomatic Relations. The Commission itself, in article 64 of its 1960 draft on consular relations, had decided to omit paragraph 2 (a) from a text which otherwise reproduced the corresponding article of the Convention on Diplomatic Relations. In paragraph (3) of its commentary on article 64, the Commission has expressed its doubts regarding the substance of paragraph 2 (a).⁶ He was therefore strengthened in the view that the present article 43 should be confined to a general statement of the principle of non-discrimination.

59. Since article 43 would apply not only to the articles on permanent missions which preceded it, but also to the sections on permanent observers and on delegations to organs of organizations and to conferences, he would suggest that, in the event of such sections being included, article 43 be moved to the end of the whole draft and placed in a section entitled "General provisions".

60. Mr. EL-ERIAN (Special Rapporteur) said that two general points had been raised during a comprehensive and illuminating discussion. The first was the advisability of including an article on non-discrimination; only two members had expressed doubts, while all the others had advocated the retention of the article. He himself had at one time considered the possibility of omitting it and thus avoiding a difficult subject. He had decided, however, to include the article because certain problems had in fact arisen in practice and it was necessary to provide a solution for them.

61. The second general point was the advisability of inserting a second paragraph on the lines of paragraph 2 of article 47 of the Vienna Convention on Diplomatic Relations. The majority of members had not been in favour of such a paragraph because of the difference between bilateral diplomatic relations and the relations covered by the present draft. Within the framework of an international organization, there was no room for extending special treatment to certain States because of some custom or particular relationship with the host State; it was necessary to establish an objective régime which applied equally to all States. There was also a theoretical reason for not including the suggested second paragraph; in bilateral diplomacy, the receiving State would grant special treatment to certain of the diplo-

⁶ See *Yearbook of the International Law Commission*, 1960, vol. II, p. 178.

matic agents accredited to it but, in the present instance, the permanent representatives and members of the permanent mission were accredited not to the host State but to the international organization.

62. With regard to the drafting of the article, he suggested that the Drafting Committee consider the possibility of adopting wording which would avoid the present negative formulation.

63. It had been suggested that the article should be reworded so as to impose a specific obligation on the host State. He was not attracted by that suggestion, if only because it would not be sufficient to refer to the host State: it would also be necessary to mention the organization, which had obligations in the matter, and perhaps third States. If delegations to organs of organizations and to conferences were ultimately covered by the draft, since a conference or an organ of an organization could meet outside the host State it would be necessary to make specific reference to third States as well.

64. He was not in favour of replacing the concluding words "as between States" by "as between member States". Reference has been made to the difficulties which would arise in a case such as that of the Geneva Office of the United Nations, where the host State was not a member. For that reason, and others mentioned during the discussion, it would be preferable to retain the text as it stood.

65. He could accept Mr. Ustor's suggestion that article 43, as a general provision, be placed at the end of the whole draft, so as to cover observers and delegations to organs of organizations and to conferences, if sections on those subjects were included.

66. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 43 to the Drafting Committee.

It was so agreed.¹

ARTICLE 44

67. *Article 44*

Obligation to respect the laws and regulations of the host State

1. 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 host State. They also have a duty not to interfere in the internal affairs of that State.

2. The premises of the permanent mission must not be used in any manner incompatible with the functions of the permanent mission as laid down in the present articles or by other rules of general international law or by special agreements in force between the sending and the host State.

68. Mr. KEARNEY said that article 44 set forth the duty of all persons enjoying privileges and immunities to respect the laws and regulations of the host State, but paragraph (2) of the commentary explained that: "With respect to immunity from jurisdiction, this immunity

implies merely that a member of the permanent mission may not be brought before the courts if he fails to fulfil his obligations". Thus if a person enjoying such immunity committed a breach of criminal law, the host State was left without a remedy.

69. It was not sufficient simply to reproduce the provisions of the corresponding article of the Vienna Convention on Diplomatic Relations.⁸ There was a great difference between the situation in bilateral diplomacy and the situation covered by article 44. Under the Vienna Convention on Diplomatic Relations, it was possible for the receiving State to declare a diplomatic agent *persona non grata* and that device could be used to expel from the receiving State's territory a diplomatic agent who violated its criminal laws or regulations. In fact, the mere existence of the device was often enough, since the sending State would normally withdraw the diplomatic agent in order to avoid embarrassment and publicity.

70. In the present case, no similar device was available. He did not deny the logic of not permitting the host State to declare *persona non grata* a member of a permanent mission who was accredited to an international organization, since permanent missions were not accredited to the host State and it was essential to ensure their freedom of action. The host State, however, could be faced with an intolerable situation if a member of a permanent mission committed a violation of criminal law: unless some remedy were provided, it would be possible for the person concerned to continue to commit criminal offences and to remain in the territory of the host State indefinitely.

71. The problem was a very real one and unfortunately practical examples could be given. Some provision would therefore have to be included in the present draft which would reconcile the protection of the host State with the freedom of the permanent mission. He therefore suggested that the following third paragraph be added to article 44.

"3. In the event of serious or repeated violations of the criminal laws or regulations of the host State by any person enjoying immunity from the criminal jurisdiction of the host State under this Convention, the sending State, upon notification thereof by the organization, shall remove such person from the permanent mission."

72. The scope of the paragraph was limited to breaches of criminal law of two kinds. The first was serious violations, which in the common law countries would cover felony cases such as manslaughter and violations of the narcotics prohibition legislation. The second kind was repeated violations; an obvious example was violations of speed limits and other traffic regulations which, if repeated often, could have very grave cumulative effects.

73. His proposal would preserve the principle that the concept of *persona non grata* was not applicable; it would in fact reverse the procedure in order to ensure the independence of the permanent mission. An important feature of his proposal was that the organization would be required to notify the sending State concerned;

¹ For resumption of the discussion, see 1023rd meeting, para. 88.

⁸ United Nations, *Treaty Series*, vol. 500, p. 120, article 41.

that requirement would provide a basic protection against abuse of the provision by the host State.

74. He realized that a provision of that type would impose an additional burden upon international organizations, and consideration might have to be given to the question whether it was necessary to lay down a special procedure. The Special Rapporteur had already introduced a general article on the question of consultation, but it might perhaps be necessary to introduce a more formal specific clause on consultation to cover the present case.

75. Unless a remedy of some kind were provided for the situation to which he had drawn attention, it was extremely unlikely that the draft articles would be accepted by States which were hosts to international organizations and, in the absence of such acceptance, the whole draft would become pointless.

The meeting rose at 1 p.m.

998th MEETING

Thursday, 12 June 1969, at 3.40 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218/Add.1; A/CN.4/L.137)

[Item 1 of the agenda]

(continued)

ARTICLE 44 (Obligation to respect the laws and regulations of the host State)¹ (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 44 in the Special Rapporteur's fourth report (A/CN.4/218/Add.1) and of the amendment submitted by Mr. Kearney.²

2. Mr. NAGENDRA SINGH said that the Special Rapporteur had been quite right to follow article 41 of the Vienna Convention on Diplomatic Relations,³ and to omit paragraph 2, which was not relevant.

3. The important point in paragraph 2 of the Special

Rapporteur's text was that the premises of the permanent mission must not be used in any manner incompatible with its functions in relation to the international organization to which it was accredited. That could be made clear by inserting the words "in relation to the international organization concerned" after the words "functions of the permanent mission". He was not proposing that as a formal amendment; it was just a drafting point which could be looked into by the Drafting Committee.

4. Mr. Kearney had raised a valid point and in general he agreed with his view. There were three ways of dealing with the problem: by accepting Mr. Kearney's amendment; by dealing with the problem in article 49, on consultations—that was probably the best solution; or by departing from the principle of absolute immunity, as had been done in the draft on special mission,⁴ and permitting the criminal law of the host State to apply in cases of acts involving criminal responsibility by persons enjoying privileges and immunities under the convention. That solution would certainly be unpalatable to many, but it might be in the interests of the community to confine absolute immunity to activities connected with a person's functions as a member of the permanent mission.

5. Mr. TABIBI said he fully supported the underlying idea of article 44 and the way it had been presented by the Special Rapporteur. It was appropriate to include in the present draft the general rule in article 41 of the Vienna Convention on Diplomatic Relations, so that there would be a balance between the privileges and immunities granted to diplomats in bilateral and in multilateral diplomacy.

6. While he fully shared Mr. Kearney's concern, he doubted whether the solution he had suggested was the best one. To adopt the clause he proposed would create difficulties in applying the rule in force under the Vienna Convention on Diplomatic Relations. The role of a diplomat serving on a permanent mission was in many respects the same as that of a diplomat in bilateral diplomacy; he merely served in a different capacity. Moreover, in many cases the head of a diplomatic mission was also a member of his country's permanent mission to an international organization. In such cases, it would be difficult to determine which rule should apply.

7. The wording of the amendment proposed by Mr. Kearney also raised a number of problems. For example, the words "In the event of serious . . . violations" implied that a judgment would be made on what was a serious violation, but no indication was given as to who would make the judgment. If it was the host State, then serious violation of its criminal laws or regulations could be used by the host State as a pretext for obtaining the withdrawal of a diplomat on a permanent mission for political reasons.

8. He doubted, moreover, whether it was appropriate for a diplomat on a permanent mission to be recalled on the receipt of a notification from the organization

¹ See previous meeting, para. 67.

² *Ibid.*, para. 71.

³ United Nations, *Treaty Series*, vol. 500, p. 120.

⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, pp. 365 and 367, articles 41 and 48.

itself. Such a provision would be a departure from accepted practice and would create a precedent. Before notifying the sending State of serious or repeated violations of the laws of the host State by a member of its permanent mission, the organization would have to judge the seriousness of the offences, and that would alter the status of the organization. It was difficult to see how the prestige of the organization in the eyes of its members could co-exist with a duty to notify members of the need to withdraw one or more of their diplomatic representatives.

9. Article 44 as it stood was well-balanced and provided the host State with adequate safeguards.

10. Mr. BEDJAOUÏ said that he fully agreed with the Special Rapporteur's drafting and presentation of article 44, except that he doubted whether the final phrase in paragraph 2, "or by special agreements in force between the sending and the host State", was necessary.

11. It was true that the phrase was to be found in the corresponding articles of both the Vienna Convention on Diplomatic Relations and the draft on special missions, but those two texts were essentially concerned with bilateral relations between States. Admittedly also, in the case of a permanent mission to an international organization there might be special agreements between the sending State and the host State; but such agreements would probably deal with relations between the two States, so they could not govern multilateral relations. Moreover, the phrase in question appeared to revert to a point which had already been dealt with in the previous article, since the majority of the Commission had accepted the Special Rapporteur's proposal to omit all reference to the rule of reciprocity from article 43.

12. With regard to Mr. Kearney's amendment, he shared the views of the two previous speakers: there was a problem and it was a very real one, especially now that there were so many international organizations and representatives of States to those organizations. For that reason the proposed wording should be carefully considered.

13. But in addition to the risk of abuses by the host State, a point mentioned by Mr. Kearney himself, there was another danger: that of error by the host State. Since the accused representative enjoyed immunity from jurisdiction, he could not be brought before a court, so what authority would declare him guilty? A preliminary inquiry was certainly no safeguard against error.

14. Under Mr. Kearney's amendment, the organization would intervene to some extent between the host State and the member State whose representative was suspected, since it was the organization that made the notification following which the sending State had to remove its representative. In practice, the organization would confine itself to transmitting the protest of the host State to the sending State; it was doubtful whether it would have the means to carry out an inquiry. The amendment did not provide sufficient protection for the sending State, and its application would raise serious difficulties.

15. The problem which Mr. Kearney tried to solve in his amendment might possibly be dealt with in article 49, through the consultations which that article made compulsory between the sending State, the host State and the organization on any question arising out of the application of the articles of the draft, and in particular article 44.

16. Mr. IGNACIO-PINTO said that article 44 met a real need, for the members of permanent missions were not all saints and some of them might behave in a manner that the host State found intolerable. The solution of the problem might lie in the idea that the representative of a State to an international organization was in the same situation as a diplomat in bilateral relations between States. In that case, it was probably unnecessary to go beyond the general idea expressed in article 44, the last phrase of which might be deleted, as suggested by Mr. Bedjaoui.

17. While he was not opposed to the spirit of Mr. Kearney's amendment, on reflection, it was hard to see how the organization could be made responsible for notifying the sending State that it must recall a member of its permanent mission. What was needed was a solution equivalent to a declaration of *persona non grata* in diplomatic relations. Perhaps Mr. Kearney could explain the procedure whereby his Government had been able to secure the almost instantaneous departure of certain persons from United States territory. Methods already used in practice might assist the Commission to find a solution.

18. Mr. CASTRÉN said he approved of the text of article 44 proposed by the Special Rapporteur.

19. On the other hand, he understood Mr. Kearney's concern; the host State must be protected against serious crimes committed by members of permanent missions. Article 49 provided for consultations in case of difficulties arising under article 44, but that might not be sufficient. The Drafting Committee should therefore examine Mr. Kearney's amendment very carefully and try to find a formula which could be accepted by all or the majority of the Commission.

20. He himself would like to propose a sub-amendment to the amendment, to provide that, in the cases contemplated by Mr. Kearney, the consultations required under article 49 should be held first, and that the measures indicated in Mr. Kearney's new paragraph 3 would only be taken if those consultations failed to achieve any result.

21. Mr. CASTAÑEDA said that Mr. Kearney's amendment dealt with an extremely serious problem which the Commission should not try to solve in the short time at its disposal before the Special Rapporteur had to leave. He would therefore confine himself to a provisional opinion.

22. In the first place, all matters connected with the peaceful settlement of disputes between States were very delicate; none of the United Nations organs which had examined that problem had yet found a real solution. When an international organization intervened in a dispute, the situation became still more complicated.

23. Mr. Kearney's amendment had the merit of throwing the problem into relief and seeking to provide a solution. It avoided simply giving the host State a right of expulsion, while at the same time it would prevent the host State from being left in a position in which it could not act if a member of the permanent mission was guilty of serious or repeated criminal offences.

24. Nevertheless, he supported Mr. Bedjaoui's view that, though there was a danger of abuse, there was an even greater danger of error on the part of the host State. Also, although it was not expressly stated, it was the international organization which, under the amendment, would have to establish the facts and take a decision, since it was the organization which had to make the notification to the sending State. And what organ of the international organization was required to act in those circumstances? If it was an organ consisting of States, that might be a sufficient guarantee; but if it was the secretariat, many countries might not be willing to entrust it with that role. Such a responsibility would be too heavy for a secretariat.

25. An even more serious defect of Mr. Kearney's amendment was that the State which had sent the incriminated representative was not consulted; yet such consultation was indispensable. Article 49, which provided for consultations between the sending State, the host State and the organization, regarding the application of article 44, offered the best safeguards for all. It instituted a new procedure which entailed not compulsory settlement, but the obligation to hold consultations.

26. Perhaps it would be possible to combine the two ideas—that contained in Mr. Kearney's amendment and that in article 49—taking the consultations as the basic means of settlement. If the consultations led to agreement between the three parties concerning the facts of which the representative was accused, the sending State would recall him. It was hardly possible to set up independent machinery by which the representative could be expelled if the consultations failed.

27. Mr. YASSEEN stressed that the Commission's task was to reconcile the interests of the sending State, the host State and the organization. It was right and logical that the vital and legitimate interests of the host State should be protected, and that State could not be required to retain in its territory a member of a permanent mission who broke its laws.

28. For most of the articles, the Commission had rightly taken the analogy with diplomatic relations as a basis. That analogy also applied to the case dealt with in article 44; the host State was no less injured if its internal law was broken by a member of a permanent mission to an international organization than if it was broken by a member of a diplomatic mission. Moreover, the abuse of privileges and immunities by a member of a permanent mission was harmful not only to the bilateral relations between two States, but also to the organization itself, and that was even more serious.

29. Mr. Kearney's amendment had great merits. It might be a good idea to appeal to the organization; such an appeal would be like asking it to arbitrate or at least to lend its good offices. But it was certainly not the

secretariat of the organization which could be charged with such a grave responsibility in matters that were often of a highly political nature. The solution might be to make the competent organs of the organization intervene, but the procedure to be adopted would depend on the constitution or statute of the organization.

30. The problem required very thorough study and it would be foolish to try to find a solution in the short time remaining for the examination of sections III and IV of the draft.

31. Mr. EUSTATHIADES said that the question was very important; even if it could not take a final decision, the Commission should at least give the Special Rapporteur some general guidance before he left.

32. With regard to paragraph 2, he shared Mr. Bedjaoui's doubts about the advisability of including the last clause.

33. On the other hand, he was entirely in favour of Mr. Kearney's amendment; the draft should, in any event, contain a provision covering the case contemplated in that amendment. The fact that the Vienna Convention on Diplomatic Relations was silent on the subject did not prove much, for in bilateral relations States always came to some arrangement in the end; besides, the receiving State had declaration as *persona non grata* as a last resort. A similar right could not be accorded to the host State in respect of permanent representatives to an international organization. Mr. Kearney's amendment had the great advantage of placing the sending State under a duty with regard to the behaviour of its representatives. Its weakness lay in the question of the determination of serious violations, which would apparently be the responsibility of the host State.

34. To remedy that weakness, the drafting of the proposed new paragraph 3 might be amended so that the machinery contemplated came into action when a person enjoying immunity from criminal jurisdiction in the host State "was implicated in activities which could constitute serious violations of the laws or regulations of the host State". Even under a rule so formulated, however, the starting point would always be a claim by the host State.

35. The matter did not concern only the sending State and the host State; it also concerned the organization, which could not keep suspect persons in its midst. Consequently, it was natural to bring in the international organization. But would the procedure for notification by the organization be a purely administrative one or, as various members appeared to think, would it entail an inquiry by the organization? The solution might be for the host State to put forward its request "after consultation with the organization, if necessary", which would be in accordance with the provisions of article 49 concerning compulsory consultations in certain cases, in particular those relating to the application of article 44.

36. A final danger in Mr. Kearney's amendment had been pointed out by several speakers: the question which organ of the international organization would be required to act. He did not think it was necessarily the secretariat. That question would arise again when the Commission took up article 49; it would then be neces-

sary to define what was meant by the "organization". The Commission should not, therefore, allow itself to be held up by that difficulty at the present stage.

37. Mr. RAMANGASOAVINA said that he was prepared to accept article 44, though he had a few comments to make on the drafting, particularly on the last phrase in paragraph 2, "or by special agreements in force between the sending and the host State". Such special agreements must be very rare.

38. It was perfectly natural that, after the rights of members of permanent missions had been enumerated, there should be a reminder that it was their duty to respect the laws and regulations of the host State; it should be made clear that, despite the privileges and immunities they enjoyed, they were not above the law. There had been cases in which members of permanent missions had paid no heed to the laws and regulations of the host State, and provisions should therefore be included to deal with such situations, which were prejudicial to good relations between States.

39. If bilateral diplomacy had to be excluded, as seemed to be the case, the answer was perhaps to be sought in article 49, provided it was explained in the commentary how the proposed system of tripartite consultations would work. It was essential to avoid any method of dealing with the problem that might in its turn be open to abuse. Like other speakers, he would like to see a system adopted whereby consultations would take place between the host State, at its request, the sending State and the organization concerned.

40. Mr. BARTOŠ said that the question was an important one. It had come before the United Nations General Assembly on a number of occasions, when the United States had requested that certain members of a delegation or certain United Nations staff members should leave the country. The question of the freedom enjoyed by members of a mission to an international organization and staff members of the organization had also arisen when an agreement had been concluded between the United Nations and the United States concerning nationals of countries with which the United States was in armed conflict. It had been decided that such persons would have to reside on the international territory ceded to the United Nations; the United States had not been given the right to ask the Secretary-General to expel them from its territory.

41. Consideration should also be given to the case in which diplomats were accredited both to a State and to an international organization. Some held the view that the duties attached to the two functions were entirely different. A distinction should also be made between a genuine crime and what might be merely described as a criminal act. Again, where criminal law was concerned, many countries distinguished between administrative offences and criminal offences; but the amendment also used the word "regulations", which was contrary to the basic principle of modern comparative criminal law and, in particular, to the United Nations Covenants, which laid down the rule that there could be no crime without a law—a crime could not exist by virtue of administrative regulations.

42. There was also the question of notification of a request by the host State to leave the territory and of the organ of the international organization which was required to make the notification. It would be difficult to ask a mere administrative organ of the international organization to do so, since that would give it the power to decide whether or not there had been a serious violation, and thus to act as judge in a dispute between States, a function which the Charter reserved for a particular organ of the United Nations.

43. The idea of Mr. Kearney's amendment was sound, for it was quite legitimate to protect the host State, which was often exposed to danger from people who were protected by their diplomatic immunity. Indeed, there was a tendency in modern international law to consider that diplomatic privileges and immunities were not granted in the interests of the person enjoying them, but in the interests of the international community; nevertheless, the 1961 Vienna Conference had been reluctant to distinguish between purely personal immunity and immunity that was essentially functional.

44. The idea should therefore be given practical form through the adoption of a reasonable solution which would make it possible to prevent members of permanent missions from committing abuses that were harmful to international relations and at the same time to protect the interests of the parties concerned without running the risk of involving international organizations. Perhaps tripartite consultations might offer such a solution, but the Commission would have to study that institution very carefully.

45. Mr. RUDA said that, in the case dealt with in Mr. Kearney's amendment, two interests were in conflict: the need to maintain the privileges and immunities of the diplomatic staff of permanent missions, and the legitimate interest of the receiving State not to have undesirable persons in its territory. It was difficult to imagine an appropriate formula which would strike a proper balance between those two interests.

46. As a basic principle, it could be laid down that, in the event of serious or repeated violations of the criminal laws or regulations of the host State, the sending State should withdraw the diplomat concerned. But there remained the question of the machinery by which that result was to be obtained.

47. Of the three possible approaches, the first—to leave the matter entirely in the hands of the host State—was out of the question: it would give the host State so much power that it could virtually annul the privileges and immunities provided for in the convention for the members of permanent missions. The second approach—to leave it to the organization to ask the sending State to withdraw the diplomat—would create more problems than it solved, because it would be extremely difficult to decide on which organ of the organization that responsibility fell. The third approach, the one the Special Rapporteur had in mind, was recourse to the consultations prescribed in article 49, paragraph 1 of which referred specifically to questions arising out of the application of article 44.

48. Paragraph 2 of article 49 referred to "provisions

concerning settlement of disputes contained in the present articles" and implied that, if the consultations failed to provide a solution, recourse should be had to the general machinery for the settlement of disputes to be established at the end of the convention. Though perhaps more dramatic, the disputes which might arise out of the application of article 44 were not essentially different from any of the other disputes which might arise out of the application of the convention, and it was therefore appropriate that the same machinery should apply to all of them. The time to solve the problem, therefore, was when the general machinery for the settlement of disputes was being considered.

49. Sir Humphrey WALDOCK said there were only two main points he wished to make. First, he fully supported Mr. Bedjaoui's proposal concerning the last phrase in paragraph 2 of article 44. It seemed inconceivable that special agreements in force between the sending and host States would really be such as to affect the functions of permanent missions. There might be special agreements arising out of the constituent instruments of the organization on other subsequent agreements binding upon the members of the organization, but it would not be appropriate to refer to special agreements in force between the sending State and the host State.

50. The second was the main point arising out of Mr. Kearney's proposal. It was his understanding that during its consideration of the topic of relations between States and international organizations at the last session, the Commission had already had in mind the possibility of solving the problem raised by Mr. Kearney through consultation procedures, and it was on that basis that the Special Rapporteur had proceeded. Consultation procedures should be the main method of dealing with difficulties arising out of the application of the convention.

51. The basic point underlying Mr. Kearney's proposal would seem to be whether there should not be some procedure of last resort to replace the normal *persona non grata* procedure. There was a case for such a proposal, since the host State would have no means of applying a real sanction, such as declaring a person *persona non grata*, in respect of persons attached to permanent missions, nor would it be able to apply other sanctions available in normal diplomatic relations when a person's misbehaviour might be regarded by the host State as rendering him no longer acceptable as a negotiator, so that he could no longer usefully perform his functions with the government to which he was accredited.

52. Mention had been made of the possibility of abuses on the part of the host State, but abuses on the part of the members of permanent missions were equally possible. Nor were such abuses all of a kind that the host State could be expected to tolerate; espionage and irregular political activities by members of a permanent mission were among those that came to mind. Some procedure along the lines suggested by Mr. Kearney might be necessary as a last resort. The Commission might have to decide whether the problem should be covered by strengthening the provisions of article 49 on

consultations, or whether it was necessary to provide for some ultimate sanction in that article or in one related to it.

53. He understood Mr. Kearney to be proposing a procedure to be used only in the last resort, if the consultation procedure failed; the normal procedure would be for the host State to take up with the sending State any question of the behaviour of one of the latter's representatives, but the possibility could not be overlooked that such consultations might fail, and the host State might be obdurate in asking for the recall of the representative. In such a case it would be useful to have the possibility of referring the dispute formally to a third party, within the organization: the Secretary-General in the case of the United Nations and some other similar official in the case of other international organizations. The Commission should not, however, become too much involved in details of the procedure in each organization.

54. He was inclined to agree that it was too early to reach a final conclusion on what was a very delicate problem.

55. Mr. USTOR said that the issue raised by Mr. Kearney was a valid one. He did not agree, however, that if the problem was not settled in the manner proposed, the convention would not be acceptable to States that wished to become hosts to international organizations. The convention would provide rules which would be subordinate to agreements between any international organization and a host State, and questions of the kind raised by Mr. Kearney would best be settled in such agreements.

56. A suitable formula for inclusion in the convention could doubtless be found, but there was not sufficient time available to study the matter properly. If he had to make a choice at the present stage, he would opt for the text of article 44 as it stood, for the reasons given by Mr. Castañeda.

57. Mr. TABIBI said that, for the protection of their own interests, it was essential that international organizations should not get involved in disputes between host and sending States arising out of violations, or alleged violations, of the laws of the host State by a member of a permanent mission. Mr. Kearney's amendment raised an important problem which should be studied and for which a solution should be found. But great care was needed because abuses might occur on both sides.

58. Some international organizations had a century or more of experience behind them and many cases of abuse had arisen during their history. The Special Rapporteur or the Secretariat should be authorized to ask the international organizations what their experience in such cases had been and what methods they had found most successful in dealing with them—consultations or any other method. It would not be appropriate to suggest a solution until a careful study had been made on those lines.

59. Mr. KEARNEY said he was grateful that all members had recognized that a serious problem existed and that an attempt should be made to solve it.

60. He wished to assure Mr. Ustor that what he had intended to say was not that, unless the convention included an amendment on the lines he had suggested, it would not be acceptable to host States, but that unless some solution to the problem was found host States would be reluctant to accept the convention. He had never imagined that his amendment was final; he had merely been trying to bring the various elements of the problem to the Commission's notice.

61. He was also aware that his amendment was linked to the consultation process and that, if such an amendment was accepted, it would be necessary to revise the consultation provisions of the convention. Possibly the two components—the principle and the machinery—were too telescoped in his amendment; it might be best to deal with them separately: the principle in article 44 and the machinery for applying it in article 49 or 50. There appeared to be general agreement on the principle that if a member of a permanent mission seriously or repeatedly violated the laws of the host State, there must be some method of removing him from its territory.

62. He agreed that there might not be time to work out the final language in the Commission, but he hoped the question would be referred to the Drafting Committee.

63. Mr. STAVROPOULOS (Legal Counsel) said that Mr. Kearney's amendment made a valid point, but did not have much chance of being accepted in its present form.

64. The United Nations Secretariat attached great importance to the retention or the strengthening of article 49. The necessity for a consultation procedure bringing in the organization was clearly illustrated by a whole series of cases within his own experience with the United Nations in New York, in which the Secretariat had been able to smooth over difficulties that had arisen between the police or other authorities of the host State and diplomats stationed in the United States. It was only reasonable, therefore, that the position of the organization should be strengthened. In the case of the United Nations, the organization could only mean the Secretary-General; otherwise, it would have to be the General Assembly, and no one would think of bringing a case concerning the behaviour of an individual diplomat before the Assembly.

65. The duty of intervention was not a pleasant duty for the Secretariat, but it was one which it had accepted and had continually performed—so much so that it might seem at times that the host State was almost beginning to resent such "uncalled for interference". The point was that the interference should be called for in the convention, in other words, that a system of consultations should be established which gave the organization a say in such matters. He hoped, therefore, that the Commission would retain article 49 either as it stood or in a strengthened form.

66. The CHAIRMAN, speaking as a member of the Commission, said that he supported article 44 as proposed by the Special Rapporteur.

67. With regard to the last phrase in paragraph 2,

he was in agreement with Mr. Bedjaoui, but he would remind the Commission, that, at the 1961 Vienna Conference, that phrase and the words which preceded it, "or by other rules of general international law", had been included at the request of the Latin American countries, which would have to be consulted if it were proposed to delete the final phrase.

68. The procedure provided for in article 49 seemed to him entirely satisfactory, and it was reasonable to make it the responsibility of the organization to hold tripartite consultations. He regretted that he was unable to support Mr. Kearney's proposal to add a third paragraph to article 44, because the article as at present worded indirectly gave the organization power to declare a member of a permanent mission *persona non grata*.

69. Another most important point was notification: the decision should not be made by some secondary organ or by a director or secretary-general, but by the highest organ. Mr. Kearney's idea was sound, but the situation he envisaged seemed already to be covered by article 49.

70. Mr. BARTOŠ said that a State, even though it could adopt the course of declaring some one *persona non grata*, could not exclude from its territory a foreign diplomat accredited to an international organization; it could only deprive him of the status of a diplomat accredited to the host State. And yet, if the headquarters of the organization was on the State's territory, it might be considered that the State was being deprived of a right which it enjoyed vis-à-vis the representative of another State, since it could not compel him to leave its territory. He (Mr. Bartoš) had himself raised that question at the Vienna Conference, but the majority had refused to settle it, because they considered the interests of the international organization more important than those of the host State.

71. Mr. EL-ERIAN (Special Rapporteur) said there was general agreement that there must be an article laying down the duty of members of permanent missions to respect the laws and regulations of the host State. Such an article must strike the necessary balance between their enjoyment of privileges and immunities and their duty to respect the laws of the host State. It should make it clear that, while in many respects they were immune from the jurisdiction of the host State, they were subject to its laws; that situation became clear in the event of a waiver of immunity, which set in motion the practical enforcement of the laws.

72. Mr. Bedjaoui had proposed, and a number of members had supported, the deletion of the clause "or by special agreements in force between the sending and the host State" at the end of paragraph 2, on the ground that it was more appropriate to bilateral relations. That phrase, as the Chairman had pointed out, had been included in the Vienna Convention on Diplomatic Relations to accommodate a group of States which had special agreements on the matter dealt with in the paragraph.

73. Sir Humphrey Waldock had pointed out that it

was appropriate to refer to such agreements if they related to international organizations, but not otherwise, since that would inject an element of bilateral diplomacy into the economy of the article. The Drafting Committee should accordingly decide whether to delete the whole clause, inasmuch as it was covered by one of the general provisions at the beginning of the draft articles, or to retain the reference to special agreements, but delete the words "between the sending and the host State".

74. He sympathized with Mr. Kearney's amendment, which raised the universally recognized problem resulting from the absence of the "*persona non grata*" procedure in respect of members of permanent missions. The amendment, as Sir Humphrey Waldock had pointed out, was designed to replace that institution in extreme cases in which there had been serious or repeated violations of the laws of the host country. But while members agreed with the idea underlying the amendment, they recognized the difficulty of drafting a satisfactory text.

75. The general view was that the question should be taken up in connexion with article 49, and suggestions had been made for strengthening that article. Article 49 envisaged consultations between the sending and host States and the organization on all the everyday, practical questions that might arise between them. Since that was the case, the reference to the "organization" could only mean the secretary-general or principal executive official, as indeed was expressly stated in paragraph (4) of the commentary on the article. Only the secretary-general could conduct the sort of unobtrusive diplomacy which was necessary if the organization was to play its role of liaison between the host State and the sending State in dealing with practical matters which did not amount to a formal dispute.

76. Paragraph 2 of article 49 was a saving clause under which, if the consultations were unsuccessful, whatever other machinery was established for the settlement of formal disputes could be applied. The article as a whole was intended to overcome the practical difficulties which arose in multilateral diplomacy as a result of the absence of institutions which existed in bilateral diplomacy.

77. He suggested that article 44 be referred to the Drafting Committee, which should also consider the question raised by Mr. Kearney, namely, whether the principle and the machinery envisaged in his amendment might not be dealt with separately—the principle in article 44 and the machinery in article 49.

78. The CHAIRMAN suggested that article 44, with Mr. Kearney's amendment, be referred to the Drafting Committee on the terms indicated by the Special Rapporteur.

*It was so agreed.*⁵

The meeting rose at 6 p.m.

⁵ For resumption of the discussion, see 1024th meeting, para. 1.

999th MEETING

Friday, 13 June 1969, at 10.10 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218/Add.1)

[Item 1 of the agenda]

(continued)

ARTICLE 45

1. *Article 45*
Professional activity

The permanent representative and the members of the diplomatic staff of the permanent mission shall not practice for personal profit any professional or commercial activity in the host State.

2. The CHAIRMAN invited the Commission to consider article 45 in the Special Rapporteur's fourth report (A/CN.4/218/Add.1). There being no comments, he suggested that the article be referred to the Drafting Committee.

*It was so agreed.*¹

ARTICLE 46

3. *Article 46*
Modes of termination

The function of a permanent representative or a member of the diplomatic staff of the permanent mission comes to an end, *inter alia*:

(a) On notification by the sending State that the function of the permanent representative or the member of the diplomatic staff of the permanent mission has come to an end;

(b) If the membership of the sending State in the international organization concerned is terminated or suspended or if the activities of the sending State in that organization are suspended.

4. Mr. EL-ERIAN (Special Rapporteur) said that sub-paragraph (b) dealt with three cases in which the function of a permanent mission ended as a result of developments relating to the sending State's membership in the organization. The first was the case of

¹ For resumption of the discussion, see 1025th meeting, para. 1.

termination or withdrawal, for which provision was made in the constituent instruments of many organizations. The second was the case of suspension of membership, which was usually also regulated in constituent instruments. The third was the case of suspension by the sending State of its activities in the organization, by unilateral decision of that State. As he had explained in paragraph (2) of the commentary, the third case had been suggested by the example of Indonesia between 1 January 1965 and 28 September 1966. The action taken by Indonesia at that time, and the closure of its mission in New York, had been interpreted not as a withdrawal from membership of the United Nations but as a suspension of co-operation.

5. No provision was made in article 46 for the possibility that the government of the host State might require a person enjoying privileges and immunities to leave its territory. As he had pointed out in paragraph (4) of the commentary, the only convention which contained any such provision was the Convention on the Privileges and Immunities of the Specialized Agencies.² There was no corresponding provision in the Convention on the Privileges and Immunities of the United Nations or in any of the host agreements. Moreover, the replies of the legal advisers of the specialized agencies showed that there had never been a case in which the relevant provision of the Convention on the Privileges and Immunities of the Specialized Agencies had been applied. No request for the recall of a permanent representative or a member of a permanent mission had ever been made under that article.

6. The CHAIRMAN, speaking as a member of the Commission, said he thought it would be better to refer to "the permanent representative" instead of "a permanent representative" at the beginning of the first sentence. It had been justifiable to refer, in the Vienna Convention, to the functions of "a diplomatic agent", because of the number of such agents, but that did not apply to permanent representatives.

7. In the first line of sub-paragraph (a), the words "to the organization" should be added after the words "the sending State" in order to reproduce, *mutatis mutandis*, the corresponding article of the Vienna Convention.³

8. The provision in sub-paragraph (b) did not seem justified, for even if the sending State ceased temporarily to be a member of the organization or if its activities in the organization were suspended, it might nonetheless retain a permanent representative to the organization. Also, the words "the international organization concerned" should be replaced by the words "the organization".

9. Mr. YASSEEN said he shared the Chairman's opinion on sub-paragraph (b). So long as a State had not really withdrawn from the organization, or even if it had withdrawn temporarily, the situation called for a special solution in each case.

10. Sir Humphrey WALDOCK also thought it was too

rigid to lay down that the function of a permanent representative, or of a member of a permanent mission, ended automatically when the activities of the sending State in the organization were merely suspended by the unilateral action of that State. It would be unfortunate if the permanent representative were to be regarded as having ceased to act in that capacity precisely at a time when diplomatic attempts to resolve the situation would probably be made.

11. The case in which the membership of the sending State was suspended by a formal decision of the organization was admittedly rather different; for it could then be said to be logical that the functions of the permanent representative, as such, should come to an end. Even then, however, he was not altogether sure that it should be a strict rule that the permanent representative must leave the host State within a reasonable time. As in the case of a rupture of diplomatic relations, there might well be advantage in some form of link being maintained between the organization and the State concerned. The permanent representative might thus remain in the country, though not in his former capacity.

12. Mr. KEARNEY said that some of the difficulties which had arisen were perhaps due to the fact that article 46 attempted to regulate two rather different matters: the first was the determination of the moment at which the function of a permanent representative, or of a member of the permanent mission, came to an end; the second was the corollary that the person concerned must leave the territory of the host State or that his privileges and immunities would cease. It would perhaps be advisable to deal expressly with the second point elsewhere.

13. With regard to the case of suspension of the activities of the sending State in the organization, it would be anomalous for a whole permanent mission, which had become totally inactive, to remain in the host State and enjoy full privileges and immunities. It would be difficult to justify extending those privileges and immunities for an indefinite period.

14. Mr. EUSTATHIADES said he agreed with the Chairman, Mr. Yasseen and Sir Humphrey Waldoock that it was not advisable to state in the article that the functions of a permanent representative came to an end "if the activities of the sending State in that organization are suspended". Even when it was the sending State which decided of its own volition to suspend its activities, as Indonesia had done, that might mean that it ceased to co-operate with the organization, but not that it withdrew its permanent representative.

15. On that point, there was a certain interdependence between sub-paragraph (b) and sub-paragraph (a). If the State suspending activities decided at the same time to terminate functions of its permanent representative, it would notify the organization accordingly, as laid down in sub-paragraph (a). But perhaps the case of temporary cessation of membership should also be provided for. If the words "comes to an end, *inter alia*" in the introductory phrase were replaced by the words "may come to an end, *inter alia*", all the possible cases would be covered and in sub-paragraph (b) there would be no need to mention temporary voluntary withdrawal

² United Nations, *Treaty Series*, vol. 33, p. 278, section 25.

³ *Op. cit.*, vol. 500, p. 122, article 43.

from the organization or to make a distinction between suspension of activities decided on by the sending State and suspension decided on by the organization.

16. If the solution he suggested was not adopted, it would not be appropriate to include the phrase "or if the activities of the sending State in that organization are suspended" in sub-paragraph (b).

17. Mr. EL-ERIAN (Special Rapporteur) said that in the case of a formal decision by an organization expelling a member, it was difficult to imagine that the permanent representative would be allowed to continue to act in any capacity.

18. He had not been convinced by the doubts expressed by some members concerning the inclusion of a reference to suspension by the sending State of its activities in the organization. The case was admittedly a very special one, but since it had occurred in practice, there was a good reason for covering it in article 46.

19. The problem of Indonesia had been solved pragmatically by the United Nations. His conclusion was that the Drafting Committee should endeavour to separate suspension of activities from the other cases covered by article 46, since the consequences were not the same. Another solution would be to explain in the commentary that in the special case of suspension of the sending State's activities in the organization, decided by the sending State itself, the function of the permanent representative could come to an end; the situation was different from termination of membership, when the function necessarily came to an end.

20. The CHAIRMAN suggested that article 46 be referred to the Drafting Committee.

*It was so agreed.*⁴

ARTICLE 47

21. *Article 47* *Facilities for departure*

The host State must, even in the case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

22. The CHAIRMAN suggested that, as there were no comments, article 47 be referred to the Drafting Committee.

*It was so agreed.*⁵

ARTICLE 48

23. *Article 48* *Protection of premises and archives*

1. When the functions of a permanent mission come to an end, the host State must, even in the case of armed conflict,

⁴ For resumption of the discussion, see 1025th meeting, para. 4.

⁵ For resumption of the discussion, see 1026th meeting, para. 1.

respect and protect the premises as well as the property and archives of the permanent mission. The sending State must withdraw that property and those archives within a reasonable time.

2. The host State is required to grant the sending State, even in the case of armed conflict, facilities for removing the archives of the permanent mission from the territory of the host State.

24. The CHAIRMAN suggested that, as there were no comments, article 48 be referred to the Drafting Committee.

*It was so agreed.*⁶

ARTICLE 49

25. *Article 49* *Consultations between the sending State, the host State and the organization*

1. Consultations shall be held between the sending State, the host State and the organization on any question arising out of the application of the present articles. Such consultations shall in particular be held as regards the application of articles 10, 16, 43, 44, 45 and 46.

2. The preceding paragraph is without prejudice to provisions concerning settlement of disputes contained in the present articles or other international agreements in force between States or between States and international organizations or to any relevant rules of the organization.

26. Mr. EL-ERIAN (Special Rapporteur) said that the question of consultations between the sending State, the host State and the organization had already been discussed by the Commission when considering article 44 and Mr. Kearney's amendment to it⁷ at the last two meetings.

27. The last sentence of paragraph 1 made specific reference to a number of articles which were particularly relevant. Paragraph 1 was intended to deal with everyday difficulties in the application of such articles as article 16, on the size of the permanent mission, and article 44, on the obligation to respect the laws and regulations of the host State. It was not intended to deal with formal disputes on the application or interpretation of the draft articles. For such disputes, other means of settlement should be provided, possibly in the final clauses of the present draft, or should be worked out on an *ad hoc* basis for particular disputes.

28. The saving clause in paragraph 2 accordingly stipulated that paragraph (1) was without prejudice to any provisions concerning settlement of disputes which were contained in the draft articles, or which might be applicable under other international agreements in force or under any relevant rules of the organization. On that last point, it was explained in paragraph (7) of the commentary that the expression "relevant rules" was broad enough to cover constituent instruments, resolutions and the practice of the organization.

29. During the discussion on article 44, it had been

⁶ For resumption of the discussion, see 1026th meeting, para. 1.

⁷ See 997th meeting, para. 71.

asked which was the appropriate organ of the organization to participate in the consultations. As indicated in paragraph (4) of the commentary, that organ could only be the principal executive official of the organization, namely, its secretary-general or director-general, as the case might be. The delicate questions which would form the subject of such consultations could be more suitably handled by the quiet diplomacy of a principal executive official than in general discussion by a deliberative body of the organization.

30. It was not uncommon for an international agreement to make provision for obligatory consultations and he had given some information on the subject in paragraph (5) of the commentary.

31. Mr. TAMMES said that the Special Rapporteur had made a distinction between difficulties of a practical character and more formal disputes on the application or interpretation of the draft articles. The former category would include disputes arising from provisions of the draft in respect of which abuses were possible. Such provisions could only be interpreted in a precise manner in the light of concrete situations; it was not possible to give interpretation *in abstracto* for such elastic notions as the size of a mission, non-discrimination, professional activity and interference in internal affairs.

32. The latter category would cover the more precise legal rules embodied in the draft. Any dispute relating to the application or interpretation of those rules would be subject to the regular procedure for the settlement of disputes. The discussion had shown that article 46, on modes of termination, embodied one of those precise legal rules and he was accordingly a little surprised to see it included in the list of articles that were particularly relevant for the purposes of paragraph 1 of article 49.

33. The provisions of article 44, which was also included in that list, appeared to belong to both categories, since they could lead not only to practical difficulties, but also to disputes of a more formal nature. The discussion at the previous meeting on Mr. Kearney's proposal to insert a new paragraph 3 in article 44 pointed in that direction. He therefore suggested that the list of articles be deleted from paragraph 1, especially as it was not intended to be exhaustive.

34. In international practice, it was customary to make provision for negotiations as a first stage in the process of settling a dispute. That stage of quiet diplomacy would, in the case of practical difficulties covered by article 49, be represented by the consultations procedure that article laid down. Only if the negotiations failed would the dispute be dealt with by one of the more formal modes of settlement.

35. Mr. KEARNEY said that the Convention on the Law of Treaties signed at Vienna on 23 May 1969 would probably come into effect before any future convention on the subject of permanent missions. Thus if a dispute arose between the host State and a sending State over the application of any of the provisions of the articles of the present draft, one of the parties would probably charge the other with a material breach of those articles and that charge would bring into play

the provisions of the Vienna Convention on the Law of Treaties.

36. Unfortunately, those provisions would exclude the international organization from any formal proceedings taken under the Vienna Convention. That was an undesirable result because a dispute of that kind would be very much the concern of the organization. The Commission should in due course consider that problem carefully, so as to ensure that the draft on permanent missions was complete in regard to consultations and other procedures for the settlement of disputes.

37. Sir Humphrey WALDOCK said that there appeared to be general agreement that the Special Rapporteur and the Drafting Committee should endeavour to strengthen or improve the provisions of article 49 in the light of the discussion on article 44 at the two previous meetings.

38. It would be a mistake to single out certain articles for special mention in paragraph 1 of article 49. There was no reason, for example, why other articles, such as article 48, on the protection of premises and archives, should not also be mentioned; modern experience in diplomatic relations had shown that differences might well arise in regard to the host State's duty to protect the premises and archives of a mission. It was clearly desirable, therefore, that the consultation procedure should be made applicable to many articles other than those mentioned in the present text of paragraph 1.

39. The CHAIRMAN, speaking as a member of the Commission, said he fully supported the principle on which article 49 was based. The Drafting Committee should, however, find more felicitous wording for the phrase "on any question arising out of the application of the present articles", for some of the articles, article 10 in particular, did not concern the host State at all. Moreover, it would be better not to refer to specific articles.

40. In the first sentence of paragraph 1, the words "*doivent avoir lieu*" in the French version should be replaced by the words "*auront lieu*"; and it should be specified that the consultations would be held at the request of one of the parties concerned.

41. Mr. EUSTATHIADES said that an article on consultations should be included in the draft, but he could not approve of the wording proposed for article 49. It should merely be stated that consultations were desirable and could be held in certain circumstances. It was not enough to mention in the commentary that the consultations would not necessarily be tripartite; it should be made clear in the article itself who would be parties to them, depending on the circumstances.

42. Then, although the commentary provided some explanations concerning the settlement of disputes, it should be specified in the article what kind of practical difficulties were contemplated. On the other hand, no specific reference should be made in it to certain articles whose application might necessitate consultations.

43. It was undesirable to mention, as in paragraph (7) of the commentary, the practice prevailing in the organization among the sources of the "relevant rules" referred to in paragraph 2 of the article, since if the

practice did not include consultations, article 49 would not be applicable.

44. He also doubted whether it was wise to state in paragraph 1 that consultations "shall be held", since that made them obligatory. Consultations should only be held if they were necessary.

45. Mr. USTOR said he supported the idea contained in article 49 and on the whole was satisfied with the drafting of the article.

46. With regard to the commentary, however, less rigid language should be used in paragraph (4). It was going too far to say that the term "organization" "must be understood to refer to the principal executive official" of the organization, or that "practical considerations make it necessary that the consultations envisaged in article 49 be conducted" with that official. In most cases, a secretariat official would in fact be responsible for carrying out the consultations, but it would not be correct to lay down a rigid rule to that effect. One could well imagine cases in which a small group of representatives might be the more appropriate body to conduct the consultations.

47. Sir Humphrey WALDOCK said it was important to retain an obligatory element in article 49. The whole point of the article was to specify that there was an obligation to carry out consultations.

48. To speak of "any question arising out of the application of the present articles" was perhaps too broad. The real intention was to deal only with questions which could not be settled between the host State and the other State concerned. The difficulty mentioned by Mr. Eustathiades could probably be overcome by a change in the wording of the article.

49. Mr. NAGENDRA SINGH said that the discussion on article 49 had brought out four points. First, there appeared to be a distinct need for an article of that kind, which would provide for appropriate consultation machinery. Second, as Sir Humphrey Waldock had urged, the article should be mandatory. Third, as other speakers had also pointed out, it would be better to omit any reference to specific articles in paragraph 1. Fourth, the article should be so worded as to permit both bipartite and tripartite consultations.

50. Mr. TSURUOKA said that article 49 was very useful, if not indispensable, in particular for the settlement of disputes arising between a sending State and a host State between which there were no direct diplomatic relations; in all other cases, matters were generally settled in the respective capitals through the usual channels. The Drafting Committee should bear that consideration in mind.

51. Mr. CASTAÑEDA said he agreed with Sir Humphrey Waldock that the compulsory nature of the consultations should be maintained. With regard to the term "any question", it was in the sense of "difficulty" that it should be interpreted, not in the sense of "subject", which was much too broad. The Drafting Committee would have to find a more suitable term.

52. He agreed with other members that it would be well to specify that the consultations would be held

at the request of one of the parties concerned and that it was not necessary to mention certain specific articles whose application could necessitate consultations.

53. Mr. EL-ERIAN (Special Rapporteur) said that Mr. Tammes, supported by a majority of the Commission, had questioned the need to include in article 49 an express reference to particular articles. That reference had been included in an attempt to fill a gap in the draft caused by the absence of the remedies which were available to a receiving State in bilateral diplomacy. He had considered that article 49 should not be too restrictive and that, though drafted in a general way, it should place special emphasis on those articles under which the host State was deprived of the customary remedies.

54. With regard to the word "question" in paragraph 1, he had considered a number of other terms, such as "dispute", "difference", "situation" and "problem"; but he had thought that the words "dispute" and "difference" were more appropriate to articles concerning the settlement of disputes in the final clauses of treaties, and he had hesitated to use the word "problem" because he did not think it was really a legal term. With some reluctance, therefore, he had decided to use the word "question" in order to indicate the kind of practical situation which he expected to be the subject of consultations.

55. Mr. Eustathiades had expressed doubts as to whether a practice necessarily prevailed in organizations with respect to consultations and whether the lack of such practice might not mean that there would be no consultations. He (the Special Rapporteur) was confident that there would be consultations in any case, but the article was designed to safeguard any practice which might already exist. The replies so far received from specialized agencies seemed to indicate that no such practice existed, but he hoped to elicit more precise information in the future.

56. The Chairman had criticized the reference to the sending State, the host State and the organization as being too general and had pointed out that the draft contained some articles which did not concern the host State. He (the Special Rapporteur) had never been entirely satisfied with that wording and would endeavour, in collaboration with the Drafting Committee, to find some formula which would cover as wide a range of situations as possible.

57. He agreed with Mr. Ustor that paragraph (4) of the commentary was too rigid, particularly the use of the word "must" in the first sentence, and he would try to find a less absolute wording.

58. He noted that a majority of the Commission was in favour of making the consultations obligatory, and that the Chairman had suggested that the words "*doivent avoir lieu*" in the French text should be replaced by the words "*auront lieu*". Mr. Eustathiades had suggested that it be made clear in the article who would be parties to the consultations, depending on the circumstances. He had also questioned whether the consultations should be obligatory and had expressed a preference for a more general provision. He (the Special Rapporteur) had understood it to be the Commission's

desire that obligatory consultations should be provided for, and he had referred to a number of examples of such provisions in his commentary. In his opinion, even if such provisions were not accompanied by any definite sanctions, they were valuable in themselves inasmuch as they tended to set in motion a process of quiet diplomacy and in that way to ensure a certain "cooling-off" period when disputes arose.

59. The CHAIRMAN suggested that article 49, together with the amendment by Mr. Kearney, be referred to the Drafting Committee.

*It was so agreed.*⁸

60. The CHAIRMAN said that the Commission had concluded its examination of the draft articles on permanent missions to international organizations contained in the Special Rapporteur's fourth report (A/CN.4/218 and Add.1) and it only remained for him to congratulate Mr. El-Erian on his excellent work.

61. Mr. TABIBI, speaking also on behalf of Mr. Ruda, expressed his deep appreciation to the Special Rapporteur for his successful accomplishment of a very difficult task. He suggested that Mr. El-Erian's fourth report on relations between States and international organizations be submitted to Member States in time for their comments to be taken into consideration at the Commission's second reading of the draft articles.

62. Mr. EL-ERIAN (Special Rapporteur) expressed his appreciation of the sympathy and consideration with which the Commission had received his report.

Co-operation with other Bodies

(A/CN.4/215 and A/CN.4/217)

[Item 5 of the agenda]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

63. The Chairman invited the observer for the Inter-American Juridical Committee to address the Commission.

64. Mr. CAICEDO CASTILLA (Observer for the Inter-American Juridical Committee) said that the previous year the Inter-American Juridical Committee had been honoured by the attendance of Mr. Ruda, as observer for the International Law Commission, at a number of its meetings and had adopted the following resolution.

65. "The Inter-American Juridical Committee,

"Considering:

"That for some years the Committee has maintained co-operative relations with the International Law Commission of the United Nations,

"That the International Law Commission has carried out, and is carrying out, work of the highest

importance on the codification and progressive development of international law,

"That the International Law Commission has sent Ambassador José María Ruda to attend the meetings of the Committee this year as an observer,

"That Mr. Ruda, who is at present Chairman of the International Law Commission, is a distinguished figure in Latin America and holds the important diplomatic post of Head of the Delegation of the Argentine Republic to the United Nations in New York,

"Resolves

"1. To express its pleasure at receiving an observer from the International Law Commission;

"2. To record its gratification that this observer should be the Chairman of the Commission and an eminent Latin American jurist;

"3. To reaffirm its intention to maintain close co-operative relations with the International Law Commission;

"4. To transmit this resolution to the Secretary of the International Law Commission."

66. Mr. Ruda had given an account of the activities of the Committee in 1968 in his report (A/CN.4/215), in which he summarized the discussions on the items of substance dealt with by the Committee, namely: harmonization of the legislation of the Latin-American countries on companies, including the problem of international companies; an inter-American convention on reciprocal recognition of companies and juridical persons; a uniform law for Latin America on commercial documents; and the rules of private international law applicable to the above matters.

67. Questions of a private and commercial character had been given priority because they were directly related to the economic integration of the Latin American countries, which was one of the new goals of the Organization of American States. The Inter-American Juridical Committee had been entrusted with the study of the legal aspects of economic integration—an arduous task, but one that would be well rewarded if institutions could be established which would work for the progress of the nations of Latin America and enable them to achieve their full development.

68. Another task mentioned by Mr. Ruda was the preparation of the preliminary draft of the Committee's Statutes, which would be found annexed to his report. The draft prescribed how the Committee would function once the Protocol of Buenos Aires amending the Charter of the Organization of American States entered into force and the Committee became the principal juridical organ of the OAS. In order to enter into force, the Protocol required ratification by fourteen American States; thirteen States had already ratified it, and there appeared to be an agreement between Governments that the ratifications still lacking would be made at the end of 1969, so that the new Charter could enter into force in 1970, in order to avoid the serious problem which would arise if fourteen countries should ratify it and seven should fail to do so.

⁸ For resumption of the discussion, see 1027th meeting, para. 31.

69. During the present year, the Committee would also study the important problem of improving the inter-American system for the peaceful settlement of disputes. The Pact of Bogota⁹ laid down procedures for the pacific settlement of any disputes which might arise between the American States, including good offices and mediation, procedures for investigation, conciliation and arbitration, and recourse to the International Court of Justice. Its efficacy had, however, been reduced by the fact that there was still a minority of States which were reluctant to be bound by the Pact, so that in practice any dispute which might arise with them would not be settled—a misfortune which had, in fact, already occurred.

70. The Committee would also consider the problem of the juridical status of so-called “foreign guerillas”—persons who participated in revolutionary movements and guerilla activities in foreign countries jointly with local revolutionaries. Because such activities had given rise to differences between various Latin-American countries with respect to extradition, the rules governing political asylum, the question whether guerillas should be considered as political offenders or criminals and the question whether they should be interned in the country of asylum or returned to their country of origin, the Council of the Organization of American States had asked the Committee to make a study of those problems with a view to determining whether regulations, a convention or a protocol on the subject could be drawn up. The Government of Mexico had taken the view that the question was one which should not be subject to international regulation, but should be left to the domestic legislation of each country concerned.

71. The Committee was also concerned with the question of State responsibility, a topic on the present agenda of the Commission. In his recent report (A/CN.4/217), Mr. Ago, the Special Rapporteur, referred to the report adopted by the Committee in 1961, entitled “Contribution of the American Continent to the principles of international law that govern the responsibility of the State”. In that report, the Committee had laid down ten principles which expressed Latin American law on the subject and which stated that intervention in the internal or external affairs of a State was not admissible as a sanction for enforcing the responsibility of that State. It had then laid down the principle of complete equality between nationals and aliens, by affirming that a State is not responsible for acts or omissions relating to aliens, except in the same cases and on the same conditions as are specified in its own legislation for its own nationals.

72. The same principles also established a restrictive concept of the denial of justice, according to which no denial of justice existed when aliens had exhausted their remedies before the local courts competent in the matter. Principle VIII, for example, stated: “(b) The State has fulfilled its international duty when the judicial authority hands down its decision, even if the latter declares that the petition, action or appeal lodged by the alien is inadmissible. (c) The State has no inter-

national responsibility for a judicial settlement if that settlement is unsatisfactory for the claimant”.

73. In discussing the topic of State responsibility, he hoped that the Commission would take the Latin-American position into account as a new element which had introduced a change in the previously accepted rules of international law. In its report, the Committee had said: “This American contribution has changed the ideas previously held in international law. This American contribution has substantially altered specific situations, as may be seen by referring to any of these principles, for example, the Drago Doctrine, and asking whether the events which gave rise to it have recurred in recent years. The negative reply to this question bears witness to the effectiveness of the doctrine with particular eloquence and shows that it has become a part of the universal concert of nations”.

74. The Committee had then gone on to add: “What is happening is that international law is not immutable, it is evolving and should continue to evolve When new States appear, as they have on the American continent, different doctrines and different concepts of law must emerge, which establish themselves in the course of time by the force of their justice. The Latin-American countries, which today number more than 200 million inhabitants and have reached a high level of civilization, have pointed out norms which should be incorporated in universal law. For international law is changed or is created as a result of the law of necessity or the law of conservation; there are needs of nations which call for new norms if they are to be satisfied, or else such norms must emerge in order to maintain the principles which are essential for the functioning of a nation or an international community”.

75. In closing, he wished to express his satisfaction at the successful conclusion of the United Nations Conference on the Law of Treaties in Vienna. The adoption of the Vienna Convention on the Law of Treaties marked the culmination of an outstanding effort in the codification of international law on the part of the Commission as a whole, and of certain of its members in particular. He was proud of the fact that, among the first thirty-two signatories of the Vienna Convention, there had been sixteen Latin American States.

76. The CHAIRMAN, after thanking Mr. Caicedo Castilla for his very interesting statement and for his kind remarks about the Commission and its members, asked him to convey the Commission's thanks to the Inter-American Juridical Committee for the flattering resolution it had adopted at its last session concerning the International Law Commission. On behalf of the Commission, he expressed the hope that the co-operative relationship established between the Commission and the Inter-American Juridical Committee would endure.

77. Mr. CASTAÑEDA thanked Mr. Caicedo Castilla for his very constructive and interesting statement, which pointed out the need for further close relations between the Commission and the Inter-American Juridical Committee. The subject of consultations in particular, which the Commission had been discussing at

⁹ United Nations, *Treaty Series*, vol. 30, p. 84.

that same meeting, was one on which the Latin American countries had made an important contribution to the development of international law. The Latin American continent had also made original and important contributions to the study of the topic of State responsibility, which was also on the Commission's agenda for the present session. He hoped that co-operation between the Commission and the Committee would continue, not only in respect of those topics on which their views were identical, but also in respect of those on which they started from different viewpoints, as exemplified by the fresh efforts being made in Latin America to develop an appropriate legal system for its economic integration.

78. Mr. KEARNEY thanked Mr. Caicedo Castilla for his very interesting report and said that his country, which was a member of the Inter-American Juridical Committee although not a Latin American State, was participating actively in that Committee's work and regarded it as a great world forum for the development of international law.

79. Mr. TABIBI said that the Asian region also had a deep respect for the work of the Inter-American Juridical Committee. He himself had been particularly impressed by the solidarity of the Latin American countries with the countries of Africa and Asia when they had been among the first signatories of the Vienna Convention on the Law of Treaties.

80. Mr. USTOR and Mr. EL-ERIAN thanked Mr. Caicedo Castilla for his statement.

The meeting rose at 1.5 p.m.

1000th MEETING

Monday, 16 June 1969, at 3.15 p.m.

Chairman: Mr. Nikolai USHAKOV

Present Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Mr. Yasseen.

Fifth Seminar on International Law

1. The CHAIRMAN welcomed the participants in the fifth Seminar on International Law and invited its Director to address the Commission.

2. Mr. RATON (Director of the Seminar on International Law) said that a determined effort had been made to improve the geographical distribution of participants in the Seminar. Out of 23 participants, 13 were from developing countries, thanks to the generosity of several States and to the co-operation of UNITAR, which had financed the granting of fellowships. He wished to thank

those members of the International Law Commission who had agreed to address the participants and without whose collaboration the Seminar could not take place.

3. The CHAIRMAN thanked Mr. Raton on behalf of the Commission and congratulated him on his continued efforts to ensure the success of the Seminar ever since its inception.

Succession of States and Governments: Succession in Respect of Matters other than Treaties

(A/CN.4/216)

[Item 2 (b) of the agenda]

4. The CHAIRMAN invited Mr. Bedjaoui, the Special Rapporteur, to introduce his second report on succession of States in respect of matters other than treaties (A/CN.4/216).

5. Mr. BEDJAOUI (Special Rapporteur) said that at its previous session the Commission had decided to begin by examining the economic and financial aspects of the succession of States. He had decided to start with acquired rights, so as to clarify without delay a confused problem which he thought was of capital importance. He did not wish to dwell on the decisive importance of the political considerations which distorted the purely technical and legal aspects of the problem and which were to some extent responsible for the contradictory solutions hitherto adopted for it. Unfortunately, those considerations made the Commission's task an extremely delicate one, but the subject had to be clarified.

6. He had decided to take as his starting point the equality of States, in particular, the equality of the predecessor State and the successor State. In public international law there were no categories of States such as the ordinary State and the successor State and, if there were any differences with regard to the obligations devolving on the successor State, the following points would have to be taken into consideration: first, the fact that in a number of resolutions the General Assembly had invited States to take into account the experience and problems of the newly independent States with a view to strengthening their sovereignty and independence; secondly, the extent to which acquired rights were compatible with the permanent sovereignty of peoples and nations over their wealth and natural resources, which had been recognized in a General Assembly resolution;¹ thirdly, the question of the impact on acquired rights of the principle of the right of peoples to self-determination, which was proclaimed in the Charter—that principle, and the recognition of permanent sovereignty over natural resources, suggested a break rather than continuity in the relations between the predecessor State and the successor State, thus making the problem of acquired rights even more acute; fourthly, the extent to which the Declaration on Rights and Duties of States,² an International Law

¹ General Assembly resolution 2158 (XXI).

² See *Yearbook of the International Law Commission, 1949*, p. 287.

Commission draft according to which every people was entitled to decide freely its own political, economic and social system and therefore had an inviolable right to modify its existing economic institutions and create new ones, was compatible with the principle of acquired rights; and lastly, the fact that decolonization had given birth to States at different economic levels and had been accompanied by basic structural reforms in the decolonized countries, where the problem of acquired rights consequently arose in its acutest form.

7. In the light of those considerations, the question arose what were the obligations of the successor State and the foundations of acquired rights. As he had shown in his report, he had come to the conclusion that it was hard to find a precise legal basis for acquired rights. One approach adopted was that the transfer of obligations resulted from the transfer of sovereignty. But sovereignty was not transferred: there was no transfer, but a substitution of one sovereignty for another. A State possessed its sovereignty not from the State which preceded it, but by virtue of international law. In a succession of States, one sovereignty ended and another began. Consequently, there could be no transfer of obligations since there were two independent legal orders. Moreover, it was doubtful whether the predecessor State itself was bound to respect acquired rights. Hence it would be more equitable to remove the ambiguity and refrain from claiming the absolute inviolability of acquired rights, and, consequentially, to refrain from imposing on the successor State any more obligations than on the predecessor State which upheld those acquired rights. International law provided no sanction for the violation of acquired rights by the predecessor State. But the successor State was expected to take over the obligations of the predecessor State and be liable to international sanctions in the event of any violation. Thus, on transfer to the successor State, the obligation of the predecessor State would be transformed into an international obligation.

8. It was therefore hard to agree not only that the obligation should be transmitted, but also that it should become more onerous in the process.

9. Again, the two concepts of transfer and transformation seemed a little contradictory. If an obligation was transformed, obviously it was no longer the same as the original obligation.

10. In a second approach, an attempt was made to justify the principle of acquired rights by appealing not to the legal orders of the predecessor State and the successor State, which remained independent and alien to each other, but to a third order, namely, the international legal order. According to that approach, the obligation would be an international obligation, imposed on the successor State, and on it alone, by public international law. That concept was clearer than the first and more in keeping with the fact that the two legal orders to which the predecessor State and the successor State belonged were so different and independent that they offered no inherent reasons for transferring the obligation. The obligation could survive only by recourse to a third order, namely, the international legal order. Consequently, it was not the obligation of

the predecessor which survived, but a new international obligation which replaced it and was imposed on the successor State.

11. It must, however, be asked how that view could be reconciled with the great principles of self-determination, sovereignty over natural resources, and equality of States. Such a rule appeared not only unprovable, but absurd, useless and unjust. It was unprovable, and its real existence had not yet been established. It was absurd, since if there were an international obligation, that would mean that the successor State was compelled to accept an obligation of which the predecessor State could divest itself. Except where aliens were concerned, a right accorded by the predecessor State afforded no international protection and could even be violated by the very State which had created it. The predecessor State had only to disappear for the successor to be compelled—to an even greater extent than its predecessor—to respect rights whose creator might violate them without incurring international sanctions. The theory of acquired rights was useless, because it linked the predecessor State to the successor State in respect of rights which had come into existence before the change of sovereignty and were invokable after the change. Assuming the obligation to have an international character, the successor State would be respecting a right not because it had been respected by its predecessor, but because a higher rule of public international law, bearing no relation to the reasons for which the predecessor had respected that right, had been imposed on the successor State and on it alone. If that were the case, there would no longer be any “problem” of succession of States; the entire subject-matter of succession would be governed by that rule of public international law, which would clearly impose respect for acquired rights in all circumstances and in all fields. That would mean taking a definitive stand in favour of continuity, of automatic extension, even to the length of hiding the new sovereignty under a bushel. Reality, with all its complexities and inconsistencies, disavowed that theory only too often. Finally, the rule that respect for acquired rights was an international obligation was unjust because it could benefit only aliens; nationals could not invoke it because they were not, or at least not entirely, governed by public international law and had no access to the necessary machinery or procedure. Acceptance of such a rule would mean perpetuating the privileged treatment of aliens in relation to nationals. On that point, he referred members to paragraphs 61-71 of his report.

12. It might thus be said that acquired rights meant perpetuation and inadequacy. Classical law, in so far as it demonstrably accepted acquired rights as a principle, ought to contain the means for adapting itself to the new circumstances, and it would be a mistake to expect it to state a principle which might cripple it and lead to its breakdown.

13. The criterion of public policy invoked by its supporters in fact upset the theory of acquired rights, since if there was one sphere in which the exclusive jurisdiction of the State was sovereign it was that of the appraisal of public policy. International relations

called for a measure of good faith and the criterion of public policy, which offered a release from the obligation to respect acquired rights, was a standing temptation to States. It was therefore better discarded.

14. Practice, jurisprudence, doctrine and precedent in general were of no decisive help in studying the problem of acquired rights. Precedents abounded, but they contradicted each other. It might be useful to re-examine the precedents so as to put an end to the practice of automatically invoking them. It was debatable whether the 1919 peace treaties or those concluded after the Second World War really confirmed the principle of acquired rights. And even assuming that they did, it might be asked when the allies and their associates of 1919 or the allies of 1945 had respected those rights. Was it when they seized and liquidated all German private assets abroad or when they compelled Germany to pay compensation to those it had expropriated? The doctrine was still obscure, and one writer had stated that respect for acquired rights was a well-established principle of public international law, but that both the scope and the nature of that protection were controversial, which to say the least was going back in the second part of his statement on what he had said in the first.

15. In citing the precedents, such as the *Hungarian Optants*,³ *Chorzow Factory*⁴ and *German Settlers*⁵ cases, it was too often forgotten that the issue in the case was not so much the principle of respect for acquired rights as the interpretation of a treaty. And did those treaties which themselves recognized acquired rights thereby confirm an existing principle, or did they merely introduce an exception to the general rule of the rejection of acquired rights?

16. Again, did respect for acquired rights consist in the absolute inviolability of established rights or in the obligation to pay compensation? But inviolability and compensation could not be dissociated without upsetting the theory of acquired rights. The principle of the abolition of acquired rights was based on the exercise of a competence of which the successor State was not deprived by international law. Nationalization, for instance, was an act recognized by public international law as falling within the competence of every State, so how could a perfectly legitimate act give rise to compensation? It was therefore questionable whether the right of nationalization could be restricted according to capacity to pay. That right was one of the attributes of sovereignty, which either existed or did not exist, but did not depend on capacity to pay. The poor countries could not be imprisoned in the vicious circle of poverty, where they could not nationalize because they were poor and remained poor because they could not nationalize.

17. On the problem of compensation legal opinion was hopelessly divided because there was no basis for compensation, as was explained in paragraphs 80-86 of his report. The ethics of compensation should therefore be re-examined. But even assuming that equity

permitted and counselled the payment of compensation, the economic and financial structures of the new countries prevented such payment, as was explained in paragraphs 125-127, on structural impediments. Justification of the obligation to pay compensation had also been sought in the theory of unjustified enrichment, but, as he had shown in paragraphs 128-132 of his report, that theory was inadequate. Current practice tended to go beyond compensation and to prefer global settlements and the substitution of co-operation for compensation. By its resolution 1803 (XVII) of 14 December 1962, the General Assembly had excluded the right of compensation in cases of succession by decolonization.

18. Jurists and international law institutes and associations were paying increasing attention to the succession problems facing the newly independent countries born of decolonization. The International Law Association had devoted two sessions, at Helsinki and Buenos Aires, specifically to those problems. The General Assembly also, in a number of well-known resolutions, had requested that the problems of State succession should be settled in the light of the experience of the newly independent States. The Permanent Court of International Justice, in the *Lighthouses* case,⁶ had rightly considered that the various cases of annexation, cession, dismemberment and independence could not all be governed by a single rule.

19. In the context of decolonization, therefore, acquired rights took on a new colour. Such problems had occurred and been dealt with daily for a quarter of a century by more than half the members of the United Nations; they affected young States and the great Powers alike. As he had shown in paragraphs 106-108 of his report, acquired rights and decolonization were a contradiction. The "reversing" function of decolonization took precedence over its "renewing" function and decolonization appeared as a process involving the destruction of certain types of economic and financial relationships which had helped to maintain the bonds of subordination. It meant a break. Renewal of acquired rights would in some cases mean a renewal of colonization, and in all cases would mean the prevention of structural reforms.

20. The lessons which could be learnt from his study of economic and financial acquired rights and State succession were, first, that in the absence of any treaty provision to the contrary, the successor State possessed complete rights over its national patrimony, which consisted of State and local authorities' property, whether movable or immovable, corporeal or incorporeal, public or private, employed in public utility services or acquired for gain by the predecessor State; secondly, that the successor State automatically acquired full sovereignty over the wealth and natural resources in its territory—patrimonial and concession rights to those resources granted by the predecessor State did not constitute acquired rights which could be invoked against the successor State; thirdly, that to an as yet unspecified extent, the successor State was responsible for charges

³ See *Annual Digest of Public International Law Cases*, 1927-1928, Case No. 59.

⁴ *P.C.I.J.*, 1928, Series A, No. 17, Judgment No. 13.

⁵ *P.C.I.J.*, 1923, Series B, No. 6.

⁶ *P.C.I.J.*, 1934, Series A/B, No. 62.

on national assets; fourthly, that rights acquired under the legal order of the predecessor State were binding on the successor State only if the latter had plainly acknowledged them of its own free will or if its competence was restricted by treaty; fifthly, however, that the free determination of the successor State with regard to acquired rights in no way released it from the obligation to observe the rules of conduct that governed every State and whose violation would render it responsible.

21. Perhaps the Secretariat, which had already produced some excellent documentation on State succession, could undertake, first, a general study of the practice of States so as to clarify its meaning and scope, indicating what solution had been finally adopted in each case; then, secondly, conduct a more thorough study of the precedents; thirdly, prepare a breakdown of the precedents showing the extent and form of the maintenance or rejection of acquired rights in the various fields such as concessions, contracts, assets and liabilities; and, finally, compile a bibliography as it had done for the law of treaties, but with a brief commentary on each title.

22. Mr. BARTOŠ, reserving the right to speak again later, congratulated the Special Rapporteur on his masterly analysis; he had made a very full presentation of the subject, couched in measured and well chosen terms.

23. The question of acquired rights was not new, since it had already arisen in acute form after the First World War, but it had taken on a new dimension with decolonization.

24. It was questionable whether acquired rights were solely a problem of equity and balance of legal rights. For several decades, while the gold standard system had been in force, the view had been held that investors were entitled, even after a devaluation, to recover the value of their investments. That was the purpose of the gold clause. In the *Serbian Loans* case and the *Brazilian Loans* case, the Permanent Court of International Justice had ordered the two defendant States to pay the gold franc value of their debts, in accordance with the gold clause.⁷ Subsequent to the Court's decisions, however, a compromise had been reached whereby France had renounced a large part of its claim, because it was more concerned over the possibility of recovering something than merely securing judicial recognition of its claim. The cases of compensation mentioned by the Special Rapporteur showed that, even where the principle of compensation had been accepted on the basis of the recognition of acquired rights, the amount of compensation actually paid had been adjusted to the debtor's real capacity to pay.

25. After the Second World War it had been affirmed, both in the General Assembly of the United Nations and at a number of conferences, that the principle of acquired rights was incompatible with decolonization. The new State must be released not only from the sovereignty of the former colonial Power, but also from the economic servitudes established by that Power, which had acted in bad faith both as possessor of the

territory and as custodian of the interests of the people. The resolutions of the General Assembly, in particular resolution 1803 (XVII), showed that the recognition of acquired rights in favour of the former colonial Powers was incompatible with the emancipation of the peoples of the new States.

26. The States of the third world, which constituted the majority of the membership of the United Nations, were all opposed to acquired rights, and that, seeing how numerous those States were, had led to a change in the substance of the notion of acquired rights.

27. Of course, compromise settlements had been made in the past and would be made in the future, for the colonial Powers were not prepared purely and simply to renounce their claims; but disputes were settled empirically and actual compensation by compromise. The debtors held out for nearly nothing, whereas the creditors claimed one hundred per cent, and in the end a reasonable settlement was reached.

28. With regard to the principle, the starting point should be that all so-called acquired rights were void. In the first place, they all arose out of concessions granted by the former colonial Power acting as an imperialist Power in a country which did not belong to it. In the second place, settlers failed to allow for the fact that their investments had already been amortized and had yielded the equivalent of several times their value. Lastly, the sovereignty of a new State would be jeopardized if its right to nationalize and exploit its resources itself were called in question.

29. That led up to the very interesting argument put forward by the Special Rapporteur that the question of compensation was not automatically linked to right of the State freely to dispose of its natural resources. In fact, that new approach was not unfamiliar to the most capitalist investor States, for they had instituted a special form of insurance for exported capital to cover the risks involved in foreign investment: by means of a system of credit insurance, the State itself covered up to seventy or even ninety per cent of the investment.

30. International case-law in the matter of security of foreign investments no longer relied so definitely as before on the doctrine of acquired rights. It relied more on the general obligations of the State and on its duty to observe the rules of general international law and municipal law. The sovereignty of the country in which the investments had been made was the prime factor. Even in nationalization cases, the right of the State to expropriate property had been acknowledged; the question of compensation had been treated as secondary.

31. That was a new trend in international law which the Special Rapporteur had brought out in his report, and it was to that trend that he (Mr. Bartoš) had tried to confine his first statement.

32. Mr. TABIBI said that, at that stage, he wished to make only a preliminary comment; he would speak again when he had carefully examined the Special Rapporteur's second report, which constituted a study in depth of a vital question and was full of valuable material and information.

33. At the previous session, the Commission had

⁷ P.C.I.J., Series A, Nos. 20/21, Judgments Nos. 14 and 15.

decided that it would examine as a priority topic in 1970 the succession of States in respect of matters other than treaties. The Commission was now able to discuss an important aspect of that topic thanks to the commendable effort made by the Special Rapporteur in submitting a second report despite his heavy official commitments.

34. The Special Rapporteur's approach and conclusions were acceptable in the light of the contemporary situation among States, of the decisions and resolutions of the United Nations and of the basic principles of international law.

35. He agreed with the Special Rapporteur that the political aspects of the topic had so far overshadowed its legal aspects and he approved of the Special Rapporteur's view that the theory of acquired rights could only be studied from the starting point of the basic principles of international law. Foremost among those principles was that of the equality of States; since all States were equal in rights and in obligations, a successor State had the same sovereign rights as the predecessor State, including the sovereign right to dispose of its natural resources.

36. The second relevant principle of international law was that of self-determination, which was not a political principle but a legal principle. That principle had been recognized in the International Covenants on Human Rights⁸ and constituted a rule of *jus cogens*. At the Vienna Conference on the Law of Treaties, during the discussion of article 49 of the draft, on coercion of a State by the threat or use of force, and of the amendment to that article of which Afghanistan had been one of the sponsors, he had pointed out that political self-determination was meaningless unless supplemented by economic self-determination.⁹ It was precisely for that reason that the Group of 77 States were working for economic self-determination in UNCTAD. In the light of those facts, he supported the Special Rapporteur's rebuttal of the theory of acquired rights.

37. There were many decisions and resolutions of the United Nations which were of special relevance and which showed the approach of contemporary international society to the important issue under discussion. The Special Rapporteur had appropriately referred to the historic Declaration on permanent sovereignty over natural resources, adopted by the General Assembly in its resolution 1803 (XVII), but it was important to remember that that declaration was a complement to the famous Declaration on the granting of independence to colonial countries and peoples, contained in General Assembly resolution 1514 (XV). To those decisions must now be added the very recent Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties adopted by the United Nations Conference on the Law of Treaties and annexed to the Final Act of that Conference¹⁰ and the resolution,

relating to that same Declaration, whereby the Conference requested "the Secretary-General of the United Nations to bring the Declaration to the attention of all Member States and other States participating in the Conference, and of the principal organs of the United Nations". Those recent decisions were especially relevant because many of the acquired rights claimed by predecessor States had been procured by coercion, and hence by illegal means.

38. Reference had been made to the question of compensation. Undoubtedly, in many cases, developing countries had agreed to grant compensation, but such decisions had been taken of their own free will. There was no rule of international law which limited national sovereignty or curtailed the principle of self-determination in that respect.

39. He supported the Special Rapporteur's request for documentation, but pointed out that the Secretariat would only be required to supplement material which had already been gathered, since in 1961 a circular had been sent to States Members of the United Nations and a considerable quantity of information had been assembled by the Office of Legal Affairs, some of which existed only in mimeographed form. In addition, the Secretariat had prepared a study on the question of permanent sovereignty over natural resources,¹¹ which contained much valuable material. Apart from supplying additional information of that kind, the Secretariat could also assist by making available to members of the Commission studies prepared by learned societies, such as the International Law Association, which had discussed the question of State succession at its Conference at Buenos Aires in August 1968.

The meeting rose at 5.55 p.m.

¹¹ A/AC.97/5/Rev.2, United Nations publication, Sales No.: 62.V.6.

1001st MEETING

Tuesday, 17 June 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldo, Mr. Yasseen.

Succession of States and Governments: Succession in Respect of Matters other than Treaties

(A/CN.4/216)

[Item 2 (b) of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's

⁸ See General Assembly resolution 2200 (XXI).

⁹ See *United Nations Conference on the Law of Treaties, First Session, 1968, Official Records*, pp. 269 and 270, paras. 21-26.

¹⁰ A/CONF.39/26.

second report on succession of States in respect of matters other than treaties (A/CN.4/216).

2. Mr. EUSTATHIADES said that it was mainly the effects of territorial changes that were being examined under the heading of State succession and most of the solutions adopted in practice for the problems raised by State succession up to the Second World War had been dictated by particular concrete needs. Similarly, the problems raised by the emergence of new States had been solved in the past, and were still being solved in the post-war period, according to the conditions under which independence had been gained and other factors peculiar to each individual case, so that various difficulties were overcome by special regulation and arrangements. What had to be ascertained was whether, in the absence of such solutions, it was possible to isolate general rules and principles already in force. But what was found was trends, rather than established rules.

3. Approaching the question of acquired rights from that angle, he did not think they could be considered as a guiding principle in State succession, either from the point of view of positive law or *de lege ferenda*.

4. The Special Rapporteur had argued at length the case for the rejection of acquired rights. The arguments advanced in paragraphs 7 to 17 of the report, based on the general theory of law and on data from juridical sociology, were the most convincing, because they were more objective than the other arguments in the report. That introduction was enough to convince him, since he had already had serious doubts about the theory of acquired rights as a generally valid guiding principle. From that theoretical and sociological standpoint, he was therefore in agreement with the Special Rapporteur, subject to the question whether the idea should not be regarded as deriving from practices in a particular field, such as private interests.

5. Among the other points advanced by the Special Rapporteur, some were very convincing, others much less so. He did not think so much importance should be attached to General Assembly resolution 1803 (XVII). The principle of the right of every State to dispose of its natural resources was not necessarily linked to the status of successor State or to the effects of State succession in general. Neither that principle, nor the question of compensation, which was dealt with from a particular angle in the resolution, appeared to have any direct bearing on the case for the rejection of acquired rights. Also, it did not seem helpful to invoke the principle of peaceful coexistence in a discussion of acquired rights. Peaceful coexistence implied acceptance of the existence of different social systems some of which permitted nationalization without compensation, while others made it contingent on compensation.

6. On the other hand, four ideas put forward in support of the rejection of acquired rights as a guiding principle of the succession of States seemed fruitful and convincing.

7. First, the Special Rapporteur rightly pointed out that some earlier decisions, including decisions of international tribunals, were based on treaty arrangements

and settled particular situations. He (Mr. Eustathiades) thought that such solutions could only indirectly affect the question of the existence of a general principle of respect for acquired rights. Secondly, the concept of acquired rights was too uncertain and controversial for it to be raised to the status of a guiding principle in matters of State succession. Thirdly, it was important to remember that what occurred was a substitution and not a transfer of sovereignty. That was an important aspect of the question, which militated strongly in favour of the denial of acquired rights. Lastly, the concept of equality of States, on which the whole report was based, should not be overlooked.

8. On the latter point, however, the Special Rapporteur was perhaps too much taken up with inter-State relations, and private interests tended to be lost sight of. It would be better to place more emphasis on the concept of substitution of sovereignty, which led up to the principle of the equality of States, instead of making that the guiding principle of the report. The principle of the equality of States did not, however, get rid of the problem. Could not the new State, as a successor State, have additional obligations without that infringing the principle of equality? The Special Rapporteur's comments in paragraphs 22, 23 and 25 showed that the principle of equality was not so important as to justify its dominating the whole report.

9. The great merit of the report was that it showed that, apart from cases of succession which were the subject of a specific settlement or treaty arrangement, there was no general legal rule of respect for acquired rights.

10. However, although the concept of acquired rights was not the key which opened all the doors of State succession, that did not mean that it could not open any of them. That reservation had to be made both in the light of the practice and *de lege ferenda*. It applied particularly, perhaps, to private rights. Paragraph 2 of the report listed public property and public debts, government contracts and concession rights. That list covered the economic and financial aspects of the succession of States; it did not, however, cover private rights. In footnote 14 to paragraph 16, in connexion with the survey to be undertaken by the Secretariat, the Special Rapporteur proposed that the results of the survey should be broken down "according to the nature of the acquired rights involved: private rights, regalian or political public rights, government contracts, concessions". That list was the same as the one in paragraph 2, with the addition of private rights. In paragraphs 36 to 38, the Special Rapporteur contrasted political rights, which were bound up with the exercise of sovereignty, with economic and financial rights, which were not directly linked with the State and sovereignty and could perhaps survive. He would therefore like to know how the idea of acquired rights would be treated in the case of private rights. The consequences of the distinction made by the Special Rapporteur were not clearly brought out in his report.

11. As to the studies which the Secretariat was to be asked to undertake, he did not think an exhaustive bibliography of theoretical studies on State succession

need be prepared, but the Secretariat could draw the Commission's attention mainly to those works from which it could obtain the necessary material and documentation.

12. With regard to part II of the report, he noted that the Special Rapporteur had linked the question of equal treatment of nationals and foreigners with the discussion of acquired rights. It was, of course, sound legal practice to put a precise problem in its more general context. The Special Rapporteur did not accept that aliens could be treated more favourably than nationals. Opinions were divided on that point; but even assuming that it could be shown that equality of treatment as between nationals and aliens was already a rule of general international law, that was no answer to the question whether, as a successor, a State could or could not have increased obligations to aliens, in accordance with data from the practice. Consequently, he thought that, in discussing succession, the question of equality between nationals and aliens should not be overstressed.

13. The view expressed in paragraph 74 regarding the public policy of the successor State was open to question. Public policy was not exempt from all control by an international body, as had been shown in connexion with the application of the European Convention on Human Rights.

14. Finally, in paragraphs 36 to 38, 50, 57 to 59 and 151 to 156, the Special Rapporteur very rightly moved forward into the field of international responsibility. The ideas expressed in those paragraphs deserved to be gone into more thoroughly, especially on the basis of precedents from both the most recent and the older international practice. Starting from the rejection of the principle of acquired rights, the Special Rapporteur noted that the actions of the successor State were subject to the same rules as those of any other State. But its obligations could have repercussions on the conduct of the successor State as such. In expressing that idea in the conclusion of his report, the Special Rapporteur had no doubt intended to give it the importance which he (Mr. Eustathiades) hoped to see assigned to it in subsequent work.

15. In his outstanding study, the Special Rapporteur had perhaps laid too much emphasis on decolonization. Admittedly that phenomenon had brought out some very important new ideas, but they were not the only ones to be taken into consideration in the matter of the succession of States.

16. A specific study should be made of the problems raised by the creation of new States apart from decolonization. Moreover, the Commission could not overlook partial territorial changes, for which it might perhaps be possible to find solutions different from those that would be adopted for radical territorial changes resulting in the creation of new States.

17. Mr. KEARNEY said that, at that stage, he would only make some preliminary comments on the approach adopted, and the methods used, by the Special Rapporteur in his second report; he hoped to have an opportunity of dealing with the substance at a later meeting.

His present remarks should not be interpreted as indicating any lack of appreciation of the ability and conscientiousness shown by the Special Rapporteur in preparing his extensive and thought-provoking report, which contained considerable substantive documentation and was an undeniable achievement on the part of a man with important and absorbing official duties.

18. The report undoubtedly suffered from technical imperfections in that it adopted a rather unsystematic approach to the identification and citation of quotations, sources and authorities. In paragraph 40 for example, reference was made to a statement by Gaston Jèze, but no indication was given of the source. Again, in paragraph 42, an idea was mentioned and the report then continued: "This idea first appeared in the case of the debts of the Boer Republics of 30 November 1900", without any indication as to when and where the case had been heard, where the opinion on the case could be found or where in that opinion the idea appeared.

19. Paragraph 54 purported to describe the "Anglo-American system of the act of State", but did not cite any authority in support of the description. He (Mr. Kearney) could safely assert from his own knowledge that, as far as the United States was concerned, the description was erroneous.

20. He would not have mentioned those imperfections had there not been another and more serious weakness in the report. On a number of matters of which he had some personal knowledge, the position taken in the report did not coincide with his understanding of the legal and historical situation. One example was the decision of 23 March 1964 by the Supreme Court of the United States in the *Banco Nacional de Cuba versus Sabbatino* case, mentioned in paragraph 55, for which no citation was given and which the Special Rapporteur had interpreted as "rejecting the doctrine of act of State whenever the measure taken by the foreign State was a violation of an international convention or of the common rules generally accepted in international law".

21. In fact, a careful reading of that decision (376 U.S. 398) showed that the United States Supreme Court had held exactly the opposite doctrine. The Supreme Court had quoted an earlier case (*Underhill versus Hernandez*, 168 U.S. 250) as containing the classic United States statement of the "act of State" doctrine: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgement on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."¹ The Supreme Court had then reached the following decision: "... we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other

¹ *The American Journal of International Law*, vol. 58 (1964), p. 785.

unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.”² The Supreme Court had thus upheld the doctrine that courts in the United States should not rely upon a claim of violation of international law in order to pass judgement on the validity of the act of a foreign Government taken in respect of property within the territory of the foreign State and subject to its jurisdiction. The interpretation of the Supreme Court decision given in the report was therefore erroneous.

22. The Special Rapporteur’s misunderstanding of the United States doctrine in the matter was not vital to any major position taken by him. What was important was that the same kind of misunderstanding could be found in other parts of the report, which showed that it was necessary to check the legal decisions mentioned and the various aspects of State practice cited in order to determine whether the report accurately and completely reflected the ruling in the case mentioned, the legal situation described, or the views of the author referred to.

23. A striking example was the statement in paragraph 19 that “the acquired rights of individuals, even in constitutional texts, will be called in question”, to which there was a footnote which purported to describe the position in United States constitutional law. The footnote said: “Acquired rights have often had to be suppressed without compensation in cases where this was justified in the public interest.” In fact, it was the clear position in United States constitutional law, and in particular under the Fifth Amendment to the United States Constitution, that the State had the right to expropriate property for a public purpose, but had the duty to make “prompt, adequate and effective compensation” for any property thus expropriated.

24. The footnote supported that erroneous description with a reference to an article on “Problems of International Law in the Mexican Constitution”, which could hardly be relevant to a discussion of United States constitutional law, and then went on to refer to problems raised by the abolition of “private telegraphic enterprises . . . and pool halls” adding that “the best-known example is that of the abolition of the manufacture and sale of alcoholic beverages during the famous period of prohibition”. In fact, neither private telegraphic enterprises nor pool halls had ever been abolished in the United States, the country to which the passage would seem to refer, to judge from the reference to prohibition. Incidentally, prohibition in the United States had resulted from the Eighteenth Amendment to the Constitution which, of course, had to be given equal weight with the Fifth Amendment.

25. Examples of that kind showed that the report would require careful checking and analysis, for which the absence of adequate source references was a substantial handicap. That was what had led him to confine his present statement to strictly preliminary remarks.

26. In the case of certain substantive passages of the

report for which the necessary materials were readily available, he had checked the accuracy and completeness of the statements made. For instance, in paragraph 97, certain statements made in connexion with the British annexation of Upper Burma were mentioned in support of the contention, in paragraph 91, that the “imperial Powers of the nineteenth century which, in their colonial policies, vigorously denied the existence of any rule affording protection to acquired rights . . . have felt able, in connexion with the reverse modern phenomenon of decolonization, to demand the application of the same ‘traditional rules’ . . .”. The information about the annexation of Burma had in fact been taken from a book on State succession, but the passage quoted in the Special Rapporteur’s second report was cited out of context and was, moreover, taken from a letter by one colonial official to another—which could scarcely be said to establish what the Government of the United Kingdom regarded as constituting international law. Moreover, reference to the correspondence quoted in the book showed that a higher ranking colonial official had specifically referred to the relevant rule of international law in the following terms: “I find that international law authorities say pretty broadly and clearly: A power which succeeds another power in sovereignty over a State should fulfil the fiscal obligations and discharge the public debts of the State contracted previously”.³

27. The next passage in the book clearly showed that the position taken by the British authorities in Burma had not been accepted by the United Kingdom Government as correct, since it read: “That the Colonial Office did not attach great importance to this policy as affording a precedent is clear from a reference made by it to the Law Officers in 1900. The department admitted that Upper Burma was ‘an uncivilized country, and it was possible that in dealing with such a State rules more favourable to the succeeding Government could be applied than to the case where two civilized States have been incorporated in Her Majesty’s Dominions.’ The Law Officers did not comment on this distinction, but reported that a successor State takes over such legal liabilities as have been incurred by the previously existing Government”.⁴

28. Since, moreover, that position had been taken by the United Kingdom Government in 1900, it could hardly be said, as was argued in paragraph 91, to have been influenced by any process of decolonization.

29. There was a similar misunderstanding in the passage in paragraph 97, where the Special Rapporteur stated that “Great Britain refused to recognize acquired rights ‘because of the absolute character of the [Burmese] monarchy, and the risks ordinarily incidental to a contract with a person irresponsible in law’”. The passage in the book from which that phrase was taken showed that the reference was to the rejection by the United Kingdom of contract claims against the King of Burma in his personal capacity. “Likewise, all claims in respect of contracts made with the King in his

² *Ibid.*, p. 792.

³ D. P. O’Connell, *State Succession in Municipal Law and International Law*, 1967, vol. I: *Internal Relations*, p. 359.

⁴ *Op. cit.*, p. 360.

personal capacity were rejected because of the absolute character of the monarchy, and the risks ordinarily incidental to a contract with a person irresponsible in law.”⁵ It was clear that the rejection of such personal claims against the former sovereign did not in any way amount to a refusal by the Government of the United Kingdom to recognize acquired rights. The statement made in the report thus failed to reflect accurately what was admittedly a rather complicated legal situation.

30. He himself was not interested in past actions by the United Kingdom in Burma, or in discussing them. He was, however, concerned that when a report urged the Commission to take certain positions partly on the strength of precedents allegedly established by those actions, the reporting of them should be complete and accurate.

31. In his argument, the Special Rapporteur had relied heavily on General Assembly resolution 1803 (XVII), on permanent sovereignty over natural resources. For example, in paragraph 135, he had said that in one of the preambular paragraphs of that resolution, “the right to compensation in the case of succession by decolonization was excluded”, and had added: “The United Nations thus showed its awareness of the special nature of succession in the case of newly independent States and indicated the course to be followed in the work of codification and progressive development of international law, with a view to arriving at a positive law of non-compensation”. Again, in paragraph 110, he had described that resolution as “the charter of combat of the poor against the rich”; that was certainly pejorative language to use in what purported to be a balanced and non-partisan report on the international law of State succession.

32. The Special Rapporteur referred to operative paragraph 4 of General Assembly resolution 1803 (XVII), which provided that in cases of nationalization, expropriation or requisitioning, “the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law”. The Special Rapporteur questioned whether the new State was bound to pay such compensation and in paragraph 111 said: “It is significant that in this well-known resolution one of the preambular paragraphs . . . makes a reservation in the case of successor States ‘in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule’”. Yet the fifth paragraph of the preamble to the resolution read: “*Considering* that nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule.”. Contrary to what the report asserted, that clear and unambiguous language obviously did not make any reservation in the case of successor States. And the history of the paragraph showed that the Special Rapporteur’s interpretation was patently

erroneous, since when the text had been discussed in the Second Committee, the Algerian delegation had proposed a paragraph reading: “*Considering* that the obligations of international law cannot apply to alleged rights acquired before the accession to full national sovereignty of formerly colonized countries and that, consequently, such alleged acquired rights must be subject to review as between equally sovereign States.”.⁶ If that proposal had been accepted, there would have been some justification for the conclusion reached by the Special Rapporteur, but it had in fact been withdrawn and the fifth paragraph of the preamble had been adopted as it now stood. The lack of any reference in the report to a series of events which had a direct bearing on that paragraph must be regarded as a serious defect.

33. He therefore questioned whether the report could be viewed as an impartial analysis of existing international law regarding State succession, or as containing suggestions presented in as neutral a fashion as possible for the resolution of whatever conflicts might exist in that law. On the contrary, the report contained a number of rhetorical statements which were far from impartial. For example, paragraph 9 contained the sentence: “However, the jurist has perhaps better things to do than to engage in a rearguard action that leaves him supporting acquired rights when practice has definitively condemned them”. In paragraph 10, the Special Rapporteur said: “Sociology demolishes the concept of acquired rights, for it teaches us that no social group and no State can indefinitely retain its privileges, which are constantly called in question”. In paragraph 15, he said: “Today, the elements of the problem seem to have been reversed and if there is anything which threatens to ‘open the way to flagrant iniquities’, it is surely the maintenance of acquired rights, or even of unconscionable privileges which jeopardize the general interest of an entire community”. In paragraph 16, he said: “As a second, supplementary approach, it may be questioned whether the recognition of acquired rights, in a treaty expresses a customary rule of international law or constitutes a departure from a general principle of non-recognition of those rights”. In paragraph 17 he said: “Treaties, for example, are nothing more than the outcome of compromises dictated by considerations which distort all the general, or allegedly general, principles of succession”. Those examples were sufficient to establish that the report before the Commission was not an impartial analysis of a series of legal problems, but an advocate’s brief intended to present arguments in support of a particular point of view and to refute the arguments in support of any other point of view.

34. Furthermore, the position taken by the Special Rapporteur was not based on any legal theory, but on a particular economic and political theory, as was strikingly revealed by the following sentence in paragraph 153 of his conclusion: “This position would, in

⁵ *Op. cit.*, pp. 358 and 359.

⁶ See *Official Records of the General Assembly, Seventeenth Session, Annexes*, vol. I, agenda items 12, 34, 35, 36, 37, 39 and 84, document A/5344 and Add.1, paras. 75 and 80.

any case, imprison the newly independent countries in the vicious circle of poverty: they cannot nationalize because they are poor, and they remain poor because they cannot nationalize". That statement, he submitted, was pure Marxist mythology, since there was no evidence whatsoever that States remained poor because they could not nationalize. On the contrary, the available evidence tended to support the view that States which nationalized remained poor much longer than States which did not. It would be interesting to know whether the Special Rapporteur could produce any statistical evidence in support of his statement.

35. He did not wish to criticize the method chosen by the Special Rapporteur to deal with such a highly controversial subject as State succession, which, as the latter had said, was as much political in character as legal. Nevertheless, he disagreed profoundly with a number of the Special Rapporteur's conclusions and, in particular, he considered that the legal precedents and principles cited by him were far from unassailable. He was sure the Special Rapporteur realized that disagreement was inevitable concerning the interpretation of judicial decisions, the meaning of historical events and the practice of States. The best plan, therefore, might be to agree to disagree about the past and to concentrate on agreeing for the future. In doing so, it might be wise to abandon the search for categorical statements about acquired rights and to revert to the original plan of dealing with different aspects of succession, such as public debts and the like, which were of great practical importance for developing States and former colonies.

36. The CHAIRMAN said he would be grateful if members of the Commission would kindly not refer to the personal opinions of the Special Rapporteur when discussing his report.

37. Mr. CASTRÉN congratulated the Special Rapporteur on his remarkable and very interesting report on succession of States in respect of matters other than treaties, and on the very clear explanations he had given of it at the previous meeting. He agreed with him that the problem of acquired rights lay at the root of the economic and financial problems raised by the succession of States and that it should therefore be examined thoroughly before studying special aspects.

38. However, the Special Rapporteur had arrived at a negative result: he went so far as to reject the very idea of acquired rights and, in the event of their termination, granted the owners no right to compensation by the successor State, particularly in the case of decolonization. Some of his arguments carried weight, but it was difficult to subscribe to his conclusions without reservation. He might be reproached for being too categorical and for generally considering only the interests of the successor State, which, according to him, was not required to respect the acquired rights even of third States and their nationals, even in cases where such rights had been lawfully granted by the former régime without any intention of harming its successor.

39. It might also be held against the Special Rapporteur that he had devoted nearly the whole of his second report to decolonization; that was certainly a very impor-

tant matter, as the Commission had unanimously recognized at its previous session, but the Commission had also stressed the need to study all cases of succession of States, including transfers of part of a territory and the constitution or dissolution of unions of States, so that it could derive from them general rules which would also be applicable *mutatis mutandis* to the States which had become independent after the Second World War. There were great differences between those States, both in economic resources and in the way in which they had gained independence. Moreover, to give only one example, if concession rights had been granted by the predecessor State only a short time before independence and the heavy investments they had led to had not yet been amortized, it was neither just nor equitable that such rights should be ceded to the successor State without any compensation. It was true that the idea of acquired rights was not very precise, that such rights were not absolute, and that it was consequently permissible to restrict or even to abrogate them under certain conditions. But it was impossible to accept their pure and simple termination.

40. At the present time, the expression "acquired rights" was generally understood to mean rights deriving from human activities or from certain legal titles such as inheritance, concessions, patents, monopolies and various other privileges which belonged to both private and public law. The protection of acquired rights under international law was particularly important in cases of territorial change, which raised the problem of the treatment of aliens and their legal status. According to a very widely held opinion, a successor State must, like its predecessor and all other States, respect a certain minimum of aliens' rights, which included various acquired rights such as the right to private property. Some lawyers, like the Special Rapporteur, had adopted an entirely negative attitude to the whole idea of acquired rights, alleging that it was not a general principle applicable to the various branches of the law. They claimed that the successor State had the right to abrogate, even without compensation, acquired rights which had originated or been granted in its territory at a time when that territory was under the sovereignty of the predecessor State. Against that opinion it had been argued that the notion of acquired rights was often accepted in international practice, in particular in treaties, in the judgements of national and international courts and in arbitral awards, so it appeared that international law had need of that notion in spite of its lack of precision.

41. Most writers considered that acquired rights, in particular the rights of aliens, could not be terminated unless there were special grounds, one of the principal duties of the State and the government being to protect the right to private property and other private rights of a similar nature. Territorial change was a political fact which should not affect private patrimonial rights of a non-political character; furthermore, States should also respect rights based on the legal order of a third State.

42. Among the special grounds which could properly be invoked by the successor State for modifying or abrogating acquired rights, legal theory, which was

divided on the subject, recognized the fact that a right had been granted in order to injure the successor State, the fact that rights granted by the predecessor State were not in keeping with the new public and social order and the legal concepts deriving from them and, lastly, the general interest. Those three exceptions, the effect of which was very far-reaching, allowed the successor State wide freedom of action.

43. With regard to concessions, some considered that they should be safeguarded, while others thought that the successor State could terminate them on payment of compensation. It seemed to him that the three special grounds he had mentioned should also apply in that case; compensation should depend on the circumstances, the amount should be equitable and payment prompt, in convertible, not depreciated, currency.

44. Although the principle of acquired rights had often been violated, general practice was still inclined to accept it, subject to the conditions he had mentioned. A favourable trend in that direction had appeared in the measures taken for the organization of peace after the First World War and in some of those taken after the Second World War. The States which had become independent at that time had generally recognized the principle of respect for acquired rights, at least in their relations with the predecessor State, and the Universal Declaration of Human Rights, in article 17, paragraph 2, prohibited arbitrary deprivation of private property. The Permanent Court of International Justice had also pronounced in that sense when it had been asked to state its attitude to acquired rights in general.

45. He could not agree that practice had definitively condemned acquired rights, as the Special Rapporteur stated in paragraph 9 of his report, for those rights were still respected in a number of countries. The Special Rapporteur appeared to have overemphasized the sovereignty of the successor State and to have drawn conclusions from it that went too far. He (Mr. Castrén) recognized that there was not a transfer but a substitution of sovereignty (paragraph 29), but the successor State, which was bound by the rules of general international law protecting the acquired rights of aliens, nevertheless did not possess the right to regulate conditions in its territory as it saw fit. That restriction on the sovereignty of the successor State did not conflict with the principle of equality of States frequently invoked by the Special Rapporteur, since other States were also required to respect the rights of aliens. Nor was it merely a question of municipal law, as the Special Rapporteur affirmed in paragraphs 33 and 45 of his report. He (Mr. Castrén) would revert to the question of succession to the public debts of the predecessor State and to the principle of unjustified enrichment as a basis for that succession, which the Special Rapporteur appeared to have condemned in paragraphs 39 to 43, 128 and 133 of his report. He subscribed to the principles stated in paragraph 46 concerning administrative contracts, the protection envisaged being adequate.

46. Several times in his report, for instance at the end of paragraph 50, the Special Rapporteur seemed to have forgotten the independent rules of general inter-

national law when trying to prove that the successor State was not bound by the obligations of the predecessor State to aliens, because it had had no part in creating those obligations. With regard to diplomatic protection, he (Mr. Castrén) did not accept the argument put forward by the Special Rapporteur in paragraphs 57 and 59 of his report, where he maintained that a State forced to accord better treatment to aliens than it accorded to its own nationals would ultimately be subjected to the capitulations régime. Nor could he agree that the régime known as an "international minimum standard" was comparable to the capitulations régime, which was obsolete and incompatible with sovereignty, or that it introduced the municipal law of the foreign country into the territory of the successor State, as the Special Rapporteur maintained in paragraph 63. As the name implied, it was an international régime and the only objection that could be made to it was that its limits were not precisely defined.

47. He thought the Special Rapporteur exaggerated the importance of political considerations when he examined, in paragraphs 76 to 79, the reasons for which States had hitherto respected acquired rights in their mutual relations. It was a legitimate assumption that, when their vital interests were not at stake, States tried to observe the rules of international law. The Special Rapporteur criticized the Powers which had practised the *tabula rasa* principle in regard to acquired rights, but the opinions he himself advanced were often on the same lines. To say, as he did in paragraph 108 of his report, that decolonization and the renewal of acquired rights were antinomical, was an exaggeration and a generalization that was difficult to accept. As to paragraphs 110 and 111, where the question of acquired rights was examined in the light of General Assembly resolution 1803 (XVII), he (Mr. Castrén) referred members of the Commission to what Mr. Tammes had said on the subject at the Commission's last session.⁷

48. With regard to paragraph 117, if, as the Special Rapporteur proposed, newly independent States were to be allowed to repudiate those undertakings which in the long run appeared to them likely to hinder their economic development, it must be asked who was to judge their claims and how the interests of the other party to the treaty were to be protected. In paragraph 120, the Special Rapporteur appeared to reject even moral considerations and equity as justification for the payment of compensation. In view of the diversity of cases, it would be better to fix the amount of compensation according to the circumstances. That comment also applied to paragraphs 125 to 127 of the report. As to recourse to global settlements and the substitution of co-operation for compensation, there was no reason why those methods should not be adopted, provided that the general rule was applied in the event of disagreement.

49. Lastly, he noted with satisfaction that the Special Rapporteur had tempered his radical opinions to some extent by saying, in paragraph 156, that the competence

⁷ See *Yearbook of the International Law Commission, 1968*, vol. I, p. 109, paras. 53 and 56.

of the successor State was not unlimited and that its actions should always be consistent with the rules of conduct that governed any State.

The meeting rose at 1 p.m.

1002nd MEETING

Wednesday, 18 June 1969, at 12.10 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States and Governments: Succession in Respect of Matters other than Treaties

(A/CN.4/216/Rev.1)

[Item 2 (b) of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's second report on succession of States in respect of matters other than treaties (A/CN.4/216/Rev.1).

2. Mr. USTOR said that, as a preliminary comment, he would say that the Special Rapporteur's report was a balanced piece of work which gave a full picture of the various tendencies in the practice and theory of State succession. The Special Rapporteur could not be blamed if he had shown an inclination towards one school of thought rather than another; the Commission would have to take a stand on the report and ultimately choose the course it intended to follow.

3. One criticism he had to make was that the Special Rapporteur had not relied sufficiently on the experience of the Soviet Union and the other socialist States, for in general he seemed rather reluctant to draw the only valid conclusions offered by theory and practice. For example, the first sentence of paragraph 8 read: "It will probably never be possible to say who is right in this centuries-old debate—the supporters or the adversaries of acquired rights". But in his opinion—and he assumed that it was also the Special Rapporteur's opinion—both history and law had already settled that argument, and not in favour of the supporters of the concept of acquired rights, a concept which, in the greater part of the world—the socialist States, Latin America and most of Africa and Asia—could hardly be called "venerable", as the Special Rapporteur termed it in paragraph 11.

4. His impression on reading the report was that what it dealt with was not so much the topic of State succe-

sion as State responsibility, particularly that part of State responsibility which related to the treatment of aliens in regard to their property rights. The Commission proposed to deal first only with economic and financial acquired rights, and those were clearly rights of aliens, not of nationals; nationals obviously did not come under international law, whereas aliens might have their residence or place of business either in the territory of the State or abroad. In practice, that might raise extremely difficult and complex questions regarding the nationality of natural or legal persons and the related problems of diplomatic protection. The problem of nationality was already difficult enough in the case of one State, but it was even more difficult if the successor State changed its nationality laws.

5. One point he would like to make was that the French equivalent of the term "acquired rights" was "*droits acquis*", which was usually translated as "vested rights" or "vested interests". The Concise Oxford Dictionary defined "vested rights" as rights "possession of which is determinately fixed in a person and is subject to no contingency". But the question then arose whether in any State there could be rights, particularly economic or financial rights, which were subject to no contingency.

6. Even in the days when all the States of the world had had more or less the same economic and financial system, such rights had not existed, either in theory or in practice. Rights of the individual had their source in domestic laws which were changeable and, indeed, did change from time to time. They might also have their source in a constitution, but even the most rigid constitutions were subject to peaceful or revolutionary change, as also were the rights derived from them. Thus, the expression "acquired rights" or "vested rights" was, if it meant a kind of unchangeable, untouchable and unalterable right, a contradiction in terms; the notion of a right, at least in connexion with property, was always relative and subject to changes, not only in the legal system of the State in question, but also in its economic system. In the socialist States, for instance, there had been a complete transformation of the economic system; the means of production were now almost exclusively under State ownership, and individual property rights did not extend beyond certain limits.

7. His view should not be interpreted as a general denial of values of a universal character, such as the human rights of all human beings, in every kind of society, to freedom, dignity and equality. He merely meant that in the sphere of property rights the world was not uniform, and that there were States and societies which believed that a limitation of those rights was conducive to the general welfare of the population and to the development of human society. That raised the question of the property rights of aliens in a State where there had been a change in the laws of property or in the laws governing the economic system as a whole, with or without the phenomenon of State succession, which seemed to revive the old, and for him now obsolete, debate between the advocates of "equal treatment" and the "minimum standard".

8. As a young man, he had been greatly impressed by the Hungarian Optants case, which had been a *cause*

célèbre for over a decade. After the First World War, when parts of Hungary had been ceded to Czechoslovakia, Romania and Yugoslavia, many Hungarians had found that their property was situated in the successor States. Article 250 of the Treaty of Trianon had guaranteed that Hungarian properties would not be subject to retention or liquidation under other provisions of the treaty. The successor States, however, had introduced extensive measures of agrarian reform, in the course of which properties of Hungarians had been expropriated. The amount of the compensation provided for in the laws of the successor States had not been considered adequate in all cases, especially in Romania, where the currency had been devalued. The case had been brought before the League of Nations and had given rise to an immense legal literature. Hungary had based its complaints both on the provision of the Treaty of Trianon and on the principle of the "minimum standard" in the treatment of aliens.

9. He would refer only to an article published in 1928 by Sir John Fischer Williams,¹ who, for the Romanian side, had argued that the maximum that could be claimed for an alien was equality with nationals, and that that did not mean that a State was obliged to accord such treatment to aliens unless the obligation had been embodied in a treaty. In support of his argument, Sir John had cited the following passage from the judgement in a Mexican case: "The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty . . .". "This is not the language", Sir John had then gone on to say, "in which all sober men in civilized communities would at the present time describe any and every measure of expropriation which, though not accompanied by full compensation, was undertaken deliberately by a civilized government and applied impartially to aliens and nationals in pursuit of a policy which that government, rightly or wrongly, acting within the sphere of its own independent authority, conceives to be in the interests of the peace, order and good government of the territory and people committed to its charge".² In his (Mr. Ustor's) opinion, that view was still valid today.

10. When the Hungarian Optants Case had been settled in Paris in 1930, arrangements had been made for setting up funds for compensating landowners whose property had been expropriated. The funds had been made up from various sources. The successor States were obliged to pay into the funds the amount of compensation provided for under their own laws, and under that arrangement the amount to be paid by Romania had been very small. The Great Powers which had financial claims on Hungary had renounced those claims and permitted Hungary to contribute the sums in question to the funds. With the advent of the economic crisis of 1931, however, Hungary had been unable to pay either its debts or its own contribution to the funds, which then became unable to fulfil the

original expectations. That case went to show that equal treatment of nationals and aliens was the maximum which could be asked of any State which nationalized property or carried out agrarian reforms.

11. After the Second World War, he had personally participated in negotiations conducted by Hungary for compensation for property which had been nationalized. In contemporary legal literature, it was often held that the practice of the socialist States of eastern Europe which had negotiated such compensation agreements militated in favour of the idea that there was an international duty to pay compensation, even in cases of general nationalization as part of a programme of social reforms. In his opinion, however, that practice was not enough to establish international custom within the meaning of article 38, paragraph 1. b. of the Statute of the International Court of Justice. The compensation agreements entered into by the socialist States in the 1950s had been concluded not in accordance with what they considered to be international law, but for reasons of political and economic expediency. Those States had considered it desirable to reach a settlement in the interests of peaceful coexistence and international trade relations.

12. The problem of the treatment of aliens in the event of State succession could easily be solved if the Commission accepted the principle that every State had full freedom to change its economic system, even if that involved a change in its property laws. He agreed with the Special Rapporteur that a successor State could not have any less rights than its predecessor.

13. Mr. ROSENNE said that the debate might be more useful if the Special Rapporteur could obtain more precise information on those points on which he wished to have the Commission's views. He suggested, therefore, that the Special Rapporteur be asked to prepare a questionnaire for that purpose.

14. The CHAIRMAN asked the Special Rapporteur whether he would be able to prepare the questionnaire for circulation at the meeting on Friday, 20 June.

15. Mr. BEDJAOUI (Special Rapporteur) said he would do so.

The meeting rose at 1 p.m.

1003rd MEETING

Thursday, 19 June 1969, at 10.5 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

¹ *British Year Book of International Law*, 1928 — International law and the property of aliens.

² *Op. cit.*, p. 29.

**Succession of States and Governments:
Succession in Respect of Matters other than Treaties**

(A/CN.4/216/Rev.1)

[Item 2 (b) of the agenda]
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of item 2 (b) of the agenda and asked the Special Rapporteur to present the questionnaire he had drawn up at the Commission's request, which read:

1. What legal basis should acquired rights be given?
Is there a "transfer" of obligations by "transfer" of sovereignty?
Does an independent international obligation exist?
Is there a more satisfactory basis than the two indicated above?
Should respect for acquired rights be presumed?
2. How can the maintenance of acquired rights be reconciled with certain principles of international law or with the General Assembly resolutions concerning the right of peoples to self-determination, the inalienable and permanent right of peoples freely to dispose of their natural wealth and resources, the right of peoples freely to adopt the economic system they desire, etc.?
3. How can the denial of acquired rights be reconciled with human rights, and with the duties (where such exist) of the State towards aliens (in so far as there is no doubt that this question belongs to the topic of State succession)?
4. Will any conclusions that the Commission may reach in this debate concern the problem of acquired rights in general, or will they not have to be confined to economic and financial acquired rights, or, even more narrowly, to private economic and financial rights?
5. How, and according to what criteria, are the boundaries to be drawn between the subject under discussion and the international responsibility of States?
6. More generally speaking, is the theory of acquired rights useful for showing the complexity of the problems of State succession, or would it not be preferable, in view of its uncertainties and imprecision, to abandon it and to seek rules in general international law (including rules of responsibility) to determine the behaviour of the successor State, like that of any other State, and to preserve any former situations which deserve to be maintained?
7. Does the Commission wish to instruct the Special Rapporteur to submit, for its next session, and in the light of the present debate, a draft of articles on acquired rights, or would it prefer a draft on a more particular aspect of succession in economic and financial matters?
8. Does the Commission wish the Secretariat to undertake the various tasks and inquiries which the Special Rapporteur has suggested?

2. Mr. BEDJAOUI (Special Rapporteur) said that the question of the legal basis to be given to acquired rights, which he had put at the beginning of his questionnaire, was not purely academic. It was necessary to know the justification of the obligation on the successor State in order to be able to define its nature, scope and limits satisfactorily and to determine possible exceptions. He himself had failed to find any such basis, either in a transfer of obligations, which would mean that the

successor derived its sovereignty from the predecessor State—a theory he rejected—or in the notion of an independent international obligation. Nor did he think that respect for acquired rights could be presumed. The heart of the matter was question 5 of the questionnaire, which was linked to question 6; for it was doubtful whether the concept of acquired rights should be retained if it was too imprecise to be of any use.

3. Mr. TESLENKO (Deputy Secretary to the Commission) said that in question 8 the Special Rapporteur asked whether the Commission wished the Secretariat to undertake the various tasks and inquiries he had suggested. It might therefore be useful for the Secretariat to explain at once what it understood those tasks to be. They would comprise a survey, a bibliography and an analysis of the jurisprudence of international tribunals.

4. The survey would be carried out by means of a questionnaire drawn up by the Special Rapporteur, designed to elucidate the actual practice of States on a number of specific points. It would be sent by the Secretary-General to the Governments of States Members of the United Nations. The Secretariat would assemble the replies received and publish them in an official document.

5. The bibliography would cover all aspects of succession of States and governments. Each title in the bibliography would be accompanied by a brief summary of the contents of the work.

6. The analysis of the jurisprudence of international tribunals would centre on the question: "are the courts' decisions on acquired rights based on general international law or on treaties binding the parties in each particular case?"

7. All that work would inevitably cost money, and in accordance with rule 154 of the rules of procedure of the General Assembly, the Secretariat would submit an estimate of expenditure to the Commission before it took a decision on the matter.

8. The CHAIRMAN said that if the work could be done by the Codification Division without additional expenditure, the decision could be taken at once. If, on the other hand, additional expenditure was involved, the Commission could not take a decision until the amount had been estimated.

9. Mr. ROSENNE said he was obliged to the Special Rapporteur for his quick response to the suggestion he had made at the previous meeting. The question of expenditure was not, however, the only question which arose in regard to the work to be undertaken by the Secretariat; much more fundamental issues were involved and he would deal with them at a later meeting when speaking on the substance.

10. Mr. YASSEEN said that the Commission should take a decision on the content and scope of the information it wished the Secretariat to obtain.

11. Mr. TESLENKO (Deputy Secretary to the Commission) said that the Secretariat had no wish to pre-judge the Commission's decision. His remarks had been prompted by two considerations: first, the Secretariat

would have to prepare an estimate of the expenditure in accordance with rule 154 of the General Assembly's rules of procedure; and secondly, he had wished to explain how he interpreted the Special Rapporteur's request, so that the Commission could say exactly what it wanted the Secretariat to do.

12. Mr. TAMMES said he would deal with the questionnaire later; for the moment he wished to thank the Special Rapporteur and comment on his interesting second report, which provided the Commission with a large amount of material set out in an appropriate form for consideration and discussion. The report contained a good many innovating ideas and he personally had no objection to the Special Rapporteur's presenting his material in the form of a strong plea in favour of the view he held. The opposite view to the Special Rapporteur's was so deeply rooted in history and in established legal thinking that it did not seem out of place to attempt to find a solution to the problems involved by argument and counter-argument.

13. The discussion so far had brought out two important points. The first was that the doctrine of acquired rights was neither sufficiently precise nor sufficiently general to be suitable for acceptance as the hard core of an international legal rule. The second was that, whatever rules might be finally adopted on the matter, the situation of State succession after decolonization was *sui generis*. Because of the immense difference in economic development usually found between the former colonial Power and the newly independent State, the case of decolonization could not be compared with other cases of State succession, such as integration or merger. The Special Rapporteur had drawn attention to that distinction in an interesting passage in paragraph 89 of his report.

14. On the central issue discussed in the report, he thought that, with regard to economic and financial rights, general international law recognized two principles which were not altogether in harmony with each other. The first was that a State could do what it pleased with the property of its own nationals. It was only recently that international law had moderated to some extent its complete lack of interest in the acquired rights of nationals by recognizing, in article 17 of the Universal Declaration of Human Rights, that "Everyone has the right to own property" and that "No one shall be arbitrarily deprived of his property". In that new development, no distinction was made between aliens and nationals. There was, however, no remedy as effective as the traditional channel of diplomatic protection.

15. The second principle, in which international law was highly interested, was the protection of aliens against the State which had power over their private economic rights. International law furnished the means of protecting such private economic rights to the State with which the rights were identified, although in fact they might represent international, or rather multinational, capital. A striking description of the position in that respect was given in a passage written in 1950, quoted by the Special Rapporteur in paragraph 58 of his report. The present position, however, was that no one would maintain that alien property was sacred and

that it was sheltered by international law from any measures that might be taken in the public interest by the State concerned, though compensation must, of course, be paid for expropriation. At the same time, the antithesis between nationals and aliens with regard to acquired rights was no longer absolute. Nor were acquired rights in themselves absolute.

16. It would be running counter to that sound development, and would be contrary to the interests of the new States in particular, if the antithesis between nationals and aliens were maintained in its full rigidity, since the paradoxical result would be that international law disclaimed all interest in acquired rights in one instance, but concerned itself with them in another, merely because sovereignty over a piece of territory had changed hands. As a recent writer on State succession had pointed out, "There is no reason why a successor State should be in any less strong a position in this respect than any other State, or why acquired rights should be invested after a change of sovereignty with a sanctity and permanence greater than they had before".¹

17. Decolonization gave rise to problems of acquired rights on a very large scale. In that particular kind of State succession, an enormous volume of rights became alien overnight, so that the question of the protection of acquired rights was particularly acute.

18. The problem could hardly be approached from the standpoint that the newly independent State had been enriched because it now had in its power all the wealth to which aliens had acquired rights. In other United Nations bodies an attempt was being made to lay down principles of co-operation, on the basis that all peoples were entitled to an equitable share in economic and social progress in accordance with Article 55 of the Charter. The idea was even being put forward of a charter of development which would constitute a solemn preamble for the strategy of development. From that point of view, the enrichment of new States should be welcomed rather than discouraged. In paragraph 109 of his report, the Special Rapporteur had included some comments on that point which took into account important trends of thought in the Economic and Social Council and its subsidiary bodies.

19. The concept of equality had been referred to during the discussion and it was interesting to note that the International Court of Justice, in its Judgement of 20 February 1969 in the *North Sea Continental Shelf* cases, had dealt with the relation between equity and equality. Those cases had been presented as a matter of geography and, in broad outline, the Court had been called upon to decide what principles should be observed by the States concerned in their further negotiations, and in future law-making. The Court had held that equity did not require the reshaping of geography: there was no room in nature for mathematical equality, but there could be room for equitable correction of natural inequality. The following passage from the Judgement was worth quoting:

"Equity does not necessarily imply equality. There

¹ D. P. O'Connell, *State Succession in Municipal Law and International Law*, 1967, vol. I, p. 265.

can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as those that equity could remedy . . . It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result".²

That passage was very pertinent to the situation under discussion, which, though historical rather than geographical, like the situation in the *North Sea Continental Shelf* cases involved a question of distribution of wealth. It was within human power to remedy if not to change such situations.

20. He could not agree that compensation had no place in the international law of the future. Compensation was a necessary safeguard for foreign investments, which still had a part to play in helping to bring a reasonable degree of prosperity to developing countries. Compensation was also necessary to relieve the human suffering which inevitably resulted from social change. It should, moreover, be remembered that compensation had a place in cases of State succession other than those resulting from decolonization.

21. It was not at all contrary to the principle of sovereign equality that compensation should come into play in cases where reliance had been placed on the promises of a State which had concluded a contract or granted a concession. Once the process of decolonization had been completed and normal participation in economic and social progress had been resumed in all continents, the international rules on compensation for loss of property would appear in a normal context. If that were the lesson to be learned from the Special Rapporteur's second report, a solid foundation would have been laid for legal rules to guide the international community in those matters.

22. Mr. REUTER said he was not in a position to reply immediately to all the Special Rapporteur's questions, which he had only just seen; he would reserve the right to add to or modify the views he was about to express on some of them.

23. But first of all he wished to pay a tribute to the Special Rapporteur for the remarkable scientific and intellectual qualities he had shown in drafting his report. It was a fighting document. In form, style and conclusions, it was designed to prove that a successor State was free to reject, as it pleased, any obligations contracted by the predecessor State. The militant character of the report could be summed up in two propositions: either there was sovereignty or there was not; either a legal rule was clear and precise or it was not a rule.

24. Nevertheless, as Mr. Castrén had discreetly but clearly brought out, several doors were still open or at least ajar. He himself was in favour of compromise solutions, for though compromise might not have the logic of reason, it had the logic of life.

25. Ever since the world had begun, *rebus non stantibus*, both the strongest grounds and the most sordid pretexts had been put forward to justify debtors not paying their debts, States plundering their subjects and States defaulting on the most solemn undertakings towards one another. It was not so very long ago that the Christian princes of the Western world used to maintain that, on the death of their predecessor, all obligations contracted by him became null and void. Some means of confirming such obligations had to be found, therefore, before they could be treated as "acquired rights", and such confirmation was not always a disinterested action. Jurists in all ages had devised procedures, concepts and a vocabulary which were not always faultless, but which made it possible to take account of conflicting interests all of which were to some extent legitimate.

26. The term "acquired rights" thus meant, precisely, that the rights acquired were genuine rights and that, if they had not been acquired, there would be no rights at all. The expression "State succession", by analogy with the death of a natural person, recalled the common-sense position that anyone who accepted an inheritance had to accept the liabilities as well as the assets.

27. No legal system could allow itself the luxury of rejecting all transition in the name of an abstract concept, however logical it might be. Problems of inter-temporal law were difficult, but the Commission had already prepared articles on such problems in international law. It was possible that those articles had been accepted because they were not very clear, but in his opinion, it was because transitional rights had to be provided for in every sphere, and even an obscure formula was better than silence, which was mere cowardice.

28. Whatever form the results of the Commission's work ought to take for its discussions to be useful, it was certainly better that they should be focussed on the future rather than on the past.

29. That presupposed the fulfilment of two conditions, distinct in law but largely united in practice. First, it must be clearly stated what cases of change in sovereignty were to be considered. In his view, it could only be those in which there was a lawful change of territorial sovereignty. Unlawful situations, which characterized a great many examples of past changes, involved nullities and sanctions and were completely irrelevant to any rules the Commission might prepare for lawful situations. And for that reason he thought the problems of State succession arising out of decolonization were not of any great importance. Decolonization had now reached a very advanced stage, unless, of course, the term was to be used in a more general sense, particularly from the geographical standpoint, than was given to it in the United Nations. Decolonization problems had been, or would be, solved within a treaty framework. If there were further operations to be undertaken and if they

² *I.C.J. Reports 1969*, pp. 49 and 50, para. 91.

did not proceed peacefully, the problems raised would be considered within the framework of international responsibility, with its full panoply of nullities and sanctions.

30. On those terms, the cases of State succession to be considered were not very numerous. Some imagination was needed, seeing that present-day international law was not very kindly disposed towards territorial changes. However, if the right of self-determination was accepted, which juridically threw open the right of secession in unitary States, there was one case today. If federations were considered, which also admitted the possibility of secession, and if it were recognized that a State could leave a federation, there was, perhaps, another case.

31. But the trend today was in the other direction. Federations were being formed and unions were developing, with their concomitant joint services, undertakings and investments. Those unions granted economic rights to aliens, and all kinds of situations could be imagined in which the problems of State succession in economic matters arose and would arise; some indeed had already arisen. It would be better to deal with some of those problems rather than with the problems raised by decolonization, although the former had also arisen in connexion with decolonization. That was the case where colonial federations had broken up and the unsolved problems now arose in the relations between the States born of the dissolution of the federation, not in the relations between the colonizers and the colonized.

32. To come to the question of principles, it had been suggested that the Commission should examine the human rights aspect of the problem, not only from the individual but also from the collective standpoint, for even in the capitalist countries, patrimonial relations were more relations between groups than relations between individuals. Internationally, however, human rights were not at present considered from that aspect. The Commission should accordingly tackle the major problems of collective economic relationships, and the question of human rights should be approached with caution.

33. On the other hand, unlike the Special Rapporteur, he attached great importance to the principle of unjust enrichment. When the abuses of capitalism were criticized, it was on the ground of unjust enrichment. If that criticism was to be accepted even by capitalists, it must be admitted that there could also be cases when the abolition by law of all existing rights brought an unjust enrichment in the opposite direction. The notion was rather vague, but it could have practical results.

34. There were also a number of lessons to be learned from the study of the concept of good faith, for investments were everywhere covered by some form of agreement, in law or in fact. The acceptance of such investments involved the acceptance of a certain responsibility. The elements and the limits of that responsibility must be studied.

1004th MEETING

Thursday, 19 June 1969, at 11.30 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Co-operation with other Bodies

[Item 5 of the agenda]

(resumed from the 999th meeting)

STATEMENT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRMAN, welcoming His Excellency Mr. Bustamante y Rivero, the President of the International Court of Justice, said that his presence symbolized the bonds which united the Court with the International Law Commission, both as to their membership and in their work. Five judges of the Court were former members of the International Law Commission, as several former judges had been; and in its work the Commission was called upon to ponder the judgments of the Court and draw the necessary conclusions to assist it in its task of codification and progressive development of international law. The Court and the Commission pursued a common aim proclaimed in the preamble to the Charter of the United Nations: "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained".

2. An eminent jurist, author of many notable works, philosopher, historian, man of letters, diplomat and statesman, Mr. Bustamante y Rivero symbolized the universal nature of the highest virtues of the great servants of the law. He had successively taught such varied disciplines as archaeology, social geography, philosophy and law. He had been advocate, judge and prosecutor, as well as minister plenipotentiary, ambassador and chairman of the committee on private international law at the second South American Congress of Jurists. Finally, he had filled the highest office in his country, that of President of the Republic. His presence was a source of pride for the Commission.

3. Mr. BUSTAMANTE Y RIVERO (President of the International Court of Justice), after thanking the Chairman for his kind words of welcome, said that the International Court of Justice and the Commission were both working to promote and develop the law, and to perfect it so far as was humanly possible. It was therefore natural that the President and judges of the Court should from time to time have the pleasure of visiting the Commission and exchanging mutual good wishes for the success of their common endeavours.

The meeting rose at 11.15 a.m.

4. Reiterating the feelings expressed in previous years by other members of the Court who had had the honour of addressing the Commission, he called for continued efforts by both bodies to further the progress of international law, which was so important for human justice.

5. An examination of the specific tasks of the Commission and the Court, however, revealed points of difference between them. The Commission was called upon to examine the whole field of international law objectively and impartially, as it were from above the living realities of relations between peoples. After carefully sifting the theory of the law, the doctrine of writers and court decisions, it formulated and refined legal principles which it stated in codifications that later served—until multilateral treaties were concluded by States—as a guide to judges adjudicating in specific cases.

6. The Commission, though it remained aloof from current legal disputes and concrete cases, never lost sight of their complexity when taking decisions that were not purely theoretical, but took the realities of the contemporary world into account. The great merit of the Commission's work was that it most aptly associated pure legal theory—as found in the writings of eminent jurists and in the decisions of the International Court of Justice, arbitral tribunals and other judicial bodies—with the concrete rules of law which could be discerned by constant observation of everyday life and the conflicts and vicissitudes of the modern world.

7. As to the judges, their aims were similar, but their position was rather different. Unlike the members of the Commission, they could not adopt a purely general and speculative approach to the technical problems of international law. They had to face the obstacles and the circumstances of the particular dispute between the parties to a case. They must laboriously seek means of adapting to the specific problems of a particular dispute the principles and rules formulated by the Commission, which would subsequently be adjusted and adopted by a diplomatic codification conference.

8. In that difficult task, the members of the Court appreciated the help and encouragement of their friends in the Commission. The Chairman had very rightly pointed out that five former members of the Commission were at present judges of the International Court of Justice. Leading international lawyers who had served on the Commission had thus come with their knowledge and wisdom to strengthen the Court in the performance of its task of rendering justice and applying the law to specific cases.

9. That explained the very pleasant comradeship between the judges of the Court and the members of the Commission. They all belonged to the same unique family. In the common task of developing the law, the Commission dealt with the theoretical aspects without disregarding practical matters; the Court dealt with practical cases without disregarding legal theory. They both worked for the same purpose.

10. It was therefore particularly gratifying for him to be with the Commission on that occasion and to bring to it the greetings of all the judges of the International Court. He associated himself with the common wish of

all the judges of the Court that the Commission might continue to be successful in its work of formulating the new rules which were constantly emerging and developing, while still remaining part of that great body of law which must prevail throughout the world if the so much needed conditions of peace were to be established.

11. Mr. CASTAÑEDA said that, as a Latin American member of the Commission, he wished to be among the first to welcome the President of the International Court of Justice. President Bustamante y Rivero united in his person some of the highest intellectual, academic and political values of the present time, so that all Latin Americans could feel justly proud of his appearance before the Commission. While the Commission had been entrusted by the General Assembly with the important task of codifying international law, which was work of a general and abstract character, the International Court of Justice was the principal international body responsible for the interpretation and application of legal rules and principles. The Commission was therefore particularly gratified by the visits of the President and other judges of the Court, inasmuch as they provided a most valuable link between legal theory and practice. He was sure that the members of the Commission regarded the Court as the surest safeguard against some of the most serious perils threatening humanity today.

12. Mr. ROSENNE said that the visit of the President of the International Court of Justice to the Commission was remarkable for at least three reasons. First, it was the first time that the Commission had been honoured by the visit of a President of the Court during his term of office. Secondly, it was the first time that the Court had been represented at one of the Commission's meetings by a distinguished jurist who had not been a member of the Commission. Thirdly, it was the first time that a whole meeting of the Commission had been devoted to an address by the President of the Court.

13. He wished to thank the President for his thought-provoking address, and in particular for his very pertinent comments on the points of difference between the work of the Court and that of the Commission. He had been reminded of a sentence in an opinion delivered by the President in 1962, which read: "Since the law is a living phenomenon which reflects the collective demands and needs of each stage of history, and the application of which is designed to achieve a social purpose, it is clear that the social developments of the period constitute one of the outstanding sources for the interpretation of law, alongside examination of the preparatory work of the technicians and research into judicial precedents. The law is not just a mental abstraction, nor the result of repeated application of judicial decisions, but is first and foremost a rule of conduct which has its roots in the deepest layers of society".¹ He was convinced that that opinion of the President was shared by many international lawyers, even if it seemed from time to time that the august body over which he now presided had not fully learned all its lessons.

14. In his statement at the International Labour Con-

¹ *I.C.J. Reports, 1962, South West Africa cases*, p. 351.

ference on 18 June 1969, the President had said: "... the vocation of a judge is neither convenient submission to prevailing social habits, nor rigid abstract theorising, but the lofty exercise of a flexible and human faculty of judgment, an unflagging determination to redress reality in the service of perfection, equity and peace". He had gone on to say that the body he represented—the organ of international justice—was perhaps the one to which was assigned the last and hence the most difficult task of all: "that of preventing, through the bonds of law, a break-up of this unity of mankind, the unity of the species that will assure in time the destiny of man". And later he had added: "It is juridical life which proclaims the rule of law over and above vested interests; which establishes equality of rights and opportunities; which accords to each what in pure justice is his due; which safeguards national and human dignity; which receives into legislation the principles of the new law and makes way for the reform of outmoded institutions". That last sentence, in particular, expressed the idea which had guided the General Assembly in establishing the International Law Commission and which had since guided the Commission in its work.

15. He noted with satisfaction that during the President's term of office a thorough re-examination of the standing of the Court, its relationship to other international organs and its methods of work had been initiated. At the same time, however, he could not avoid expressing his concern lest, through an excess of publicity—which at present seemed characteristic of United Nations diplomacy—the Court might be drawn into the storm-centre of political controversy. At the last session of the General Assembly, more than one representative had tried to provoke a public debate on the report which the Court had submitted to the United Nations in 1968 and which had implied a somewhat unexpected reinterpretation of United Nations practices.

16. Mr. REUTER said the Commission was bound to feel respect and pride at the great honour of being able to welcome the President of the International Court of Justice. Since he himself was at present discharging the duties of counsel to the Court, he had to be discreet and could not say everything he wished, but he would say that the personal charm, courtesy and friendliness of the President made him forget the distance by which their functions separated the counsel and judges of the International Court of Justice. The presence of Mr. Bustamante y Rivero in the Commission was a reminder that the Court was an organ of the United Nations, but it must be borne in mind that any application of the law was a creative and original effort requiring the calm, independence and solitude in which he exercised his heavy responsibilities with such distinction and authority.

17. Mr. YASSEEN said that the great honour done to the Commission by the visit of the President of the International Court of Justice, was due both to his personal qualities and the office he held. After paying a tribute to Mr. Bustamante y Rivero's eminence, he emphasized the interdependence of the work of the International Court of Justice and that of the International Law Commission: the former had to ensure respect for the international legal order, while the latter

had to codify and progressively develop its rules. The codification of international law could help to promote general acceptance of the compulsory jurisdiction of the International Court of Justice by making the rules of international law clearer, more precise and less controversial. For instance, some countries which had not accepted the Court's compulsory jurisdiction had not hesitated, after the adoption of the Vienna Convention on Diplomatic Relations, to ratify the optional protocol on compulsory jurisdiction. What was more, the Commission's work had made it possible to widen the scope of compulsory jurisdiction, which, since the adoption of the Vienna Convention on the Law of Treaties, could henceforth extend to the question of incompatibility of treaties and rules of *jus cogens*. For all those reasons, the visit of the President of the International Court of Justice was of exceptional importance for the Commission.

18. Mr. TABIBI said he wished to welcome Mr. Bustamante y Rivero as the President of the principal United Nations organ concerned with the ending of injustice throughout the world. Since President Bustamante had assumed office, there had been a great change in the International Court of Justice, particularly in the direction of closer contacts between the Court and other United Nations bodies, such as the General Assembly and the International Law Commission. As the President had mentioned in his address, many former members of the Commission had become judges of the Court; it was not surprising that their visits should be particularly welcome to the Commission, which at its 1967 session had received no less than three of them.

19. The President had rightly pointed out the need for stronger links between the Commission and the Court, inasmuch as both served the same ultimate objective under the United Nations Charter, the one as a quasi-legislative and the other as a judicial organ.

20. He also welcomed the President as a representative of the Latin American region, which had such a rich tradition of law and justice. He himself, as an Asian jurist, could say that the people of his region were looking forward to the day when the Court would really assume the role expected of it in the preservation of law and justice throughout the world, and he hoped that in its future work, the Court would take into consideration the new force which the emerging nations represented in the development of international law.

21. Mr. BEDJAOUI said that the Commission felt proud and honoured by the visit of the President of the International Court of Justice. Mr. Bustamante y Rivero was not only an eminent jurist and statesman, but a man with a richly endowed personality such as was rarely encountered; he was a servant of the international community working for the renovation of law who, by reason of the constant and distinguished services he had rendered to the cause of law in the International Court of Justice, must be held in high esteem by all jurists and all men.

22. Mr. TAMMES said he had always followed the decisions and opinions of the International Court of Justice with the greatest interest and had therefore been gratified by the President's reference, in his address, to

the converging activities of the Commission and the Court. He wished to join other speakers in expressing the hope that relations between the Court and the Commission would be even closer in the future.

23. The people of his country were proud to have the International Court of Justice in their midst as the continuation of a tradition dating from the early days of the present century, when statesmen from all over the world had found The Hague an ideal meeting-place for international conferences.

24. Mr. USTOR said he wished to greet the President of the International Court of Justice not only as a distinguished jurist and scholar, but also as a son of heroic Peru and a representative of the great Latin American legal tradition. He was continuing that tradition not only in his work in the Court but also in his books, among which could be found a treatise on sociology; that showed that his thinking went to the very roots of law and to its role in the development of society.

25. He welcomed the closer contacts which the Court was establishing with the United Nations General Assembly, through reports submitted to that body, and with the International Law Commission. The Commission was an important law-creating agency of the United Nations, because its work of codification inevitably also involved an attempt to improve, supplement and generally reformulate legal rules in the light of contemporary conditions. How far the application of international law—which was the main task of the Court—was connected with its creation, or with interpreting and thereby moulding it in the light of contemporary conditions, had been the great problem facing the Court in 1966 in the *South West Africa* cases. The views of seven of the judges had proved unsatisfactory to the greater part of the world, which had found their position too rigid when they had said that law could serve a social need “only through and within the limits of its own discipline”,² and that the duty of the Court was “to apply the law as it finds it, not to make it”.³ The greater part of the world community had approved the stand taken by the dissenting judges, one of whom had said: “The historical development of law demonstrates the continual process of the cultural enrichment of the legal order by taking into consideration values or interests which had previously been excluded from the sphere of law”.⁴

26. In the of dissenting opinions of that kind, the Court was faced with no small difficulty in serving the needs of the world community as a whole; he hoped that in future it would give an even more prominent place to the realization of social justice.

27. Sir Humphrey WALDOCK said he wished to join with his colleagues in expressing his sense of privilege and pleasure at the presence of the President of the International Court of Justice. As Special Rapporteur for the law of treaties, he had always been impressed by the very real importance of the Court as the interna-

tional organ concerned with completing the work of codification on which the Commission was engaged. He had noted in the past that, in dealing with the general principles of codification, the Commission had often found itself confronted with questions involving a mixture of facts and law and that it then became very difficult to push codification of general rules further without encountering sharp divergences of opinion. It was at that point that the work of the Court in interpretation and application became an essential complement to the work of the Commission. As a member of another Court, he could also assure the President that all international courts attached the greatest importance to the decisions and opinions of the International Court of Justice, and that he personally would look forward with the liveliest interest to its future activities.

28. Mr. RUDA said that, as a Latin American member of the Commission, it was a great pleasure for him to welcome the President of the International Court of Justice. The President had already been justly praised as an eminent jurist, statesman and man of letters, but he (Mr. Ruda) recalled that in his student days Mr. Bustamante y Rivero had also been universally looked up to by the youth of Latin America as an outstanding example of what was finest in that continent. He was glad to note that the Court and the Commission, as the President had pointed out, were engaged in a joint task in which the rule of law was placed above any political ideology.

29. Mr. BARTOŠ, after paying a tribute to the President of the International Court of Justice, emphasized the importance of the compulsory jurisdiction of the Court—the only guarantee that the law would be applied—which the Charter had unfortunately not made into a rule. He regretted that the powers of the Court were limited, since that was a ground adduced to justify the optional character of its jurisdiction. The Court should be given the widest possible competence in order to ensure respect for international law and the rule of law generally in relations between nations. It would be wrong to think that to recognize the jurisdiction of the Court was a slight on the honour of States.

30. He hoped that by their future work the International Court of Justice and the International Law Commission would develop a better international order and fight side by side, independently of all political considerations, against injustice and disorder in the world.

31. Mr. IGNACIO-PINTO associated himself with the tributes paid to the President of the International Court of Justice. A visit by the representative of a body which sought to ensure respect for the primacy of law in the world was an encouragement to the Commission which, far from engaging in “legal pedantry” as it had been accused of doing, was helping to establish the reign of peace through justice in the world.

32. The CHAIRMAN thanked the President of the International Court of Justice for his kind words about the Commission and its members and asked him to convey the Commission's respects to the judges of the

² *I.C.J. Reports*, 1966, p. 34.

³ *Ibid.*, p. 48.

⁴ *Ibid.*, p. 252.

International Court and to tell them how much the Commission appreciated the work they were doing, which was of such importance for international law.

The meeting rose at 1.5 p.m.

1005th MEETING

Friday, 20 June 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Bartoš, Mr. Bedjaoui, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States and Governments: Succession in Respect of Matters other than Treaties

(A/CN.4/216/Rev.1)

[Item 2 (b) of the agenda]

(*resumed from the 1003rd meeting*)

1. The CHAIRMAN invited the Commission to resume consideration of the Special Rapporteur's second report (A/CN.4/216/Rev.1).

2. Mr. REUTER said that in his previous remarks¹ he had suggested that the form in which the question had been presented to the Commission required that it should first decide what were the specific cases it wished to study under the heading of succession of States and then consider what principles it should follow in their detailed examination. His personal opinion was that principles which could lead to constructive compromise solutions should be chosen, depending, of course, on the sphere which the Commission assigned to succession of States.

3. Many of the problems taken up, either by the Special Rapporteur in his report or by those members of the Commission who had already spoken, did in fact arise very often in cases of State succession, but not necessarily in that connexion only; they often arose quite apart from State succession. For example, members of the Commission had naturally mentioned the question of the consequences, in international law, of changes in the structure or economic policy of a State, whether it was a new State or not. Such changes, which raised the problems of respect for private property and the treatment of aliens, could occur without any succession, as had happened in France in 1944-1946. In the example given by Mr. Ustor, problems of succession had arisen when the Austro-Hungarian empire had been split

up into several States; and then later, in 1946, fresh problems of war damage and change of régime had been superimposed. Again, problems of succession would arise for a decolonized State which recovered its full independence and opted for a relatively liberal economic régime, but it would also have problems of the same kind to settle if it subsequently decided to change its economic structure. Those examples showed that the Commission's task could be envisaged more or less broadly. The question was whether the problems raised by succession of States and governments and the similar problems which arose apart from succession should be studied together or separately.

4. He was not opposed to the idea that the Commission should examine, under State succession, the problems arising out of changes in the structure or economic policy of an independent State, whether it was a new State or not, which were outside the limits of succession as such. If the Commission so decided, it would inevitably have to widen the scope of its study considerably and introduce new principles. For example, it would have to study the important consequences for a whole series of contracts—concessions, investment agreements, and so on—of changes made by a State in its economic policy or structures. That was a case for application of the *rebus sic stantibus* clause, a legitimate case for the modification of certain contractual balances. In private law and in collective property relationships, amendments to contracts were common, and examples could also be found in public international law. In the modern world, the distinction between private collective property and public collective property was artificial. The contracts concluded every day between the socialist planned-economy countries and private enterprise contained revision clauses or provided for amendment procedure.

5. The modern world, therefore, was one of creative change, and it was in that direction that the Commission should orient its studies if it wished to deal with succession in the broadest sense. Such an attitude might perhaps be regarded as revolutionary, but he had no objection to that. The Commission had already decided that the product of its study should be draft articles for a convention, not just a model draft. If it decided to deal with succession of States in the manner he had indicated, the Commission would not have to prepare draft articles; it would have to think about proposing more flexible texts, directives, recommendations or simply commentaries on model solutions. It might also submit, in the form of a report, a critical analysis of a new kind of treaty relations to which Mr. Bedjaoui had referred in his study. On the other hand, if it took State succession in the strict sense of the term, it would have to leave aside problems which were linked to State succession in fact if not in law.

6. As to the research requested of it, the Secretariat should be given precise instructions regarding the most important points on which it was to concentrate.

7. Sir Humphrey WALDOCK said he admired the lucidity and elegance of the Special Rapporteur's report, but found it rather difficult to comment on, because the Special Rapporteur had made the subject acquired rights and the Commission had been expecting to receive a

¹ See 1003rd meeting, paras. 22 *et seq.*

rather different kind of report. His own reactions had already been voiced by several of his colleagues; he agreed with a great deal that had been said by Mr. Castrén and sympathized with the views expressed by Mr. Reuter.

8. On the whole, the report seemed to him to be more of a brief or an argument than an objective exposition of the subject on which the Commission could safely take a decision in full knowledge of the issues. In particular, it showed a certain lack of balance, since the case on one side had been put very strongly while the balancing arguments on the other side had not been stated with the same fullness. There were also a number of matters in the report involving legal appreciations on which he had considerable reservations, as he did not think they could be accepted as correct. Examples were the *German Settlers* case and the *Sabbatino* case.²

9. The Commission hardly had sufficient well-balanced material before it to give satisfactory answers to the Special Rapporteur's questionnaire.³ Indeed, he was not entirely sure what the purpose of that questionnaire really was. The Special Rapporteur had stated that he was listing some of the problems on which he would be glad to learn the views of his colleagues, but if the questionnaire was to be used by the Commission as a basis for some form of preliminary decisions, he thought the time was quite premature for arriving at those decisions, because much more thought would have to be devoted to the subject before even a preliminary decision could be taken.

10. He had said he did not consider that the Special Rapporteur's report was a fully balanced exposition; he wished at the same time to make it clear that he himself had no fixed views on the possible outcome of any discussion of the issues raised in the report. He did feel that the issues had been placed in the wrong perspective by orienting them so largely to the notion of acquired rights. Historically, that notion might have dominated juristic writing at a certain period, but undue emphasis would be placed on a particular aspect of the problem if the Commission's attention was focussed mainly on the question of acquired rights.

11. With reference to Mr. Ustor's statement at a previous meeting, he thought that his comment on the concept of "vested interest"⁴ was not correct as that term—a highly technical one—was understood in English common law. In English law, such interests became vested rights when all the necessary antecedent conditions had been fulfilled; a right so vested might afterwards still be liable to destruction by the happening of a subsequent event, but that would not preclude it from being considered a vested interest.

12. What was at issue was the rights of individuals and the State of which they were nationals to property which the former might have acquired through their efforts in particular foreign territories. That might also touch problems of human rights, and the whole question had to be considered in a general way with a view to

determining what was the proper balance of legal interests at the present time. The Commission would therefore have to work out the general principles and then identify the several exceptions to those principles which might exist.

13. The Special Rapporteur seemed to have overlooked the fact that the subject of acquired rights had already been before the Commission in another context, namely, that of State responsibility; and he had not taken any account of a paper written by Mr. Jiménez de Aréchaga which dealt with issues discussed in the present report. The question of acquired rights had been discussed at length in 1963 in connexion with the topic of State responsibility. After considering the reports by Mr. García Amador, the former Special Rapporteur for the topic, the Commission had ultimately decided that it would prefer to deal with the general principles of State responsibility rather than with the particular aspect of acquired rights. At that time, Mr. Jiménez de Aréchaga had submitted a paper on the duty to compensate for the nationalization of foreign property⁵ to a special Sub-Committee of the Commission; in that paper he had turned his back on the concept of acquired rights as having been based on general principles of law recognized at a time when the economic systems of the world had greater unity. He had taken the view that today the right to compensation still existed, but that the legal basis for that right had to be sought rather in the ideas of equity and unjust enrichment. He himself, who had been brought up in English traditions of international law, had sympathy with that approach, but thought that the Commission should not try to force the issue, since the situation today was much more complex.

14. The subject was a delicate one, on which it was undesirable to come to any premature conclusions. What was needed was to seek common ground on which it might be possible to go forward with the work of codification, whether such codification was to be expressed in terms of a convention or not. To find that necessary common ground, the Commission should have before it a more balanced exposition of all the issues; what the Special Rapporteur had produced was a frontal attack delivered from a particular point of view. He could only imagine that the Special Rapporteur had made such an attack because he had thought that some of his colleagues held more rigid positions than in fact they did.

15. As far as acquired rights were concerned, it was clear that in the period between the two wars the Permanent Court of International Justice had taken the view that there was a rule of customary law in favour of such rights, even if it had not defined how far they extended. That was also apparent from the other cases cited by Mr. Castrén. In its advisory opinion on the *German Settlers* case, the Court had expressly said that "no treaty provision is required for the preservation of the rights and obligations now in question",⁶ so that

² See report (A/CN.4/216/Rev.1) paras. 16 and 55.

³ See 1003rd meeting, para. 1.

⁴ See 1002nd meeting, paras. 5 and 6.

⁵ See *Yearbook of the International Law Commission, 1963*, vol. II, p. 237.

⁶ *P.C.I.J.*, 1923, Series B, No. 6, p. 38.

it was, for him, impossible to accept the Special Rapporteur's presentation of the Permanent Court's views in that case. On the other hand, much had happened since that time. What the Commission now had to do was to find the most acceptable attitude to adopt with respect to the position of aliens where their "vested" rights or property rights in foreign countries were involved. To his way of thinking, the first question to be answered by the Commission was whether it should take up the problem of acquired rights in the context of State responsibility, or in that of State succession, or possibly as a separate topic. Mr. Ustor had raised that issue and to him it seemed a fundamental one.

16. As Mr. Reuter had pointed out, the question of acquired rights did not fall exclusively within the topic of State succession, and the Commission's work on State succession might only be complicated if it became involved in such a delicate and prickly problem. So far in its history, the Commission had shown a certain reluctance to take up the question at all; it undoubtedly did have links with the topic of State responsibility, but was only one aspect of that topic.

17. The Commission should therefore decide whether it wished the Special Rapporteur to deal with the question of acquired rights as a major issue under State succession or to concentrate on some other branch of the topic, leaving acquired rights aside as one of the incidental questions involved.

18. Mr. Tammes had referred to the *North Sea Continental Shelf* cases and the statement concerning equality made by the International Court of Justice.⁷ The question of equality was undoubtedly important in that context, but he thought that it would be more prudent not to give too broad an interpretation to the Court's language, which applied primarily to a particular problem of "geographical" equity arising in connexion with the continental shelf. On the German side the case had been argued as a question of geographical equity and equality. At the end of the case, as a counter-argument on behalf of Denmark, he himself had invoked more general considerations of equity. Denmark had never possessed any natural resources, while Germany had had vast resources of coal and steel which had enabled it to achieve a dominant position in Europe in the 19th century. He had argued, therefore, that if the principles of equity were applied, there was a case for compensation to Denmark for what that country had been denied by nature. But the Court had clearly limited its own references to equality and equity to the context of boundaries on the continental shelf. Accordingly, it was necessary to be careful in drawing any general conclusions of the kind suggested by Mr. Tammes from that particular case.

19. With regard to decolonization, while it might have considerable significance in connexion with the topic of State succession, that significance should not be exaggerated. In particular, the question of nationality following decolonization was a very delicate one, as his own country had found in dealing with its former territories.

The Commission should therefore be careful in the language it used and remember that it was codifying international law for the future.

20. Another element which seemed to have been inadequately dealt with in the report was General Assembly resolution 1803 (XVII), concerning permanent sovereignty over natural resources. The Special Rapporteur's reference to that resolution had been made from a particular point of view. The resolution should be approached with caution, however, since it had been arrived at with difficulty and contained so many elements of compromise that it was not easy for international lawyers to give any precise interpretation of the conclusions to be drawn from it.

21. The Commission must strive to find common ground for a proposal which would be acceptable not just to a narrow majority or even to a two-thirds majority. There were issues which had been touched upon brilliantly by Mr. Reuter: it was not enough, for example, to think only in terms of individuals, since their property was a part of the economic strength of their country. Moreover, the question of foreign investments was extremely complex, since in many countries during the last twenty-five years such investments had been subject to greater or smaller controls. For those and other reasons it would be difficult and premature at the present juncture for the Commission to issue any clear-cut directives to the Special Rapporteur. The Commission's first task should be to decide on its answer to question 5 in the Special Rapporteur's questionnaire. Should the question of acquired rights be dealt with under State responsibility or under State succession? In his opinion, the latter approach would be hardly satisfactory unless the matter was studied very completely. Or should the question of acquired rights be left aside for the time being and discussed later as a separate and highly important subject?

22. With regard to question 8, the answer would depend on the other answers to the questionnaire. He personally would be glad to see the Secretariat undertake the various tasks and inquiries suggested, but he doubted whether it would wish to go into any analysis of jurisprudence, since the subject tended to be controversial.

23. Lastly, he frankly admitted that he was not at all clear as to the course the Commission ought to pursue and had an open mind on the subject. But he believed that the Special Rapporteur would make it easier for the Commission to find the direction in which it ought to go if he supplied it with a dispassionate statement of the various considerations, rather than a forceful presentation of one point of view.

23. Mr. CASTRÉN said that, since he had already defined his position, he would confine himself to a brief reply to the questionnaire submitted by the Special Rapporteur.

25. In paragraph 1, four questions were asked in connexion with the legal basis to be given to acquired rights. He agreed with the Special Rapporteur that there was no transfer of sovereignty; on the other hand, it seemed to him that there was an independent inter-

⁷ See 1003rd meeting, para. 19.

national obligation. The third question therefore appeared to be unnecessary. The fourth question called, in principle, for an affirmative reply. Everything depended, however, on the nature of the right, and on the form and conditions in which rights had been granted. Each case had to be decided on its merits.

26. In paragraph 2, it was asked how the maintenance of acquired rights could be reconciled with certain principles of international law. The right of self-determination was no more absolute than other rights, and could therefore be reconciled with the principle of acquired rights. Similarly, in the application of the right of peoples freely to dispose of their natural wealth and resources, or of the right of peoples freely to adopt the economic system they desired, the interests of the other parties had to be considered. The State invoking those rights could not be allowed complete discretion.

27. On the other hand, it was very difficult to reconcile the denial of acquired rights with human rights and the duties of States towards aliens. Human rights protected certain acquired rights such as the right to private property, subject, of course, to certain restrictions. Moreover, successor States were not free to treat aliens as they wished.

28. The question asked in paragraph 4 could not be answered by a simple yes or no: the problem of acquired rights concerned other rights besides economic and financial rights. But in accordance with the Commission's decision of the previous year, the study should be confined to economic and financial rights, and deal mainly with private rights of that kind.

29. It was very difficult to reply to question 5. The two problems could not be completely separated, but at least a detailed discussion of responsibility could be avoided; in other words, the Commission could confine itself to deciding what rights were protected by international law and subject to what conditions and exceptions such protection was accorded, without going into the question of the sanctions for violations of those rights. In any case, as Mr. Reuter had said at a previous meeting, unlawful acts should not be considered.⁸

30. The basis of respect for acquired rights should be sought in general international law, in other words, in the subject-matter of human rights and the legal status of aliens, so there was no need to deal with the theory of acquired rights as such, if it was considered, not without reason, that the concept was imprecise.

31. In paragraph 7, the Special Rapporteur offered two alternatives. He himself was in favour of the second, which was in accordance with the Commission's decision of the previous year. The next report might deal with public property and public debts and the economic and financial rights of private persons, including administrative contracts and concession rights.

32. Although the Secretariat had already prepared several excellent documents on the succession of States, that material was partly out-of-date, and should therefore be supplemented as proposed by the Special Rapporteur. It would be sufficient, however, for the

Secretariat to submit to the Commission the replies of governments on State practice, a report on the jurisprudence containing the most important decisions, and as full a bibliography as possible, particularly of the most recent publications. On the other hand, the Secretariat should not undertake an analysis of the practice and jurisprudence. It was for the members of the Commission, particularly the Special Rapporteur, to draw their own conclusions from the material supplied. It would also perhaps be going too far to ask the Secretariat to prepare a commentary on every work dealing with the succession of States. That was a very difficult task which would take time, so that it might delay the Commission's work.

33. Mr. TABIBI said he was grateful to the Special Rapporteur for his valuable contribution to the study of a very important subject. His second report had led to a lively discussion on a very complex question, which touched on problems of vital interest to all countries, developing and developed alike.

34. He would not at that stage give detailed answers to the Special Rapporteur's questionnaire. His purpose was to urge caution in dealing with the issues involved. Any attempt by the Commission to reach formal conclusions quickly could affect its relations with the General Assembly. The issues had political implications and might even be called explosive. They had been discussed both in the General Assembly and at conferences dealing with economic subjects and had invariably led to heated argument and to great difficulties in reaching any conclusions.

35. The Commission had decided at the previous session to request the Special Rapporteur to confine his work to the study of economic and financial rights, and the Special Rapporteur had now submitted a report on an extremely sensitive area of that aspect of the topic of succession of States in respect of matters other than treaties. No doubt the Special Rapporteur had prepared his report largely for the purpose of ascertaining what the Commission's reaction would be. In the past, topics had sometimes been kept on the Commission's agenda for a long time and reports on them had been submitted to the Commission periodically without any conclusions being arrived at; the topic of State responsibility during the period 1956-1961 was a case in point. In that case, the reaction of members of the Commission to some of the reports had found expression during informal consultations rather than in the Commission's meetings.

36. The present topic was one on which it was necessary to adopt a balanced approach taking into account not only the legal, but also the economic and political factors involved, and allowing for the interests of all parties. First and foremost, it was necessary to bear in mind the needs of the developing countries; for the very peace and security of the world depended on their development. But at the same time, it was necessary to make allowance for the interests of the developed countries.

37. The Commission should bear in mind that there was already another United Nations organ dealing with the same issues: the Commission on Permanent Sovereignty over Natural Resources, set up in 1958 by

⁸ See 1003rd meeting, para. 29.

General Assembly resolution 1314 (XIII), containing "Recommendations concerning international respect for the right of peoples and nations to self-determination". According to that resolution the right to self-determination, as affirmed in the two draft Covenants on human rights subsequently adopted by the General Assembly,⁹ included permanent sovereignty over natural wealth and resources. The General Assembly had experienced the greatest difficulty in agreeing on the composition of the Commission on Permanent Sovereignty over Natural Resources and on its terms of reference. It had finally reached a balanced compromise between the opposing views and interests, which made the Commission's terms of reference particularly significant. Operative paragraph 1 of resolution 1314 (XIII) specified that, in making the survey of "the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard shall be paid to the rights and duties of States under international law . . .". The Commission on Permanent Sovereignty over Natural Resources had in fact produced a draft, which the General Assembly had adopted in 1962 as section I of resolution 1803 (XVII) on "Permanent sovereignty over natural resources". It was significant that, in section II of that same resolution, which it had adopted unanimously, the General Assembly had welcomed "the decision of the International Law Commission to speed up its work on the codification of the topic of responsibility of States", thereby emphasizing the relationship between the issues now under discussion and another topic on the Commission's agenda.

38. Thus there was another United Nations body to deal with those issues. It was true that the Commission on Permanent Sovereignty over Natural Resources had not met again, but it had not been dissolved and could be reconvened. Hence, any attempt by the International Law Commission to deal with the same issues might expose it to criticism in the General Assembly.

39. It should also be noted that one of the reasons why the Commission on Permanent Sovereignty over Natural Resources had not been able to meet again was that the issues under consideration were charged with political implications and difficulties; neither the developing nor the developed countries were anxious to debate those issues.

40. The Declaration adopted by the General Assembly as section 1 of resolution 1803 (XVII) consisted of eight paragraphs, which had been agreed on only after a great deal of discussion. The text of those paragraphs reflected a delicate balance between the views of the two groups of States concerned.

41. As a citizen of a developing country, he fully supported the basic principle of permanent sovereignty over natural resources, but he also recognized the urgent need of developing countries for foreign investment and technical assistance from both socialist and capitalist sources. In the circumstances, it was incumbent upon jurists to avoid any action which might have a detrimental effect on the inflow of such investment and

assistance. For example, unless adequate safeguards and acceptable procedures for the settlement of disputes were agreed upon, it would be difficult for developing countries to obtain the assistance they required. That was the present reality which must be faced, regardless of any question of past exploitation of developing countries by foreign interests.

42. He well remembered the problems that had arisen at the first United Nations Conference on Trade and Development in 1964. The Fifth Committee of that Conference had been engaged in the formulation of certain rules, and some of the proposals discussed had threatened the whole Conference with a breakdown. Ultimately, however, the bulk of the proposals had been adopted in the form of legal rules, some of which had been adopted unanimously, while others had received the support of many industrialized countries.

43. Hence, in view of the work already being done on the subject by the United Nations within the ambit of international law, the Commission would be well advised not to deal at present with the difficult question of acquired rights. It should instruct the Special Rapporteur to continue to study the question of economic and financial rights in State succession, and if it ultimately drew up any rules on the subject, it should take care that their formulation was well-balanced and that they took the interests of all States into account, so that they would be suitable for application not only at the present time, but also in the future.

44. The CHAIRMAN, speaking as a member of the Commission, said he would confine himself to a few preliminary remarks and reserve the right to speak again later. He congratulated the Special Rapporteur on his important and fruitful report, which he considered to be impartial. He fully shared the view that no acquired rights existed so far as the private property of foreigners in the territory of the successor State was concerned.

45. But he would like to approach the problem in another way and divide it into two parts: first, the alleged acquired rights of aliens, both natural and legal persons; second, the alleged acquired rights of States.

46. The question of the alleged acquired rights of private persons concerned all States in general, not only successor or predecessor States. Hence the Commission should not deal with it in the present context. The right, which belonged to every State, to nationalize or expropriate was merely the other side of that question. It was a general principle of contemporary international law that a State could nationalize not only the property of nationals and aliens by general measures, but also the property of aliens only, and a sovereign and independent State was not required to provide any explanation to any subject of international law whatsoever. Whether that question was discussed under the topic of succession of States or under that of the international responsibility of States, which was its other aspect, it was definitely settled by international law.

47. In the Soviet doctrine of international law, the concept of acquired rights was rejected, not only with respect to persons but also with respect to States.

⁹ See General Assembly resolution 2200 (XXI).

However, the concept was retained for purposes of criticism and in expositive works. It was then used to cover what were sometimes called servitudes, a term which he did not favour. Servitudes sometimes derived from treaties, sometimes from customs or usage by which they had been established between two States. An example was military bases on foreign territory. The concept also covered the matters mentioned in paragraph 2 of the report. The question of those alleged acquired rights did not lend itself to a uniform approach. In the case of a new State born of decolonization, the answer was that the new State assumed no obligations of that kind. But it was doubtful whether the answer should be the same for other types of succession, for example, when several States merged, when a State was partitioned, or when part of the territory of one State was transferred to another. In those cases, public property and public debts, servitudes and so on, clearly had to be safeguarded.

48. In short, alleged acquired rights should be studied only with respect to States and differently according to the kind of situation. The Special Rapporteur might well give the Commission some further clarification, at least if that was the wish of members of the Commission and of the Special Rapporteur himself.

49. Mr. EUSTATHIADES said he wished to make a suggestion which might help the Commission to overcome the difficulties with which it was confronted. The concept of acquired rights could be set aside as a general principle and considered only in those fields where acquired rights were respected. The controversy was not so much over the existence or non-existence of acquired rights in general as over continuity or non-continuity of the obligations of the successor State according to the field considered. The Commission might ask the Special Rapporteur to ascertain in what matters there was continuity in the traditional and the new practice, and in what matters there was not. To place the problem in the context of the existence of acquired rights in general could only lead to misunderstandings and, although he himself did not believe in the existence of a general principle of respect for acquired rights, it would be very difficult for him to reply to the questionnaire if the questions remained in their present form.

50. Mr. BEDJAOUI (Special Rapporteur) said that the discussion seemed to have got into a blind alley. He himself would have liked all the members of the Commission to have given their views on that problem of capital importance, but some members wanted him to take it up again first, in order to simplify the issues and clarify the discussion. He would, however, agree to summarize, as well and as fully as he could, at the next meeting, the valuable contributions to the debate made by members of the Commission. That would also make things easier for those members who had been unable to hear them.

51. Mr. BARTOŠ said that there were two theories to be considered: did legal relationships continue in the situations contemplated or did they not? Jurists had been studying the question for a long time and it could not be said that either theory had prevailed. Some

countries with a bourgeois social system had not always accepted the continuity theory, whereas some socialist countries had done so in certain cases. The answer depended more on the needs of the country concerned in each case than on its social system in general. Consequently, the Special Rapporteur could not be expected to provide a clear-cut reply. To ask for one would place him in an awkward position. All he could do was to take both theories into account in his study.

52. Mr. EUSTATHIADES said that his suggestion was not intended as support for any particular view; it was merely a method for work. Instead of basing his study on the concept of acquired rights considered as a general principle, the Special Rapporteur could try to determine what cases of continuity or non-continuity were to be found in the classical practice and in the new practice.

The meeting rose at 1.5 p.m.

1006th MEETING

Monday, 23 June 1969, at 10.10 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States and Governments: Succession in Respect of Matters other than Treaties

(A/CN.4/209; A/CN.4/216/Rev.1)

[Item 2 (b) of the agenda]

(continued)

1. Mr. BEDJAOUI (Special Rapporteur) said he wished to make a few comments, some general and some particular, on the various statements that had been heard, to summarize the opinions that had been expressed concerning the basis of acquired rights, and to say a few words about the dividing line between that subject and the subjects of State responsibility and decolonization.

2. The discussion had shown that there were several ways of looking at the matter. Some members of the Commission thought that the question of acquired rights should not be studied at all, either because, like Mr. Ushakov, they considered that acquired rights did not exist, or because they thought that the question belonged not to the succession of States, but to the international responsibility of States. Others, like Mr. Reuter, had expressed the opinion that the matter

should not, as the Special Rapporteur wished, be studied exclusively from the decolonization angle, and that decolonization problems should even be dropped altogether in order to reduce the Commission's workload. Lastly, some speakers wished the Commission to take the theory of unjustified enrichment as the basis for acquired rights.

3. One notable conclusion was that the problem of acquired rights could not be viewed from a single standpoint. Some speakers had urged that a distinction should be made between different types of succession, that acquired rights should not be rejected outright, and that it was necessary to pick out the cases in which the theory was applicable: for example, partial territorial changes, merger and integration. Others thought that acquired rights did not exist, but that the concept might be used with caution in certain kinds of succession of States.

4. The fact of wishing to exclude decolonization from the scope of the Commission's study amounted to recognizing the special character of the problem.

5. He had listened with great interest to the argument of Mr. Tammes who, relying on O'Connell, had said that to maintain the antithesis between the treatment of aliens and that of nationals was to run counter to a sound development and would be contrary to the interests of new States; it would, in fact, have the paradoxical result that public international law would disclaim all interest in acquired rights in one instance, but concern itself with them in another, merely because sovereignty over a piece of territory had changed hands.¹ But if one accepted the modern doctrine of non-discrimination between aliens and nationals, in other words, equal treatment for everybody in regard to acquired rights, it was rather paradoxical to impose a special obligation in the matter on the successor State. For when the predecessor State had exercised sovereignty over the territory, no problem of acquired rights had arisen at the international level, at least so far as nationals of that State were concerned; but if a succession occurred, those nationals became aliens and automatically obtained recognition of their acquired rights by the successor State, which was not the author of those rights, whereas so long as they had been nationals of the predecessor State, which had granted the rights, they had had no possibility of claiming against it. He had also noted the views of Mr. Bartoš, who had emphasized the precariousness of the theory of acquired rights and had shown that investors were so conscious of the risks that they took out insurance.

6. Opinions were also very much divided on the question of the basis of acquired rights.

7. With regard to the treaty basis, he had thought it necessary to state in his report (A/CN.4/216/Rev.1) that those treaties which admitted acquired rights were not free from ambiguity, since it was open to question whether they confirmed an existing principle of acquired rights or merely provided an exception by treaty to the general rule of non-recognition of acquired rights. The

ambiguity was all the greater because not all treaties respected acquired rights. Moreover, as Mr. Ustor had pointed out, it was questionable whether the mere repetition of a practice without legal foundation was sufficient to establish a customary rule. Mr. Castrén thought it was. Mr. Eustathiades, like the Special Rapporteur, took the opposite view. Mr. Ustor had further emphasized that treaties often showed more signs of political expediency than of legal rigour.

8. Apart from treaty foundations, another basis of acquired rights might be the transfer of obligations by transfer of sovereignty; but members of the Commission had agreed with him in recognizing that there was not a transfer, but a substitution of sovereignty.

9. The existence of an international obligation must also be rejected as a basis, because the existence of an international obligation outside the legal order of the successor State had not been proved.

10. In the memorandum on the duty to compensate for the nationalization of foreign property, which he had submitted to the Commission in 1963, Mr. Jiménez de Aréchaga had put forward some excellent arguments for rejecting the legal basis of acquired rights.²

11. As a possible basis, at least in the opinion of Mr. Reuter, there remained respect for human rights, good faith between States and unjustified enrichment. The criterion of respect for human rights was very difficult to apply in practice, since human rights were interpreted in different countries from an individual or from a collective standpoint and there might be a conflict between the two concepts. The Commission might, however, take human rights as the basis for one of the provisions of the future convention on the succession of States, but, as Mr. Ustor had said, there was no uniformity in the treatment of the right to property, and some States considered that a limitation of that right was more consistent with the needs of the general good and of development.

12. The criterion of good faith had been abandoned by Mr. Reuter himself, who in any case had only suggested it with some hesitation.

13. As for the criterion of unjustified enrichment, which had been discussed at length, it was not a legal basis at all. Mr. Reuter had recognized that it was vague and imprecise. Moreover it was at most a tendency, rather than a rule of international law. In any event, it was a criterion difficult to apply, because it had first to be proved that there had been enrichment. The abolition of acquired rights could mean a loss for their owner without necessarily enriching the State which abolished them. What had to be considered was the actual enrichment of the successor State and not the actual loss suffered by the former owner, still less his loss of earnings. It also had to be proved that the enrichment was "unjustified"—a concept which was extremely difficult to define. Lastly, unjustified enrichment was at most a principle of municipal law. Even admitting that the theory was common to all legal systems, the existence of a common rule was not suffi-

¹ See 1003rd meeting, para. 16.

² See *Yearbook of the International Law Commission, 1963*, vol. II, pp. 241 and 242, paras. 31-40.

cient to prove the existence of an identical rule of public international law, and still less to establish such a rule. The theory of unjustified enrichment might, indeed, be retained because it had been invoked in a number of arbitral awards, as Mr. Jiménez de Aréchaga had pointed out in paragraphs 49 and 50 of his memorandum, but there had also been contrary decisions, as was indicated in paragraph 46.

14. There was one form of succession in which the criterion of unjustified enrichment must in any case be excluded; namely, decolonization. As he had stated in paragraphs 128-132 of his report, it was necessary, first of all, to prove that the successor State had been enriched, that the enrichment had taken place at the expense of the claimant, and that the enrichment was unjustified. That was open to doubt in many instances, especially in the case of rights acquired during the "suspect period" and, as Mr. Castrén had stressed, of rights acquired with the intention of injuring the successor State.

15. It was therefore impossible to speak of unjustified enrichment in the case of decolonization. Even though decolonization might be accompanied by a measure of unjustified enrichment, all peoples had a right, as Mr. Tammes had pointed out, to a fair share of wealth and to conditions of economic and social progress, as was proclaimed in Article 55 of the Charter. It had even been suggested in the Economic and Social Council that a development charter should be drawn up confirming that right. The notion of equity in the distribution of wealth had been recognized by the International Court of Justice in its judgement of 20 February 1969 in the *North Sea Continental Shelf cases*.³ If the Court had acknowledged the possibility of correcting geographical inequalities, there was even more reason for correcting historical inequalities. In any case, there would be a psychological difficulty in applying the theory of unjustified enrichment to decolonization; it would require detailed accounting of all colonial acts and would open the way to painful litigation, which would lead to sullen assessments of the past instead of helping the cause of future good relations between the predecessor and the successor States. Moreover, practical difficulties would make the situation impossible, because in the former colonies all the wealth had belonged to private persons and the successor State would have to buy back the whole colony.

16. Finally, the criterion of unjustified enrichment was impracticable, particularly with respect to decolonization. It might perhaps be applicable, with great caution, to other forms of succession, provided that it was clearly identified as a tendency, not as the categorical and imperative affirmation of a rule of international law.

17. With regard to the question 5 of the questionnaire⁴ concerning the boundary between the subject under discussion and the international responsibility of States, it was necessary to know in what form the problem of protecting the acquired rights of aliens

arose in cases of succession of States. Mr. Reuter had raised the question whether the Commission wished to study at the same time or separately the problems raised by a succession of States and the problems of the same type which arose in a new or an old State, independently of any succession. He thought that those problems should be studied, but only in connexion with new States. Sir Humphrey Waldock thought that, to be logical, the problems of acquired rights should be studied either in connexion with the succession of States, or in connexion with the responsibility of States, or as a separate subject. Mr. Eustathiades had asked whether the successor State had greater obligations towards aliens and whether that question was related to the succession of States. Mr. Castrén held that the treatment of aliens did not form part of the succession of States. Opinions agreed on one point: the problem of private acquired rights should not be studied, either because it belonged to the responsibility of States and not to succession, or, as Mr. Ushakov believed, because there was no principle of respect for so-called acquired rights. In that connexion, he drew attention to paragraph 113 of his report, where it was shown that the acquired rights of aliens were not always trifling, as Mr. Castrén had suggested.

18. Acquired rights were not, it was true, a problem peculiar to the succession of States, but he had chosen to study that problem for several reasons. First, he had not dealt with the rights which the successor State had freely granted as the new sovereign, but only those which it had inherited from the predecessor State and which were therefore rooted in the succession. Secondly, it was open to question whether the problem arose in the same way and in exactly the same terms in a succession of States as it did in connexion with international responsibility. He was not sure that acquired rights ought not to be treated differently in the case of a succession of States. The attitude of the successor State might differ according to whether the rights were inherited or freely granted and the juridical grounds themselves might be different in the two cases. Again, the question arose at what moment a State ceased to be "new" and how long the process of decolonization lasted. Independence was not decolonization, which sometimes did not follow till a long time, possibly one or two generations, later. Lastly, the dividing line between succession of States and international responsibility was clear in the case of acquired rights of aliens: succession of States was concerned only with the existence or non-existence of an international obligation, whereas the question of sanctions belonged to the subject-matter of responsibility; and in his report he had dealt only with acquired rights that were rooted in the succession, leaving aside the question of their violation, which was a matter of State responsibility. He would not hesitate to limit the scope of the topic if it were certain that the problem of private acquired rights arose in exactly the same way in a succession of States as it did in the case of State responsibility.

19. If, as Mr. Reuter advocated, the Commission did not study the problems arising out of decolonization,

³ *I.C.J. Reports*, 1969, pp. 49 and 50.

⁴ See 1003rd meeting, para. 1.

it would have practically nothing left to study but the "wars of succession" of the distant past. There were also, of course, new phenomena, such as mergers and integrations, but those were voluntary acts which did not affect acquired rights. It was in cases involving conflict, such as secession—and decolonization was a form of secession—that the jurist was useful and there might be a need for law. Moreover, decolonization was a lengthy process, which was not completed simply by accession to independence. It raised problems of change of structures which could not be dealt with properly or fully in a different framework, such as that of responsibility. That was why he had decided to extend the topic to cover decolonization.

20. Mr. CASTAÑEDA congratulated the Special Rapporteur not only on the amount of work he had done and the learning he had shown, but also on having succeeded in presenting all the points of view and all the doctrines very fully in the light of his own political and legal ideas. In a subject such as the succession of States, there could be no question of dissociating purely legal considerations from the political ideas on which they rested, unless one recognized as legal only what derived from a practice followed in an obsolete historical context, and qualified any projection into the future pejoratively as a political solution.

21. The Special Rapporteur had done well to make a frontal attack on the notion of acquired rights itself. In the theory of the non-retroactivity of laws, that notion designated what the new law could not destroy, as opposed to a mere expectation in law. The Special Rapporteur had very aptly placed it in that context in his report (para. 11).

22. But outside that context the term itself was misleading. The Special Rapporteur had rightly cited Duguit (para. 7); any right owned by a subject was an acquired right. But the expression gave an idea of permanence which was false, for neither internal law nor international law guaranteed the enjoyment of legal situations *ne varietur*. The Special Rapporteur had shown, both by his analysis of the effect of the precedents and by his irrefutable logical and legal arguments, that there was no international norm by virtue of which the mere fact of a change of sovereignty would create, as such, the obligation to respect rights acquired under former legislation. As was stated in paragraph 148 of the report "If the predecessor State can free itself from rights which it has itself created, why should those rights be binding upon the successor, which had nothing to do with their creation?" The succession introduced nothing new in the way of rights or obligations. The successor was bound only by the general obligations of any State, as the Special Rapporteur explained in a key paragraph of his report (para. 156).

23. The problem therefore belonged to the sphere of State responsibility. The question was what rules were in force concerning the obligation to respect the rights of aliens in general. He would not examine the various aspects of that question in detail, but would confine himself to a few comments.

24. No one could deny that to adopt the notion of a "minimum international standard" was tantamount to agreeing that aliens could have more extensive or better protected rights than nationals.

25. Everyone was familiar with the precedents, but a question of that kind could only be decided on the basis of general rules of international law, such as the rule of the sovereign equality of States. All the precedents quoted to justify the existence of more extensive rights for aliens were valueless if they were anterior to the United Nations Charter, which confirmed that rule. That meant that the scope of the "minimum standard" rule must be assessed subject to the more general rule of the sovereign equality of States.

26. Similarly, the affirmation of the principle of the permanent sovereignty of every people over its natural resources had not left the content of the "minimum standard" unaffected.

27. More generally, juridico-political factors such as those two principles were more relevant for establishing the existence or non-existence and the scope of certain legal rules relating to the responsibility of States than the almost ritual invocation of old precedents from a world very different from the present one.

28. As had already been said, in matters of that kind moral considerations could not be disregarded completely in appraising juridical situations. In that connexion the theory of the community of fortunes enunciated by the great Argentine jurist Podestá Costa was of interest. According to that theory, an alien who invested in a foreign country associated himself with that country for better or for worse. He expected to make a bigger profit than he would by investing in his own country. In most cases, that was possible because of the country's relative economic under-development. But economic under-development was almost always accompanied by greater political instability, and that involved risks for the alien. He could not claim the advantages without also accepting the disadvantages. Profits and risks were the same for aliens and nationals. The rights of aliens and of nationals must therefore be equal in everything, including, for example, nationalization and compensation.

29. There was no particular ideological stamp attached to any of that. It was hardly a Marxist theory. At most, it was the point of view of every developing country. And for the citizens of those countries, it was not theory but reality; the history of Mexico was proof of that.

30. The nationalization of alien property, and compensation and its conditions, were the matters which raised most problems in connexion with the succession of States. The Commission would certainly have to study those problems from a strictly legal standpoint. However, he had the impression that they were becoming more and more closely linked with the question of international economic co-operation. In fact, in most of the cases in which those problems had arisen recently, they had been settled by treaty arrangements based less on a legal division of responsibilities than on certain conditions peculiar to the economic deve-

lopment of developing countries. For example, when carrying out an agrarian reform, it was at least as relevant and important to know whether the compensation terms would permit the country to carry out the reform successfully or prevent it from doing so, as to know whether they fulfilled certain conditions laid down, at least according to some, by international law.

31. In the future, all those matters would increasingly become part of that great chapter of international law which was being slowly but surely worked out, and which might be called the law of international economic co-operation.

32. Mr. RUDA said that the importance of the Special Rapporteur's second report was shown by the quality of the discussion to which it had given rise.

33. The Special Rapporteur's first report, submitted to the Commission at its previous session, had ended with a chapter on acquired rights⁵ which contained in outline many of the ideas now expounded in his second report. In that first report, the Special Rapporteur had suggested that the Commission should set aside the question of acquired rights for the time being, at least until it had considered the question of public debts and public property.⁶

34. At the previous session, the members of the Commission had replied to a questionnaire submitted by the Special Rapporteur which did not contain any item on acquired rights.⁷ The Commission had then decided to begin consideration of what was now item 2 (b) of the agenda by dealing with State succession in economic and financial matters. The Special Rapporteur, however, had decided to embark boldly on a study of the question of acquired rights, explaining that that question was "more general in nature and arises in connexion with virtually all aspects of State succession in economic and financial matters" (A/CN.4/216/Rev.1, para. 3) and had accordingly introduced the term "acquired rights" into the very title of his second report.

35. From the point of view of method, he had doubts about the advisability of the approach adopted by the Special Rapporteur. Perhaps it would have been preferable to study the whole subject of State succession in economic and financial matters before reaching any final conclusions on the question of acquired rights. Undoubtedly, that question would have to be examined in connexion with economic and financial rights, because the doctrine of acquired rights was traditionally applied to rights having a monetary value, as had been pointed out by a recent writer on the subject.⁸ The doctrine, however, could best be considered in the light of any decisions of draft articles which the Commission might adopt on specific questions relating to economic and financial rights. If that course were adopted, it might even be possible for the

Commission to avoid discussing the doctrine altogether and to leave it to others to draw their own conclusions from its decisions on concrete issues.

36. On the substance of the report, he was in agreement with most of the ideas expressed. He concurred with the Special Rapporteur's view that "nothing should be imposed on the successor State that would not be imposed on any other State" (para. 22), although he himself would qualify that statement by adding "in the same or similar circumstances". He also agreed that the principle of the equality of States made it necessary "to refrain from imposing more obligations on the successor State than on the predecessor State" where respect for the same rights was concerned (para. 24). Like the Special Rapporteur, he believed that a foreign State could not assert "any right to inquire into action taken by the successor State" with respect to "rights of individuals which it had no part in creating" (para. 48) and that a successor State which amended its own laws was "entitled to respect its legislation only to the extent that to do so is not contrary to the *public interest*" (para. 53). One of the first articles of the Argentine civil code laid down that no one could invoke acquired rights against a law enacted in the public interest; that rule, he thought, constituted a general principle of law.

37. He also adhered firmly to the view that "it should be within the exclusive competence of the State to determine the juridical régime of the persons and property in its territory" (para. 68) so that it could carry out such nationalization as it deemed appropriate; only where a measure was "directed against a class of persons because of their foreign nationality" could it be described as illegal on the basis of other rules of public international law (paras. 67 and 71).

38. As a fellow citizen of Calvo and Podestá Costa, he firmly believed that an alien could not have more extensive rights than a national and that "the maximum that may be claimed for a foreigner is civil equality with nationals" (para. 64).

39. He would not dwell any longer on the points on which he agreed with the Special Rapporteur; he must now express some of his doubts. The crux of the problem, as he saw it, was whether the successor State was, or was not, under an obligation to respect the legal bonds created by the predecessor State. In principle, a new sovereign independent State would seem to have the right to establish a new legal régime for property and persons in its territory. Should such a change of legal régime affect aliens, he did not believe that the case would be any different from that of a similar change made in a State which had been sovereign and independent for many years. The problem of international responsibility would arise in the same manner for a new State as for an old one. He therefore believed that it might perhaps be premature to consider the problem of acquired rights in the present context before it had been examined in the context of State responsibility.

40. Those remarks were particularly relevant to the case of compensation as a result of nationalization, for which he did not think there was any well-defined

⁵ See *Yearbook of the International Law Commission*, 1968, vol. II, document A/CN.4/204, paras. 138-153.

⁶ *Ibid.*, para. 75.

⁷ *Op. cit.*, 1968, vol. I, pp. 111 and 112.

⁸ D. P. O'Connell, *State Succession in Municipal Law and International Law*, 1967, vol. I, p. 245.

rule, although certain clear trends seemed to have emerged in recent years.

41. He also had doubts about the question, dealt with in various places in the Special Rapporteur's second report, of the status of property and persons between the date of gaining independence and the date on which a change of régime or structure was introduced. The Special Rapporteur had pointed out that the "successor State has not been established *ex nihilo*" and that it "cannot disengage itself from pre-existing rules and situations, or at least it cannot do so immediately and for ever" (para. 23). But he had also said: "There are, however, factual considerations which induce it to renew previous situations, not because it lacks the legal power to annul or change them, but because it does not wish to do so for reasons of expediency . . ." (para. 77).

42. It was his view that, bearing in mind the need for order in any society, there could be no automatic extinction of all existing rights and obligations at the time of succession and that, so long as no change of régime had been introduced by the successor State, that State had the obligation to respect them. If and when it decided to introduce a change of régime, that change might or might not give rise to questions of State responsibility.

43. He also had doubts about public debts contracted by the predecessor State in the direct interest of the territory of the successor State, such as a loan raised in order to carry out public works. The question arose whether, in such a case, the successor State might not be regarded as a debtor even though it had not itself originally borrowed the funds.

44. An even more serious question was the possible obligation to respect pre-existing rights in cases of merger or integration. Those cases were likely to occur in the future and it was desirable that they should be carefully examined.

45. The Special Rapporteur had undoubtedly had good reasons for placing the emphasis on State succession in cases of decolonization, but the other cases of State succession should also be examined, and a wider and more general approach should be adopted for that purpose.

46. He believed that he had now replied in general terms to questions 1 to 6 of the Special Rapporteur's questionnaire. As to question 7, he preferred the second alternative, namely, that the Commission should instruct the Special Rapporteur to submit draft articles on a more particular aspect of succession in economic and financial matters.

47. With regard to question 8, he supported the idea of publishing the replies of Governments to an inquiry concerning certain aspects of the practice followed in State succession. He did not favour the suggestion that the Secretariat should be asked to compile a bibliography and a summary of works concerning State succession; that was a task for the members of the Commission. In any case, the expected cost was so high that the scheme would meet with strong resistance in the financial organs of the General Assembly.

Lastly, he supported the suggestion that the Secretariat be requested to prepare an analysis of the decisions of international courts, especially as the expected cost was small.

48. Mr. YASSEEN said he admired the fine work of synthesis accomplished by the Special Rapporteur, whose views he largely shared. Work of that kind was essential, in order to find bases, if possible, for the codification and progressive development of the topic of State succession.

49. State succession covered a number of situations. If they were to be analysed by types, the circumstances in which the succession occurred could not be overlooked; for those circumstances could justify rupture or provide the basis for some continuity, and it was on them that the solution of the problems depended. State succession in cases of decolonization was important, but it did not exhaust the subject. Other circumstances might lead to a succession of States, in particular, the constitution of international unions or federations, and secession. Because of the differences between those cases, it was impossible to derive from a single one of them all the principles governing State succession as a whole.

50. The question of acquired rights was one of the most confused and controversial in both internal and international law. It could not provide the key to the general theory of State succession, even though it could help to solve certain problems which might otherwise remain unsolved. Thus a frontal approach to the question of acquired rights was perhaps not without disadvantages.

51. The Special Rapporteur was right in maintaining that in State succession there was a substitution, not a transfer of sovereignty. The existence of an obligation to respect acquired rights was not essential to justify the rules to be applied to State succession. However, he felt that in certain cases there must be continuity of the legal situations.

52. To take first the cases other than decolonization, it was to be noted that succession allowed many legal situations to subsist. But the existence of such situations was one thing, and the attitude of the State and the extent of its power over them were another. The notion of acquired rights had never meant that the successor State was not entitled to alter those situations. In the last paragraph of his report, the Special Rapporteur had written that "the competence of the successor State is clearly not unlimited". He himself would go further and say that the successor State certainly had the power to alter existing legal situations, but it must not exercise that power in an arbitrary fashion.

53. The problem, therefore, was not whether the State had or did not have that power, but whether it had to justify its negative attitude towards such situations in some way or other. Mr. Castrén had aptly cited three cases in which the State was entirely free to modify existing legal situations:⁹ when it was

⁹ See 1001st meeting, paras. 42 *et seq.*

necessitated by a change of structure; when such situations were incompatible with public order; and when such situations had been created in bad faith by the predecessor State during the period described by the Special Rapporteur as "suspect".

54. The notion of a "minimum standard" also required some clarification. It had been accepted at a time when a distinction had been made between civilized and uncivilized countries. With the disappearance of that distinction, a State could not today be asked to respect a "minimum standard" unless it was a standard based on existing rules of positive law, perhaps on human rights, for example. A State could be required to respect human rights if they were part of positive law for that State.

55. The principle of equality of treatment as between aliens and nationals had been wrongly invoked. A State could always accord more rights to its nationals than to aliens. In fact, most States did so. Hence that argument could not be used against the "minimum standard" theory. The State did not incur any responsibility by adopting a less favourable attitude towards aliens than towards its own nationals. But there could be a difference in the efficacy of the two sets of rights. An alien's rights might be protected by diplomatic means, whereas generally speaking there was no effective international protection of a national against his own State.

56. In any event, the recognition of acquired rights for certain persons never entailed a limitation of the sovereignty of the State with respect to such rights. There might perhaps be a case, especially in decolonization for recognizing an intermediate category between aliens and national: the category of nationals of the predecessor State, in regard to whom the successor State would have more freedom of action than in regard to nationals of third States.

57. On the question of State succession in the case of decolonization, he was largely in agreement with the Special Rapporteur, subject to a few shades of emphasis. It was difficult to maintain that, in decolonization, the successor State retained absolute freedom; but it was possible to safeguard the rights and sovereignty of the successor State and to avoid obstacles to its development by other methods, which could be fairly generally accepted.

58. There was no denying that, in decolonization, as in any other type of succession, the successor State was free under the rules of its own legal order to adopt a negative attitude towards certain juridical situations. But it was not certain that it could always do so without paying compensation. Of course, he recognized the force of all the examples quoted by the Special Rapporteur. But in order to redress the wrongs suffered by colonized peoples, all that was needed was to calculate the compensation in an appropriate manner. With some concessions, it would be reasonable, when deciding whether the concession holders were entitled to compensation, to calculate how much the concession had yielded as a going concern. The result would nearly always be quite fair. For example, there

would be no injustice in refusing compensation if, during its life, the concession had produced exorbitant profits for its holders at the expense of the country.

59. It was difficult at that stage to answer the Special Rapporteur's questionnaire more precisely with regard to acquired rights and the reconciliation of their maintenance or denial with certain principles of international law. In his view, if the right in question was protected by international law, it must be respected, for the State must comply with the rules of international law even in its own legislation. The question was, therefore, whether a rule of international law existed to support the alleged acquired right.

60. His reply to question 7 was that it would be preferable for the Special Rapporteur to prepare draft articles on a more particular aspect of succession in economic and financial matters. It was neither necessary nor possible to examine all the aspects of State succession on the basis of the notion of acquired rights.

61. With regard to question 8, on the tasks and inquiries to be entrusted to the Secretariat, he would recommend the utmost caution. The Secretariat should not be asked to do anything which would entail making an assessment or expressing an opinion. It should not be assigned a task which was the responsibility of the Commission itself. It could be asked to describe its own experience, to send States a questionnaire on the practice they followed, and possibly to make a list of works and precedents. But apart from all considerations of expense, for reasons of principle, the Secretariat must not be asked to summarize such works or to analyse the precedents, because it could not do that without making an evaluation.

62. Mr. ROSENNE said that question 8 of the Special Rapporteur's brief questionnaire raised a series of questions of principle. In general, the task of the Secretariat should be limited to collecting material and presenting factual data regarding aspects particularly within its own cognizance, or which it was in a particularly good position to obtain. The Secretariat should not, however, attempt to assess the juridical value of the material or set forth any conclusions to be drawn from it; that was the duty of the Commission. In connexion with the "wide-ranging survey by the Secretariat" referred to in footnote 14 of the Special Rapporteur's report, he would like to point out that he had received from New York the text of the Secretariat's *note verbale* of 27 July 1962, which stated that "it would be appreciated if governments would also transmit, in addition to the materials mentioned in the note of 21 June 1962, copies of diplomatic correspondence relating to succession as it affects the new States referred to . . .". The original *note verbale* of 21 June 1962 had referred to various materials "which relate to the process of succession as it affects States which have attained their independence since the Second World War". The material thus obtained was now available to the Commission in the United Nations Legislative Series, and he believed it was the Commission's duty, with appropriate guidance from the Special Rapporteur, to make its own deductions and analyses; as a matter of principle, the Secretariat should not be

asked to undertake that kind of evaluation of State practice.

63. In addition, he doubted whether much more information would be forthcoming—at least not quickly. In a report submitted to the General Assembly in 1960, the Secretary-General had written: "Optimism as to the rapidity of the transmission from governments of the material . . . ought to be tempered with some substantial measure of caution. . . . Past experience has shown . . . that it is questionable whether all governments will provide the necessary information . . .".¹⁰ He was sure that all members recalled the famous and caustic observation of the French Government in 1950 to the effect that it could not work through "several tons of its archives" in order to answer questions emanating from the Commission.¹¹

64. The Special Rapporteur's proposal that the Secretariat should undertake an evaluation of jurisprudence was open to the same objection: it invited the Secretary-General to undertake a task which was essentially the special responsibility of members of the Commission. The digest of decisions furnished by the Secretariat¹² contained adequate data for the Commission's researches, but it should be brought up to date along the lines indicated at the seventh meeting of the Subcommittee in 1963.¹³

65. The proposed bibliography might be useful, but only on condition that it was compiled by the Library services in conjunction with the Codification Division, and that no attempt was made to evaluate the items listed.

66. He suggested that the Secretariat should also be asked to prepare a short note on the interaction between the present topic and General Assembly resolution 1803 (XVII), on permanent sovereignty over natural resources, the other resolutions mentioned in footnote 76 of the Special Rapporteur's report and subsequent resolutions, with particular reference to discussions in the General Assembly. General Assembly resolution 1803 (XVII) was dealt with as far as State responsibility was concerned in the summary prepared by the Secretariat of the discussions in various United Nations organs and the resulting decisions,¹⁴ while subsequent developments in connexion with the same topic were covered in document A/CN.4/209. A parallel document was now needed for the topic of State succession.

Organization of Work

67. The CHAIRMAN said that an estimate of the cost of implementing the Special Rapporteur's suggestions had just been circulated. In his view, that document should be discussed at a closed meeting. Since

the issue was clearly presented, perhaps the meeting could be held even if the Special Rapporteur was absent. The officers of the Commission would decide that point.

The meeting rose at 6 p.m.

1007th MEETING

Tuesday, 24 June 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Beđjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ingacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Appointment of a Drafting Committee

1. The CHAIRMAN said that the officers of the Commission wished the Drafting Committee to start work without delay, so that the Commission could begin to examine the draft articles on permanent missions to international organizations. He suggested that the Drafting Committee should consist of the following: Chairman: Mr. Castañeda; members: Mr. Ago, Mr. Bartoš, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Reuter, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor and Sir Humphrey Waldock.

It was so agreed.

Succession of States and Governments: Succession in Respect of Matters other than Treaties

(A/CN.4/216/Rev.1)

[Item 2 (b) of the agenda]

(resumed from the previous meeting)

2. Mr. ROSENNE said he wished to join with other speakers in expressing great appreciation of the work accomplished by the Special Rapporteur. His frank, hard-hitting and superficially uncompromising report, or brief, as it had been called, amplifying points contained in his first report¹, squarely pointed up the non-jural context in which the matter would have to be discussed. He (Mr. Rosenne) was rather disappointed, however, that the Special Rapporteur had not phrased his questionnaire in such a way as to bring into clearer focus the legal issues on which he wished to have the views of members of the Commission. As a result, the

¹⁰ See *Official Records of the General Assembly, Fifteenth Session, Annexes*, agenda item 66, document A/4406, para. 18.

¹¹ See *Yearbook of the International Law Commission, 1950*, vol. II, p. 206.

¹² *Op. cit.*, 1962, vol. II, p. 131.

¹³ *Op. cit.*, 1962, vol. II, p. 277.

¹⁴ *Op. cit.*, 1964, vol. II, p. 125

¹ *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/204.

present debate had been essentially a repetition of the one the Commission had had the previous year, which was summarized in its report.²

3. It would appear that questions 1, 2, 3 and 6 in the Special Rapporteur's questionnaire³ invited the Commission to take a position precisely on the non-jural elements, although all experience, including that of the present debate, showed that an attempt to reach decisions on those elements or on abstract theses would result in a sharp division of opinion. He himself was not yet convinced that it was really necessary to take a position on them or that it was even possible to do so on an abstract basis. He hoped the Special Rapporteur would find sufficient indication of his general views in his statement at the 962nd meeting.⁴

4. In paragraph 6 of his report (A/CN.4/216/Rev.1), the Special Rapporteur said that his initial conclusions "might form the basis of a set of draft articles which would constitute the first chapter of the work on succession." While agreeing with that statement, he wished to point out that, as the Special Rapporteur said in paragraph 137, "the International Law Commission could not concern itself with abortive or precarious solutions", and that paragraph 148 contained somewhat negative conclusions on certain concepts or principles. In his experience, it would be abortive and precarious for the Commission to attempt to work on such a basis. Moreover, like many other members, he did not disagree with many of the conclusions reached by the Special Rapporteur, and he thought that in many respects the report was knocking at open doors.

5. He had always been doubtful about the validity of extreme theories of "acquired rights" and believed, as he had written in his working paper of 1963,⁵ that the real problem for the Commission was to achieve a just balance between the need to maintain a measure of stability and the need for regulated change which was implicit in the process that led to the political and economic independence of new States. In dealing with the law of treaties, both in the Commission and at the Vienna Conference, it had been found that time and time again theoretical or doctrinal approaches had to be abandoned in favour of pragmatic solutions, which alone were able to secure the representative two-thirds majority necessary for the long-term success of a codification effort.

6. As to the impact of the principle of the equality of States on the present topic, he did not disagree with the Special Rapporteur's general thesis, but he was not sure that that thesis necessarily led to all the conclusions reached in the report; in particular, paragraph 25 seemed to state what it called "the heart of the problem" in too broad terms. According to the report, the problem was whether the successor State was "obliged to respect whatever it was that bound the predecessor State".

The answer was obviously in the negative. He would have thought that the real problem was to establish the extent to which the successor State was bound to respect obligations which the predecessor State had legally assumed in respect of the territory which became that of the successor State. He wished to stress the territorial as opposed to the temporal aspect, for the reasons given in paragraph 17 of the report.

7. On the same issue, he could not accept the thesis that the principle of the equality of States was impaired simply because one State was the obligor and the other the obligee—a thesis which seemed to be implicit in paragraph 27 of the report—whether the obligation arose out of a valid international treaty or from some other rule of international law. In his opinion, the acceptance of that thesis would quickly lead to legal nihilism and make nonsense of the very idea of international law. Nor could he accept what seemed to be the parallel thesis, advanced in paragraph 107, that it was only since 1917 that the problem of economic distortion between States had become intertwined with the problem of State succession. As Mr. Ago had once said, it was an easy error to believe that what happened in one's own lifetime was entirely different from what had happened in the past.⁶ For similar reasons, he did not think that the General Assembly, in the resolutions to which the Special Rapporteur had referred,⁷ had intended to infer the existence of categories of States, but that, at the most, it had been pointing to categories of problems.

8. As to paragraph 29 of the report, with which he generally agreed, he thought that on the whole it should be more nuanced, for it did not deal with the case in which there was a real transfer of territory.

9. With regard to the Special Rapporteur's questionnaire, he thought that questions 1, 2, 3 and 6, as he interpreted them, could not really be answered except on the basis of a firm doctrinal position, which was unnecessary for practical purposes. To some extent, that was also true of question 4, which was answered in the Commission's report for 1968⁸ and the report of the Sixth Committee.⁹

10. Question 5 raised major issues which were not fully ventilated in the report, and which had only been discussed in detail by the Special Rapporteur in his statement at the previous meeting. The general policy should be not to reopen issues which had already been disposed of by the General Assembly or other organs and not to deal with other topics of international law under the guise of State succession. The fact that the question had been put meant either that the Commission's earlier decisions had not been clear, or that, in effect, the Special Rapporteur wished to appeal from them. A re-examination of the Commission's previous

² *Ibid.*, Report of the Commission to the General Assembly, paras. 76 and 77.

³ See 1003rd meeting, para. 1.

⁴ See *Yearbook of the International Law Commission*, 1968, vol. I, pp. 113-115.

⁵ *Op. cit.* 1963, vol. II, p. 285.

⁶ *Op. cit.*, 1962, vol. I, p. 35, para. 19.

⁷ See 1000th meeting, para. 6.

⁸ See *Yearbook of the International Law Commission*, 1968, vol. II, Report of the Commission to the General Assembly, para. 79.

⁹ See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 84, document A/7370, para. 53.

decisions on the treatment of the topic of State succession showed that what it had probably had in mind was not so much "State succession in respect of treaties" and "State succession in respect of matters other than treaties", as "succession in the law of treaties"—picking up where the Commission had left off at article 69 of its 1966 draft¹⁰ and the Vienna Conference had left off at article 73 of the 1969 Convention¹¹—and "succession in other branches of international law", succession always being the secondary subject. That being so, it was not a matter of tracing the boundaries of State succession in matters other than treaties, but of how to draw the boundaries of State responsibility and other relevant topics—a matter which would probably have to await progress on those other topics. Among the other branches of the law which had been mentioned in the present discussions, apart from the topic of State responsibility in general, had been the law of diplomatic protection, the treatment of aliens, the inter-temporal law and the law relating to coercion, particularly economic coercion and the Declaration on that subject which had been adopted at the recent Vienna Conference;¹² in addition, the question of recognition and all its implications could not be overlooked.

11. The answer to question 7 was to be found in paragraph 79 and 104 of the Commission's report for 1968. He doubted whether draft articles on acquired rights as such would be of much practical use, and he feared that, in view of the controversy which they were likely to stir up, they might prejudice any future work on the topic. He reminded the Commission that the delays in its work since 1962 had caused considerable dissatisfaction in the General Assembly, so they should not be aggravated.

12. With regard to the Chairman's ruling at the last meeting, if it had in fact been a ruling, he did not in principle see why, after the Special Rapporteur had squarely posed the issues concerning the proposed work by the Secretariat, the matter should have to be discussed at a closed meeting. He would not, however, object to such a course of action. As to the Commission's report to the General Assembly, he thought it would be unwise to take a summary of the present discussion as a basis for that report; he recalled that in 1956 and 1957, when the Commission had received similarly controversial reports on State responsibility, it had merely said that it had examined the report and requested the Special Rapporteur to continue his work.

13. Mr. TSURUOKA said that before making some general and provisional remarks on acquired rights and the method that should be adopted for the study of State succession, he wished to stress that the Commission's terms of reference were clearly stated in its Statute. Its members were not the legislators of the world. According to its Statute, the Commission's object

was to promote the progressive development of international law and its codification. It was responsible for preparing international conventions which would be applicable in the largest possible number of countries and its work should be of an essentially pragmatic nature. It should therefore seek compromise as the only means of obtaining the support of the majority of States and try to make the rules it formulated correspond as closely as possible to the requirements of the international community.

14. He would examine the question of acquired rights successively in relation to the international responsibility of States, State succession in general and State succession resulting from decolonization.

15. In the first case, respect for acquired rights seemed to him to be a well-established rule of international law, judging from State practice, jurisprudence and doctrine. In particular it had been recognized by the Institute of International Law in 1927, in the resolution it had adopted on the "International responsibility of States for damage caused in their territory to the person or property of aliens",¹³ by O'Connell in 1967¹⁴ and by Nkambo Mugeerwa in 1968.¹⁵ Moreover, as Professor Egawa, a Japanese jurist, had said, respect of the person and property of aliens was the foundation of private international law. On the other hand, no one denied that international law gave every independent State full freedom in the exercise of its sovereignty in its own territory and, consequently, gave it the power to take any legislative or administrative measures it wished with regard to both aliens and nationals. Those two rules appeared to be contradictory and it was in order to remedy that state of affairs that international law laid down that a State must pay compensation for any damage caused to the property of aliens by measures it had taken. It would therefore be incorrect to say that a State could freely dispose of the property of aliens by virtue of its absolute right of government, since that would be recognizing one rule and disregarding the other.

16. As to the question whether the principle of the international responsibility of States for damage caused in their territory to the property of aliens was generally applicable in the case of State succession or whether that principle varied according to the conditions of the succession, both practice and jurisprudence appeared to recognize that acquired rights must be respected in cases of succession. That view was supported by the advisory opinion given in 1923 by the Permanent Court of International Justice in the case of the *German Settlers in Poland*,¹⁶ by the declaration of the Japanese Government protecting the rights of aliens in Korea at the time of its annexation by Japan in 1910,¹⁷ and by the resolution adopted by the Institute of Inter-

¹⁰ See *Yearbook of the International Law Commission*, 1966, vol. II, p. 267.

¹¹ A/CONF.39/27.

¹² See Final Act of the United Nations Conference on the Law of Treaties (A/CONF.39/26), annex.

¹³ See *Annuaire de l'Institut de droit international*, 1927, vol. III, p. 330.

¹⁴ *State succession in municipal law and international law*, 1967, vol. I, p. 263.

¹⁵ See *Manual of public international law*, ed. Max Sørensen, p. 485.

¹⁶ P.C.I.J., Series B, No. 6.

¹⁷ *British and Foreign State Papers*, vol. CV, p. 688.

national Law in 1952 on the "Effects of Territorial Changes upon Patrimonial Rights".¹⁸ He was therefore unable to accept the opinion expressed by the Special Rapporteur in paragraph 33 of his report, where he said that if a State encroached on acquired rights in ordinary times, that was to say when succession was not involved, it was "bound only by an obligation under municipal law, which is not susceptible to any international recourse". He himself believed that respect for acquired rights was a rule of international law.

17. Nor did he think it was possible to set aside acquired rights in the case of State succession resulting from decolonization. It was true that the predecessor State and the successor State could derogate from the rule by mutual consent but, in the absence of such agreement, doctrine and practice generally affirmed the validity of the principle of acquired rights, even in that case. It was on that basis that the draft Convention on the International Responsibility of States for Injuries to Aliens,¹⁹ in particular article 10, paragraphs 2 and 4 and the relevant commentaries, had been drafted by Sohn and Baxter in 1961. It could therefore be said that the question was controversial and that the Commission should try to find a compromise.

18. In conclusion, he referred to the working document he had submitted to the Commission in 1963,²⁰ in particular, paragraph 3 concerning the terms of reference of the Commission and paragraph 24, which pointed out that neither changes in the political system of a State nor the emergence of an independent State could have the legal effect of destroying the juridical value of the international law in force. At a time of increasing co-operation between the developing and the developed countries, the dangers to which the property of aliens would be exposed if the principle of acquired rights was abolished might damp the enthusiasm even of those who were willing to make an effort for international solidarity. It was therefore essential to ensure the equitable protection of those rights.

19. With regard to the Commission's method of work, he thought it would be advisable to study the problem of acquired rights within the framework of State responsibility and to ask the Special Rapporteur to submit to the Commission, at its next session, a third report, dealing with the general rules of State succession in respect of financial rights, public debts and the like, leaving it to him to refer where necessary to the problems of acquired rights arising in cases of succession, in the light of the discussion at the present session. As to the work to be requested of the Secretariat under question 8 of the questionnaire, he shared the views expressed at the previous meeting by Mr. Yasseen and Mr. Rosenne.

20. Mr. AGO said he was grateful to the Special Rapporteur for having drawn attention to the very many

problems raised by the subject under study and for having pointed out that they might be closely connected with the rights of aliens and with State responsibility.

21. It must not be thought that a succession of States resulted *ipso facto* in the automatic disappearance of the pre-existing legal system and that legal situations established under that system consequently ceased to exist. At the very moment of the succession a continuity was established, which subsisted so long as the successor State did not intervene to break it and to alter the existing legal situations. The problem of succession lay precisely in the question whether the successor State was restricted, and if so how, in its power to change the existing legal order. In that connexion it was obvious that the State could not be granted the right to change everything, any more than it could be obliged to leave everything unchanged. The answer would differ according to the type of succession, but in every case a series of problems would arise from the outset, in particular, with regard to respect for human rights and certain legal situations. Was the successor State free to adopt even legal rules which disregarded certain essential rights or certain basic legal situations established under the previous régime?

22. The problem which arose with regard to the treatment of aliens was the same in the case of succession as where no succession was involved. There could be exceptions, but it must be recognized in principle that the successor State too was required to guarantee to aliens the treatment which every State must accord them in its territory. It was not a matter of treatment prescribed by treaty rules, which raised other problems; but where rules of general international law were concerned, it was difficult to accept that a State, because it was the successor to another State, was entitled not to comply with some of those rules which related to the treatment of aliens. In any event, he wished to stress that the succession problems raised by the Special Rapporteur were very closely connected with the treatment of aliens, but not directly connected with State responsibility. Responsibility was involved when an obligation deriving from a rule was violated. One must not be misled by the fact that certain obligations, for example, the obligation to pay compensation, could arise just as much on one ground as on another. The obligation to compensate an alien for expropriation was a primary obligation and had nothing to do with responsibility for an unlawful act. The obligation to pay compensation as reparation for an internationally unlawful injury was quite a different matter. Only the latter obligation came within the sphere of responsibility.

23. In codifying and developing the law governing State succession, the Commission should always bear that distinction in mind. Its task was to codify the primary rules from which derived the obligations of States in case of succession, not to study the consequences of a failure to fulfil those obligations. The problem of State succession amounted to deciding whether the fact that a State had succeeded another State introduced an element which authorized it to derogate from the rules generally applicable to the treatment of aliens under national and international law.

¹⁸ See *Annuaire de l'Institut de droit international*, 1952, vol. II, p. 475.

¹⁹ See *The American Journal of International Law*, vol. 55, p. 548.

²⁰ See *Yearbook of the International Law Commission*, 1963, vol. II, p. 247.

He also recommended the Commission not to lose sight of the fact that codification was a long-term project in which too much consideration should not be given to transitory situations.

24. Mr. NAGENDRA SINGH expressed his unqualified admiration for the erudition shown by the Special Rapporteur in marshalling facts in support of his views; the convincing legal logic on which his second report was based would undoubtedly win him general support in all the developing countries of the decolonized areas of the world.

25. The Special Rapporteur had entered a field that was both complicated and controversial—an undertaking which had its merits and its difficulties. The question that arose was how to deal with such a vast subject: whether to begin with certain specific matters which lent themselves to easy codification, or immediately to take up the most complicated and controversial issue involved.

26. Opinions on the question of acquired rights differed so widely that his only concern was to see concrete results emerge from the Special Rapporteur's most illuminating report. In principle, he agreed with all the Special Rapporteur's submissions, but he did not wish the progress of the Commission's work to be impeded by controversies. The question of acquired rights was undoubtedly of vital importance to new States and decolonized areas, and the Special Rapporteur had made a valuable contribution by emphasizing that aspect of the matter. He feared, however, that as the subject was still nebulous and very controversial, it might be difficult to codify it and formulate draft articles. The Commission might well lose sight of its objective in the resulting controversy. For practical reasons, therefore, and with a view to achieving concrete results, he wished to make some suggestions.

27. The Special Rapporteur's second report had been very useful, for it had provoked an interesting exchange of views which had shown the vital importance of the subject. But if the Commission were to ask the Special Rapporteur to draft articles on acquired rights it would be inviting difficulties, because the law on that subject had not yet crystallized. The question of acquired rights was still much debated and any attempt at codification might stir up regrettable controversy. The Special Rapporteur himself had said that "Practice, jurisprudence, doctrine and precedent in general were of no decisive help in studying the problem of acquired rights. Precedents abounded, but they contradicted each other".²¹ In those circumstances, he thought that the Special Rapporteur's second report had served its purpose by showing the importance of acquired rights, and the Commission could resume consideration of that important subject at a later stage.

28. He suggested, therefore, that the Commission should invite the Special Rapporteur to deal in his third report with questions mentioned at the previous session, such as public debts, public property and other economic and financial questions connected with State

succession which were not controversial and would be easy to codify. That would provide a firm foundation on which rapid progress could be made, even in regard to the question of acquired rights, which would have to be taken up again later.

29. There were good reasons for adopting that method. In the first place, it might be asked whether acquired rights belonged to the topic of State responsibility or to that of State succession—a question on which the members of the Commission were divided and which could lead to endless argument. For his part, he was inclined to share the Special Rapporteur's view that the question of acquired rights belonged to the topic of State succession. He suggested, however, that the Commission should not attempt to settle the matter at that stage, since no agreement was in sight. When the Commission had made some progress on the substance of State responsibility, it would be in a better position to decide which topic the question of acquired rights properly belonged to and it might easily endorse the Special Rapporteur's position.

30. He urged the Commission to proceed step by step and deal first with those aspects of State succession which would make it possible to lay a firm foundation for the subsequent consideration of acquired rights.

31. The nebulous character of the question of acquired rights was shown, for example, by the fact that during the discussion Mr. Yasseen had, quite rightly, asked whether nationals of the predecessor State should not be considered as a third category of persons, distinct both from nationals of the successor State and from aliens.²²

32. Some States certainly claimed acquired rights that were very questionable and should be set aside; he therefore fully supported the idea of approaching the subject from the point of view of the developing countries, but he thought it would be better not to do so until the Commission had been able to formulate some of the principles governing the whole topic of State succession.

33. In his opinion the Commission should thank the Special Rapporteur for his interesting second report and ask him to prepare a third report containing articles on the law of State succession relating to public debts, public property and other similar subjects connected with State succession in economic and financial matters.

34. The CHAIRMAN, speaking as a member of the Commission, drew attention to the positions of principle he had taken in his statement at the 1005th meeting.²³ He was convinced that contemporary international law could not give direct protection to private persons, since they were not subjects of international law, and that it did not recognize any acquired rights in respect of the property of aliens, whether they were natural persons or legal persons. He was thus entirely in agreement with the Special Rapporteur concerning the present state of international law in regard to so-called acquired rights.

35. As to the Commission's approach, it might be

²¹ See 1000th meeting, para. 14.

²² See 1006th meeting, para. 56.

²³ See paras. 44 to 48.

asked whether the question should be studied on the basis of the subject-matter of succession, such as financial and economic or territorial questions, or whether it would not be preferable to start from the different types of succession of States.

36. The previous year the Commission had approved the principle of making a more specific study of succession of States due to decolonization, without neglecting the other causes of succession.²⁴ Solutions would certainly differ according to the origin of the succession: whereas a new State born of decolonization could be absolved from all obligations, a different solution would have to be applied to a State created by the fusion of several States or the partitioning of one State.

37. The Special Rapporteur was, of course, entirely free to approach the subject as he understood it. But perhaps he might once again consider the various ways of studying it and the possibility of adopting different methods according to the type of State succession considered. In any event, he (Mr. Ushakov) was convinced that a special chapter should be devoted to decolonization, covering all the questions of succession of States in respect of matters other than treaties.

38. Mr. CASTAÑEDA, referring to Mr. Ago's comment that the position of the successor State in regard to aliens was, in principle, more or less the same as that of any State in the absence of succession, observed that Mr. Ago had nevertheless made the reservation that there could be exceptions.

39. Those exceptions could be looked for in two opposite directions. First, could the successor State have more extensive obligations than those of the predecessor State? The answer was, of course, in the negative. The fact of succession added nothing. The Special Rapporteur had very well explained, in paragraph 33 of his report, that if succession imposed additional obligations on the successor State, it could only be by "some mysterious phenomenon of legal transmutation". It was, indeed, difficult to see what justification could be adduced for such new obligations.

40. The second type of exceptions had not been brought out clearly enough. Might not the obligations assumed by the predecessor State be diminished for the successor State by reason of the succession, since for the latter State they were *res inter alios acta*? It was not possible to give a general reply. The question must be examined for each type of succession. For instance, in a succession due to decolonization, when concessions had been granted very cheaply or under conditions which had been understandable at one time but were now unacceptable, the fact that the successor State had had nothing to do with the granting of those concessions might have the effect of lessening its obligations. Thus, while it was recognized, as a general principle, that the successor State was in the same position as the predecessor State, it could be recognized, as an exception, that its position could be changed by the very fact of the succession.

²⁴ See *Yearbook of the International Law Commission*, 1968, vol. II, Report of the Commission to the General Assembly, paras. 61 and 79.

41. Mr. BEDJAOUI (Special Rapporteur) contested the premise of continuity upon which Mr. Ago's reasoning was based. If there were no element of rupture, that would indeed mean that the successor State assumed the obligations of the predecessor State. There would be no need to consider whether the successor State could modify or abolish acquired rights. The problem was solved by the premise itself.

42. A clearer situation could be arrived at if another premise, which he would be prepared to accept, were adopted. Instead of proceeding from the principle of continuity, by which the successor State absorbed the old legal order into its own legal order, the successor State could be regarded as being only a State like any other, and reference could be made to the international legal order. There would then be continuity, not of the legal order of the predecessor State, but of the international legal order. Once the successor State was born to international legal life, it immediately accepted the rules in force, namely, the international legal order. On that basis, it would be possible to accept the reasoning by which Mr. Ago drew the line of demarcation between the succession of States, which concerned the substance of the law, and responsibility, which covered the problems of sanction for violations.

43. As Mr. Castañeda had just said, the successor State should even be able to claim the right to be bound by lesser obligations than those of the predecessor State, in so far as it had not participated in drawing up the legal rules imposed on it.

The meeting rose at 12.45 p.m.

1008th MEETING

Wednesday, 25 June 1969, at 10.10 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States and Governments: Succession in Respect of Matters other than Treaties

(A/CN.4/216/Rev.1)

[Item 2 (b) of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's second report (A/CN.4/216/Rev.1).

2. Mr. IGNACIO-PINTO said he wished to join in congratulating the Special Rapporteur on the thoroughness and elegance of his report. The question of decolonization had been studied particularly well.

3. The discussion had shown, however, that the succession of States, and more especially its economic and financial aspects, should be considered from a practical angle. The problem of acquired rights was so complex and so controversial that unless it shifted its ground the Commission was in great danger of rapidly reaching a deadlock. It would be better to adopt a pragmatic approach and look for points on which agreement would be possible, with a view to drawing up texts for submission to Governments. That seemed to be the only way to achieve a codification and slow but reliable progressive development of international law on the succession of States.

4. All who had lived under the colonial system would be grateful to the Special Rapporteur for having emphasized that situation. Decolonization, however, had not taken place in a uniform manner. The modes of accession to independence had been very varied and it would be a mistake to overlook that point.

5. The Special Rapporteur's arguments were perfectly appropriate to the context in which he had placed decolonization. When it was not a voluntary act and when a former colony had to be, so to speak, wrenched away, the inevitable conclusion was that there could be no acquired rights.

6. But decolonization might result from agreement between the former colonial Power, the predecessor State, and the former colony, the successor State. The successor State might have freely accepted, by treaty, what had been done by the predecessor State. There was also a question of good faith. For instance, a railway company in Dahomey had sold its business to the new State through the intermediary of the French Government. On Dahomey's accession to independence, the public debt included the balance outstanding on that transaction. He did not think that Dahomey could now simply repudiate the debt.

7. States which had come into existence through decolonization had a major interest in not adopting extreme positions. They were all subject to the imperative needs of development, and development was not possible without the help of investors. That was perhaps a down-to-earth point of view, but it was realistic.

8. On the whole, the arguments in the report concerning the other cases of State succession should be approved. However, since that was shifting ground, too categorical statements should be avoided. As Mr. Rosenne had said at the previous meeting, it was better to seek solutions which had some chance of securing a wide measure of agreement.

9. With regard to the Special Rapporteur's questionnaire,¹ he agreed that in State succession there was a substitution rather than a transfer of sovereignty. Acquired rights should be respected in some cases, as the situations were not always similar. Moreover, it

should be borne in mind that decolonization might be completed in the fairly near future, and if the Commission was to work for the future, it must not rigidly adhere to a particular view of the question of State succession.

10. With regard to the tasks and inquiries referred to in question 8, as Mr. Yasseen had said, the Secretariat should not be assigned a task which was the responsibility of the Commission itself.²

11. He approved of the report in broad outline and was grateful to the Special Rapporteur for having recognized, in paragraph 156, that the successor State did have certain obligations. It was for the Commission to define those obligations.

12. Mr. KEARNEY said the discussion had shown that it was just as impossible to reject the concept of acquired rights altogether, as the Special Rapporteur proposed in his report, as it was to accept it without any qualification. A number of members had already pointed out that there was a considerable body of international law which supported the thesis that a successor State was not free from all restraints in dealing with property rights established under the aegis of the predecessor State, and that if the successor State wished to take over such property it was subject to an obligation to compensate the former owners. It would be superfluous to recapitulate all the authorities, decisions and precedents for that point of view, as that had already been adequately done by some of his learned colleagues.

13. The mere assertion, in paragraph 148 of the Special Rapporteur's report, that international law had not raised the concept of acquired rights to the status of a principle, would not do away with that important body of international law. That type of flat assertion could just as well be countered by the assertion that the principle of acquired rights was *jus cogens* and not open to challenge. Both statements were probably equally fallacious.

14. The fact was that quite a large number of States did support the principle that the successor State was obliged to respect acquired rights to the extent of paying compensation in the event of nationalization of foreign property. And it was obvious that no consensus could be reached in the Commission on the basis of any assertion that such a principle did not exist.

15. On the other hand, neither would the Commission be able to reach a solution by ignoring some of the very real problems raised by the Special Rapporteur in his report. He had cited cases in which unduly heavy burdens had allegedly been laid on former colonies and had pointed out that in some former colonies the property holdings of former colonizers might be so large and managed in such retrograde fashion as to constitute a severe limitation on the economic development of the new State. If conditions of that kind did exist on a wide scale, they should certainly be taken into account and appropriate remedies should be devised.

16. The Commission, however, would need much more

¹ See 1003rd meeting, para. 1.

² See 1006th meeting, para. 61.

information about the facts of each particular case if it was to make any serious attempt to deal with problems of that kind. It would have to know, for example, to what extent the economy of an ex-colony, or specific sectors of it, was controlled by aliens who had acquired their holdings from the predecessor State. It would also have to know whether those aliens were re-investing in the local economy, the extent to which they were supplying expertise not otherwise available, the extent to which they were conducting research and development for the benefit of the local economy, and what indirect benefits or losses to the economy might result from their activities. For example, did they attract and encourage the establishment of additional productive capacity or did they hinder it? Those were only some examples of the type of information which the Commission should have if it was to deal at all satisfactorily with the problems raised by the Special Rapporteur. The practices of the past could not be relied on in laying down general rules: for example, one major complaint often encountered in legal literature was that foreign corporations tended to bleed the economy of a State by withdrawing excessive profits from it. He would like to point out, however, that the United States Treasury Department was greatly concerned by the fact that United States corporations operating in foreign countries were not repatriating their profits, usually for tax reasons, and were attempting to increase their capital holdings abroad.

17. With regard to the Special Rapporteur's questionnaire, and particularly to question 8, if the Commission was to engage in the progressive development of international law, it was far more important that it should ascertain what might be the economic and financial consequences of the maintenance, discontinuance or modification of the principle of acquired rights.

18. As to the major issue of the discussion, namely, the existence or non-existence of acquired rights, it seemed to him that the Special Rapporteur had approached the problem from too narrow a legal concept; for instance, in paragraph 149 of his report, he said: "However, if there has never been an acquired right to the maintenance *ne varietur* of a given situation, the theory of acquired rights is useless". That statement seemed to pay too much deference to legal formalism and too little to the basic principles which law was intended to serve. Law, after all, was not a mere abstraction, but was intended for the achievement of peace and harmony in human society. If the theory of acquired rights was regarded from that point of view, it was difficult to reach the bald conclusion that it was useless, since it undoubtedly did tend to promote stability, especially in the financial and economic spheres, and to encourage capital investment and technical assistance. It also avoided certain possible consequences that might result from a denial of the concept of acquired rights, such as the possibility of a resort to sanctions by a foreign State which had lost what it considered to be acquired rights. Foreign investment, after all, was an important element in the finances of many States, particularly in their balance-of-payments situation, so

that any large-scale nationalization without compensation might involve their interests either directly or indirectly.

19. It might be argued that there was a social objective which was hindered by the maintenance of acquired rights, namely, the objective of improving the economic condition of the poorer countries, and particularly of former colonies. That thesis seemed to him to be the foundation of many of the positions taken by the Special Rapporteur in his report. However, in order to reconcile the apparent conflict between two international social objectives, each of which was valid in its particular sphere, it was still necessary to have much more information than was now available to the Commission about the impact of acquired rights on the economic development of former colonies. It was his belief that a solution of the economic and the financial problems of State succession could only be found if the Commission proceeded on the assumption that it was dealing with competing social goals which seemed to come into conflict with each other at certain points, and that the only way to work out a solution was to determine those actual points of conflict and see how they could be eliminated.

20. To return to the Special Rapporteur's questionnaire, he did not think it was necessary to go any further into legal theory under question 1, or into the balance of equities under questions 2 and 3. On question 4, he shared the doubts of other members as to whether the Commission should reach any conclusions about the problem of acquired rights in general. With regard to question 5, if any boundaries were to be drawn, it would have to be done by considering draft articles in greater detail. Concerning question 6, he agreed with the many members who believed that the chances of progress would be considerably greater if the Commission concentrated on concrete problems, rather than on acquired rights in the abstract.

21. The report made no attempt to define acquired rights; indeed, a definition might well be impossible. In his opinion, it was likely that there would be a vast difference in equity, law and fact between a person who held a foreign currency bond issued by a former local authority of the predecessor State, a foreign stockholder in a corporation established under the predecessor State, and a foreigner who owned and operated a farm in the successor State. At times, the discussion of the concept of acquired rights had seemed to him unreal because the range of factual situations involved was so broad that no single theory could possibly embrace them all. He urged, therefore, that the Commission should take up specific topics such as public property and public debts, with a view to determining what specific solutions it could reach for specific problems.

22. He further urged that all aspects of succession, such as the union of States, the division of States and the cession of territory, should also be dealt with, in addition to problems connected with decolonization.

23. Sir Humphrey WALDOCK said that nothing he had heard during the discussion had caused him to alter

in any material way the views he had previously expressed.³

24. His primary intention at present was to note the state of the debate. All members, including the Special Rapporteur, would have to agree that there was a great deal of uneasiness over the strong emphasis given in the report to the problem of acquired rights as the point of departure for examining the topic of succession of States in respect of matters other than treaties. The reasons for that uneasiness differed. The concern of some members, such as the Chairman and Mr. Ustor, was due to the fact that they did not believe in acquired rights at all. Other members thought that the discussion of acquired rights in the report was too absolute and amounted to a frontal attack on the whole concept of such rights; those members considered that a better balance was called for in the treatment of the interests at stake.

25. It was thus clear that the subject of acquired rights was a highly controversial one, and was likely to lead the Commission to an early deadlock in an undertaking which all concerned wished to be productive; he hoped the Special Rapporteur would bear that fact in mind in his concluding remarks on the future course of his work.

26. There could be no doubt that the decision which the Special Rapporteur and the Commission itself were about to take with regard to that work would be a very important one, and he had wished to make his own position clear because he would unfortunately be unable to attend the next meeting, at which the Commission was expected to conclude its debate.

27. He believed that the problems of State succession affecting the rights of individuals would prove to be the most controversial ones. They ranged well beyond the question of acquired rights and included a number of other extremely delicate questions, such as those of nationality, which were all the more delicate in the context of decolonization. For example, the demography of certain British territories had been fundamentally affected by the colonial period. Under the protection of British sovereignty, there had been considerable migratory movements spread over long periods. Non-indigenous communities had grown and prospered and, in some cases, had actually come to outnumber the indigenous peoples. Situations of that kind had created grave problems of statehood in connexion with the efforts made by the United Kingdom to carry out the process of decolonization in peace and harmony. Nationality questions of that type were very controversial and involved human problems of great magnitude.

28. The best approach to the topic of succession of States in respect of matters other than treaties was probably through such matters as public property and public debts. The Commission could bring out the basic principles of the topic in the context of those specific subjects; it would then be easier to deal at a later stage with other branches of the topic.

29. On the substance, he would continue to keep an

open mind; he did not wish to pronounce on any particular point until the Commission had advanced much farther in its knowledge of the topic. He could, however, already agree with Mr. Ignacio-Pinto that it would be a mistake to lump together all cases of decolonization. In practice, the cases had been very varied and it was necessary to take into account the different situations which had arisen.

30. As the Special Rapporteur on the topic of succession of States and Governments in respect of treaties, he regretted that it would not be possible to make much more progress on that topic until the end of 1969, when he expected to be released from certain other major commitments. When the work on State succession in respect of treaties was more advanced, the Commission would probably find that a technical subject of that type afforded a better medium for the study of problems of acquired rights.

31. His own experience so far had been that many technical treaty problems arose in regard to State succession which could well provide a basis free from controversy for later consideration of some of the same problems in the context of State succession in respect of matters other than treaties. There could be no doubt that the latter topic was by far the most difficult part of State succession for the Special Rapporteur who had to deal with it.

32. Mr. RAMANGASOAVINA said he must pay a tribute to the Special Rapporteur for the quality and solidity of his report. The Commission now had evidence of the wisdom of its choice of Special Rapporteur and of the advantage of dividing the subject of State succession into two parts. It was only natural that the Special Rapporteur should have been rather sensitive to one particular aspect of the problem, namely, decolonization.

33. His report showed that neither practice nor doctrine offered generally accepted solutions from which a rule of international law could be derived. The notion of acquired rights was confused, and the position of States sometimes varied according to circumstances. Thus a State which had firmly rejected claims by aliens to acquired rights in a territory it had conquered at the end of the last century was now, after the recent accession of that same territory to independence, claiming respect for its own acquired rights with equal insistence.

34. The sovereign competence of the new State, its power to establish a new legal order, the imperative needs of its development, which required the total mobilization of its natural wealth and resources, the very vagueness of the concept of acquired rights and the problems relating to the mode and time of acquisition of the rights claimed were all factors which militated against the application of that concept. That was why States wishing to safeguard acquired advantages had arranged for them to be protected in their constitution or in co-operation agreements concluded at the time of the declaration of independence.

35. Nevertheless, it was already apparent that, even when acquired rights had been consolidated in that way,

³ See 1005th meeting, paras. 7 *et seq.*

some injustice could still result, because nationals of the predecessor State were protected against any subsequent measures which might be taken by the new State, whereas nationals of the new State had to accept them. It must also be noted that, unlike those States which had safeguarded acquired rights in their constitution or by treaty, others, less numerous perhaps, had abolished those rights in the treaties they had concluded.

36. It had been demonstrated that there was no established rule or regular practice in the matter. Solutions varied according to the circumstances which had given rise to the succession. Substitutions of sovereignty which had taken place on amicable terms lent themselves more readily to mutual concessions than those which had occurred as the result of violent rupture. And so, while recognizing that there was no sure criterion, it was impossible to reject outright the theory of acquired rights, since some situations deserved to be preserved if only in the name of justice and equity.

37. At the start, studies would have to be directed towards the problems of acquired rights in economic and financial matters, but in more general terms. Certain aspects of acquired rights might belong to the responsibility of States. The subject as a whole, however, might be studied with reference to other concepts, such as equity, good faith and unjustified enrichment which, though vague perhaps, might shed light on each other. If, instead of being based on the concept of acquired rights, the study were made on the broader basis of the reciprocal rights and obligations of States in economic and financial matters, polemics over the actual concept of acquired rights could be avoided and situations in which obligations were too often regarded as "one-way" obligations could be more satisfactorily dealt with.

38. For the predecessor State could also have obligations to the successor State or its nationals, such as the pensions of ex-soldiers or retired civil servants of the former régime; or strategic debts—criminal expenditure—contracted by the predecessor State to consolidate its power before independence and which the successor State refused to pay; or where the successor State was situated down-stream from the predecessor State and was thus dependent on it.

39. That approach to the problem might perhaps free the discussion from politics and produce a more balanced account of the respective rights and obligations of the predecessor State and the successor State. In the last analysis, the subject might thus link up with State responsibility.

40. Mr. BARTOŠ said he could not refrain from congratulating the Special Rapporteur once more on his excellent report, which offered plenty of food for thought. He noted with regret, however, that the Special Rapporteur had not studied the effects of succession of States on the rights of private persons which, in his view, deserved separate treatment from the economic and financial interests of States and corporations and, moreover, were more important from the point of view of international law.

41. In his report, the Special Rapporteur set out to

refute the principle of respect for acquired rights. That was perhaps the direction in which history was moving, since acquired rights used to be regarded as sacred, but nowadays their inviolability was increasingly called in question. With the decolonization process after the Second World War, the question had arisen whether the doctrine of acquired rights in the case of change of territorial sovereignty should be accepted or not. That question had already arisen in Soviet Russia after the October Revolution and in Yugoslavia after the overthrow of the monarchy. The Soviet Union had considered, and still considered, that there was no continuity between the imperial régime and the people's régime and that the Soviet State had therefore not inherited the obligations of the predecessor régime. Yugoslavia, on the other hand, after a period of hesitation, had recognized the external obligations created under the former monarchy, but not obligations connected with the internal public order. In the case of the newly independent States born of decolonization, the attitude varied according to how liberation had taken place. Some of those countries, like Pakistan and India, had recognized the continuity of obligations. In the case of the State of Israel, however, which had been created following the United Kingdom's renunciation of its mandate over Palestine, there had been cessation of one sovereignty and the creation of another, so that a transfer of obligations was out of the question.

42. As to the question of acquired rights in public law, the Special Rapporteur had defended only the *tabula rasa* thesis, which was legally correct, but had never been accepted by creditors. For the report to be complete, he should have mentioned various other theses, such as that of useful debts, although the public utility of such debts was often questionable.

43. With regard to equality of persons, diplomatic protection should not be confused with the capitulations régime. The purpose of diplomatic protection was to safeguard the interests of nationals and corporations of one State in another State, within the limits recognized by international law. But it gave no right to encroach on the jurisdiction of the host State.

44. The concepts of discrimination and an "international minimum standard" in the treatment of aliens were not things of the past, as the Special Rapporteur seemed to believe. The United Nations itself, in the International Covenants on Human Rights,⁴ had recognized certain minimum standards, applicable to human beings as such, irrespective of nationality. That heralded a new era in which United Nations practice would be followed.

45. Opinion was divided on the question of compensation. In general, creditor States were in favour of full compensation, whereas debtor States denied the obligation to compensate or recognized it only with reservations. However, refusal to compensate might sometimes put the debtor State in an international situation in which it had no choice but to pay its debts, if it wished to regain access to the world market. Yugoslavia had been in that situation after the Second World War.

⁴ See General Assembly resolution 2200 (XXI).

46. It seemed, therefore, that compensation was essentially a political and economic problem, not a legal one. It was a question of the international balance of forces. In the case of States born of decolonization, willingness to pay compensation was often prompted by the desire to establish good political relations with the predecessor State. The matter was then usually settled by agreement.

47. He recognized that large landowners or corporations which had exploited the natural resources of former colonies should not be compensated, because there were good grounds for believing that they had acted in bad faith. There could be no unjustified enrichment when they were expropriated by the successor State, because it was only recovering assets which formed part of the national heritage; that was in accordance with justice and with the resolutions of the General Assembly concerning permanent sovereignty over natural resources.⁵ Private persons of humble means, however, like workers or farmers, living in the territory of the predecessor State, had the right to compensation within the limits of what was fair and reasonable, or to facilities for taking their property with them if they left that territory. It could be said that that kind of debt was an obligation of general international law which did not derive from a treaty, though it might be sanctioned by a treaty settling all questions of compensation.

48. The Special Rapporteur should be invited to prepare a definitive set of draft articles in the light of the comments made by the various speakers during the discussion, and to submit it at the Commission's next session.

The meeting rose at 12.40 p.m.

⁵ See General Assembly resolutions 1803 (XVII) and 2158 (XXI).

1009th MEETING

Thursday, 26 June 1969, at 11.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagen-dra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Mr. Yasseen.

Succession of States and Governments: Succession in Respect of Matters other than Treaties

(A/CN.4/216/Rev.1)

[Item 2 (b) of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's second report (A/CN.4/216/Rev.1).

2. Mr. ALBÓNICO said he fully supported the political philosophy underlying the Special Rapporteur's excellent report, though he did not agree with some of the legal conclusions. As he understood it, the Commission's terms of reference required it to study in broad outline the main legal systems of the world, regardless of the political views held by its members.

3. He proposed to examine the report in some detail in order to indicate the points on which he agreed with the Special Rapporteur and those on which he disagreed with him. In the first place, he noted that the Special Rapporteur said at the outset (para. 1) that he had made "only a provisional approach to the problem"—which explained certain minor omissions in such matters as citations.

4. The Special Rapporteur said that he was "acting in accordance with the views expressed in the Sixth Committee", and he made special reference to those views in his report (para. 5). It had been suggested that, because of that approach, the report amounted to an advocate's brief rather than a balanced analysis of the position. He (Mr. Albónico) thought that in some respects the Special Rapporteur had gone too far, while in others he had been rather cautious.

5. Contrary to what was maintained in the report (para. 7), the problem of acquired rights did not arise only in cases of social and political upheaval. It figured prominently in conflicts of laws in private international law, and also in disputes arising from intertemporal developments; in neither case was there any question of abrupt social or political change.

6. He agreed with the Special Rapporteur that a law which took effect immediately and affected all the consequences of legal situations which had come into existence before its promulgation was not a retroactive law (para. 11). A law had retroactive effect only when it took away a right already acquired. In Chile, the rule of non-retroactivity of the law was a mere recommendation of the legislators; the legislature had the power to make a law specifically retroactive and had been known to do so, despite a century and a half of uninterrupted democratic rule in that country.

7. He did not think that non-payment of compensation for expropriation amounted to a denial of acquired rights (para. 12). It could result from a state of necessity, though admittedly that idea was not yet part of international law.

8. He fully supported the Special Rapporteur's suggestion that a conspectus of State practice in the matter should be prepared (para. 16). If its work was to be successful, the Commission needed to have full information on the actual practice of States. As no commentaries would be attached to the compilation in question, it would cost less than the Secretariat had estimated.

9. Paragraphs 22 and 23 of the report, which dealt with essential points of substance, had very much impressed him. The Special Rapporteur had rightly stressed that the successor State had the same rights and obligations as the predecessor State (paras. 24

and 25) and that the successor State did not derive its sovereignty from the predecessor State, but from its own statehood (para. 29).

10. He agreed with the Special Rapporteur that the successor State derived its sovereignty from international law and did so "fully and without restriction" (para. 35). He himself would add that the successor State could restrict the exercise of acquired rights, and even abolish them on such grounds as public policy, national security or public health, subject to payment of appropriate compensation commensurate with the State's real economic capacity. In the same paragraph the Special Rapporteur spoke of "pre-existing situations", but that expression obviously referred to acquired rights. The terminology used was immaterial: the problem remained the same.

11. He fully agreed with the contents of the section entitled "Absence of acquired rights in the case of public rights" (paras. 36 to 38). As far as public debts were concerned, however, he believed that a distinction must be made between debts contracted by a State and those contracted by a régime, a distinction which the Special Rapporteur had omitted to make in the section on that subject (paras. 39 to 43); moreover, he had not dealt with the question of terms of payment. With regard to the important subject of nationality, paragraph 44 of the report said nothing about plebiscites or the right of option, which were especially relevant.

12. On the question of administrative contracts, he would go further than paragraph 46 of the report; he believed that the successor State had the widest powers in the matter and that no acquired rights could be invoked against those powers.

13. He entirely agreed that acquired rights were subject to limitation for reasons of public policy (para. 53).

14. In paragraph 59, the Special Rapporteur appeared to confuse the proper exercise of the right of diplomatic protection with the régime of extraterritorial jurisdiction or capitulations. On that point, he fully approved of the comments made by Mr. Bartoš at the previous meeting.¹

15. As to the idea of an "international minimum standard", discussed in paragraphs 63 and 64, in contemporary international law such standards existed not only for aliens, but also for nationals. Since the adoption of such instruments as the International Covenants on Human Rights,² no State was free to disregard the human rights of any person, whether an alien or a national.

16. The Special Rapporteur had acted with commendable caution in drawing attention to the illegality of a nationalization measure "directed against a class of persons because of their foreign nationality" (para. 67); but that statement should be qualified by the rule in paragraph 71 that such measures were permissible when required by national security or public policy.

17. The Special Rapporteur had rightly pointed out

in paragraph 68 that an alien could not object to structural changes of a general character. In Latin America, great social changes were now taking place; in Chile, important measures of agrarian reform had been enacted and implemented, and no alien or foreign firm had protested against them in any way.

18. On the subject of public policy as a limitation on acquired rights, paragraphs 72 to 76 did not go far enough. The Bustamante Code, which regulated conflicts of laws between fifteen Latin American States, laid down that acquired rights must be respected, but it added the important proviso that those rights could not be invoked against the requirements of public policy. Since the successor State was the sole judge of what the requirements of public policy were, that reservation provided the necessary counterweight to the doctrine of acquired rights.

19. With regard to compensation, he considered that a State which expropriated property was under an obligation to pay an amount that represented a reasonable valuation of the property. The State concerned could defer payment, and even suspend it in case of need, but it could not do away with compensation altogether, because international law did not countenance spoliation.

20. He agreed that it was necessary to distinguish between the various types of State succession. The problems of State succession arising between a former colonial Power and a new State were completely different from those arising when two States were merged into one. Decolonization called for special treatment, particularly as the General Assembly had adopted specific decisions on the matter, such as resolution 1803 (XVII) on permanent sovereignty over natural resources. In cases of decolonization, the amount of compensation to be paid for nationalization, and the terms of payment, were bound to be different. In particular, the benefits derived in the past by the colonizing Power would have to be taken into account in order to avoid unjustified enrichment.

21. It was desirable, however, not to lay too much stress on the decolonization process, which belonged essentially to the past. There were more topical problems, such as those connected with integration and the formation of communities among States having similar legal, economic and social systems. The Commission should concentrate its attention on those problems of the future; in so doing, it would make a contribution to the formulation of the new international law which Alejandro Alvarez had heralded in his works.

22. Mr. BEDJAoui (Special Rapporteur) said he could not sum up a debate so full of substance as the one which had taken place or refer specifically to each of the comments made; moreover, that might lead to further debate. He was sorry if he had caused some difficulty to certain members of the Commission, but he was sure that, in view of its importance, the problem of acquired rights would be discussed by the Commission again at subsequent sessions. He would therefore confine himself to replying, first to Mr. Ago,

¹ See para. 43.

² See General Assembly resolution 2200 (XXI).

the Special Rapporteur on State responsibility, regarding the boundary between international responsibility and State succession, and secondly to Sir Humphrey Waldock, who like himself was studying State succession, regarding the direction which the Commission's work should take.

23. In the first place, he wished to make it clear that what Mr. Ago referred to as the continuity between the predecessor and the successor State³ could not be continuity of the legal order of the predecessor State since, if there was no break, the problem solved itself. Sociology taught that there was always a transitional stage in succession. Certain things might be continued provisionally, but there was also the practice of *tabula rasa*, particularly in succession in respect of treaties. Mr. Ago's thesis could therefore be accepted only if it related to continuity of the international legal order. But in that case one should not speak of "continuity", which would imply the idea of succession. The successor State did not continue the sovereignty of its predecessor when sovereignty was manifested in international relations. There was no transfer, but a substitution of international competence. Consequently, the starting point should be that the successor State was a State, and, as such, was governed by general public international law. The question then arose whether, as a successor, it was governed by other additional rules belonging to a special branch of public international law, namely, the law of State succession.

24. If such rules existed, should they be regarded as increasing or diminishing the obligations of the successor State? Mr. Ago envisaged only the possibility of rules which would impose upon the successor State greater obligations than those of the predecessor State. It was acknowledged, however, that the most that could be asked of the successor State was to respect acquired rights inherited from the predecessor State, not to assume greater obligations concerning them. But if one stopped there, what would be the use of a special branch of public international law concerned with State succession? For if the successor State had the same obligations as any other State, all cases would merely be cases of responsibility, and the branch of the law concerned with responsibility would entirely absorb that dealing with succession. On the other hand, if it was asked whether the successor State, as a successor, did not have lesser obligations, there was every reason for having a branch of law on succession. It was reasonable to put that question, if only because the successor State had taken no part in creating the acquired rights which it was desired to impose on it. The question whether that State had lesser obligations was at the root of the whole matter of acquired rights. Respect for those rights, or their abolition, hinged on it. And if that hypothesis were adopted, in what context should it be studied?

25. It could not be studied in the context of responsibility, as envisaged by Mr. Ago; for the question whether there was a lesser obligation was a question of substantive rules which did not come within the

sphere of responsibility as Mr. Ago had defined it. The matter could only be examined on the basis, for instance, of the idea that since the adoption by the General Assembly of resolution 1514 (XV), on the granting of independence to colonial countries and peoples, the responsibility of the colonial Power could not be invoked. But that would be going too far.

26. If that approach were adopted, a central, fundamental problem—the problem of the acquired rights of aliens—would be left aside, since it would belong neither to the theory of succession nor to that of responsibility. He had therefore thought fit to study it, in order to ensure that the two Special Rapporteurs did not overlook a problem which was the heart of the matter.

27. As to the direction the Commission's work should take in the future, it was true, as Mr. Tsuruoka had said, that the members of the Commission were not the legislators of the world, but too sharp a distinction should not be made between doctrinal studies, which should be excluded from the Commission's work, and pragmatism, which should be its sole guide. If the Commission—and that was its task—was to arrive at rules that would be generally applicable to the international community, which displayed such a variety of trends, it must take all those trends into account and avoid an unduly traditional approach. The process of decolonization had altered the whole question of State succession.

28. The discussion had shown that the theory of acquired rights was extremely vague and imprecise. That was why it was so controversial, and it would therefore be a mistake to accept it as a whole and in all cases. But it did not follow that it should be left aside. He intended to submit to the Commission at its next session, in 1970, two or three articles of a general character on acquired rights; they would not be characterized by "legal nihilism", as some had feared, but would reflect and express in words the evolution of law in the modern world and also, perhaps, the exceptions found under every rule. Some members of the Commission had proposed that it should take note of the report on acquired rights and the discussions on it and, at the next session, study articles dealing with individual items such as public property and public debts, taking into account the report, the discussions, the appropriate resolutions of the General Assembly, such as those on natural resources, and the legal and diplomatic practice, which was to be re-examined. Other members had proposed that the Commission should revert to the report on acquired rights later, either when it had made further progress in its work or when it had made a full study of the topic of State succession, and that the Special Rapporteur should then draft some articles on acquired rights to synthesize the discussion. In that way the thorny question of the acquired rights of aliens would be left aside and the Commission would confine itself to the study of succession.

29. He would like to set about the task quickly, since the discussion had shown that the question of acquired rights needed clearing up. As Special Rapporteur, he was quite prepared to begin with public property, since

³ See 1007th meeting, para. 21.

both he and the Commission acknowledged that acquired rights were ill-defined and should not be invoked without caution against successor States, particularly newly independent States.

30. With regard to the work which the Secretariat could have been asked to undertake, the financial implications seemed to be very considerable; he would not insist on the work being done if the cost was really prohibitive or if questions of substance were involved. Nevertheless, the inquiry into certain aspects of the practice followed in State succession would be valuable, especially if the Secretariat took care to explain, in the note to be sent to governments, exactly what the Commission intended to do. As to the bibliography, it might include a summary which, without assessing the quality and scope of each work, would give an indication of its contents. It would, moreover, be better to engage two consultants for one year than one consultant for two years as provided for in the estimate of expenditure. The purpose of analysing the jurisprudence of international courts would be to determine whether the problem had been approached specifically from the standpoint of acquired rights or only incidentally.

31. Mr. EUSTATHIADES said he would prefer the Commission to move on to firmer ground than that of theoretical considerations. He noted that no member of the Commission, whether he rejected acquired rights outright or was in favour of giving them some recognition, seemed to wish that notion to be made a guiding principle in dealing with the topic of State succession. It was too early to say what place should be given to the idea. Instead of discussing at the outset various theses, often *a priori*, as to the theoretical basis of succession, it would be preferable to start by outlining all the actual rules on the subject. Only then would it be possible to see whether there should be a place for acquired rights in one connexion or another. The Commission's task would be no easier if some other basis were used, derived from human rights, for instance, or from the notion of unjustified enrichment.

32. He had proposed that in the course of his studies the Special Rapporteur should draw up a balance sheet to determine to what extent there was continuity or rupture of legal relations. What should be established was not whether there was genuine succession in theory—an idea which the Special Rapporteur rejected—but whether there was *de facto* succession in certain respects. The answer to that question would emerge from the Commission's future work. He therefore welcomed the fact that the Special Rapporteur had agreed, for the next session, to deal in specific terms with public property and public debts as part of the economic and financial aspects of State succession. The study of general notions such as that of acquired rights should be postponed until the end of the Commission's work on the topic.

33. An effort should also be made to eliminate from the Commission's discussions another *a priori* element, namely, statements of political position. That problem arose more especially in connexion with decolonization.

Several speakers had proposed distinguishing between the different types of succession of States. It had also been suggested that distinctions should be made between types of succession not connected with decolonization. The Commission's work should thus make it possible to see how much difference there was between the traditional and the new solutions. The Commission would then be faced with a choice: either it could make a synthesis of the traditional and the new international law, or it could say that in some particular sphere, such as that of public property and public debts, there were certain special rules applicable to the birth of a State through decolonization. In any case, depoliticizing the debate meant abstaining from *a priori* positions and one-sided arguments, but it did not mean that the various socio-political phenomena should not be taken into consideration.

34. In making such a comparison, it would be better to leave aside matters that were not unquestionably linked with State succession, in particular, the treatment of aliens. For under traditional international law an alien might possibly enjoy more favourable treatment than nationals, whereas under the new law a trend towards equality seemed to be emerging. The Commission had not yet found the answer to that question. Nor was it a matter of excluding the problem of aliens *a priori* from the topic of State succession, any more than from that of responsibility. Only when the Commission's work was finished would it be possible to say whether aliens might come to have more rights than nationals and in what specific cases.

35. The Special Rapporteur need not tackle the problem of aliens rights in general, which might hold up the Commission's work, but he would see whether, in any particular sector of State succession, there were special rules relating to aliens. To proceed otherwise would oblige the Commission to base its work from the outset on considerations *de lege ferenda*. That would be putting the cart before the horse: before synthesizing codification and progressive development, it was necessary to have a thorough knowledge of the positive data of the material to be codified. Consequently, the Commission's next session should be devoted to the study of specific solutions.

36. Mr. CASTRÉN said the Commission should renew the instructions it had given the Special Rapporteur the previous year for the preparation of draft articles on the economic and financial aspects of State succession, beginning with public property and public debts. The draft should be based on the discussion that had taken place and should objectively reflect the opinions expressed. An equitable compromise should be sought between the interests of the successor State, the predecessor State and third States, without overlooking the interests of private persons who were nationals of those States. As hardly any generally accepted rules on the matters under consideration could be derived from the practice of States, the draft articles would inevitably contain rules based on the progressive development of international law.

37. Mr. RUDA, after thanking the Special Rapporteur

teur for his impartial summing-up of the discussion, said he thought the Special Rapporteur should begin his work for the next session with the subjects of public property and public debts, as indicated in paragraph 79 of the Commission's report on the work of its last session⁴, though he should not disregard the broader economic and financial problems referred to by Mr. Eustathiades.

38. With regard to the Commission's report to the General Assembly, he noted that Mr. Rosenne wished it to be brief and not to reveal the differences of opinion on acquired rights which had come to light during the discussion.⁵ He believed, however, that it was the Commission's duty to inform the General Assembly of the full scope of the discussion, since it was bound to be of interest, particularly to the new States. He therefore suggested that the Commission's report should include a full section on the discussion concerning acquired rights and perhaps also a request for the views of Member States on that subject.

39. As to the work to be requested of the Secretariat, he shared Mr. Yasseen's view that the proposed bibliography on State succession should be simply a catalogue, and that it should be prepared by the United Nations Library service. He also agreed with Mr. Yasseen that the Secretariat's digest of the decision of international tribunals relating to State responsibility⁶ should be brought up to date, but that no attempt should be made to analyse the decisions.

40. Mr. TABIBI said he was grateful to the Special Rapporteur for having put all the complex aspects of the problem before the Commission so clearly. He supported the Special Rapporteur's conclusions, although he differed from him in some respects concerning the procedure to be adopted. The Commission should endeavour to find common ground without resorting to a vote. As to the Special Rapporteur's general instructions, he thought he should have full freedom to draft his report as he saw fit.

41. He was sure that neither the Commission nor the Special Rapporteur would wish the Secretariat to engage in studies which might place a heavy financial burden on the United Nations. However, the estimates might be rather too high and it was usual, in United Nations practice, for the Secretariat to prepare documentation, both for the special rapporteurs of the Commission and for the Sixth Committee. He hoped, therefore, that within the limits of its budget the Codification Division would be able to do something along the lines requested. He would revert to that matter later at the closed meeting which the Chairman proposed to devote to it.

42. Mr. YASSEEN said he concluded from the discussion that it was the casuistic method, or study by types of succession, which would be best suited to the material. That seemed to be the view of the Commis-

sion, and the Special Rapporteur appeared to think it would be possible to propose some solutions for certain sections of his extensive subject. It was obvious that the Commission's efforts should be directed not only to codification, but also to the progressive development of international law on the topic.

43. As to the content of the work, since it was necessary to determine whether or not there could be continuity of legal relations, the answer had first to be sought in positive law. Far from stopping there, however, it was necessary to review the existing rules in the light of the new reality of international life. It was true that the Commission was not the legislature of the world, but under its Statute it was required to initiate the legislative process in the international community.

44. If no rules were found in positive law, the Commission would take the practice of States as a basis. Failing that, it would study any agreements which might have been concluded on the subject by States. It was a question of formulating, not principles of *jus cogens*, but residuary rules which States could accept if they were unable to reach agreement on other arrangements.

45. Mr. NAGENDRA SINGH said he wished to place on record his sincere appreciation and admiration of the monumental work accomplished by the Special Rapporteur in his report, and of his well-balanced summing-up of a particularly complicated and controversial debate. He agreed with Mr. Tabibi and Mr. Yasseen that the Special Rapporteur should be given all possible assistance by the Secretariat in preparing his next report on such a very important subject.

46. Mr. BEDJAOUI (Special Rapporteur) said he fully agreed that the report to the General Assembly should be sufficiently full. Moreover, it was not so much a matter of recording the differences of opinion which had come to light, as of showing the interest and importance of the topic by presenting the different positions taken.

47. That would have a twofold advantage: first, it would enable the Sixth Committee to provide, through its debates, a first instalment of the information expected from the inquiry to be addressed to Member States; and secondly, it would change the level of the debate, so that those whose function was to deal in politics could be made aware that, at the legal level, there were some very serious problems concerning acquired rights, and it would thus not be necessary to revert to the same discussion at the next session when dealing with public property and public debts.

48. Mr. ROSENNE, pointing out that he had been the first to raise the question of the Commission's report to the General Assembly, said that, in view of the statements made by his colleagues and the Special Rapporteur, he had no objection to the inclusion of a full summary of everything which had been said in the debate.

49. Mr. TABIBI said that since the General Assembly would examine the Commission's summary records, it would in any case be useless to try to conceal what had

⁴ *Yearbook of the International Law Commission*, 1968, vol. II.

⁵ See 1007th meeting, para. 12.

⁶ See *Yearbook of the International Law Commission*, 1964, vol. II, p. 132.

been said during the debate. The subject of acquired rights was a highly political one and it was important that the Special Rapporteur, in particular, should know the political reactions of the delegations to the General Assembly.

50. Mr. AGO said he would not like the Commission to give the impression that it was asking for instructions from the General Assembly because of differences of opinion among its members. The Commission was sovereign in its study of the topic. It was normal that it should report on the progress of its work. On the other hand, if it wished to bring its task to a successful conclusion, it must retain full freedom of action.

51. Mr. BEDJAOU (Special Rapporteur) said he had no wish to induce the General Assembly to tie the Commission's hands regarding the problem of acquired rights. He only wanted the Commission to gain the maximum benefit from a debate that would bring out the existing trends. Moreover, he would not like the Commission to devote only two or three paragraphs to a topic which had required two weeks' discussion. The Commission's last report constituted a precedent: problems had been presented in it in such a way as to make for an interesting debate in the General Assembly.

52. Mr. YASSEEN said that there was no fundamental disagreement between members of the Commission on that point. It was simply a question of emphasis. For his part, he thought it necessary to give an adequate account of the main trends which had appeared, without, of course, going so far as a verbatim record.

53. The CHAIRMAN said he was sure that the General Rapporteur and the Special Rapporteur would be able to take account of the comments made by the members of the Commission.

54. He invited the Commission to take a decision on the following paragraph for inclusion in its report to the General Assembly:

"The Commission thanked the Special Rapporteur for his second report on succession of States in respect of matters other than treaties and confirmed its decision to give that topic priority at its twenty-second regular session, in 1970. It requested the Special Rapporteur to prepare, for that session, a report containing draft articles on succession of States in respect of economic and financial matters, taking into account the comments made by members of the Commission on his second report at the twenty-first session."

55. Mr. USTOR said that in his opinion the text suggested by the Chairman should include some reference to public property and public debts, since the Special Rapporteur considered that his report should centre on those aspects of the topic.

56. Mr. RUDA said he feared that if the Commission gave priority to the Special Rapporteur's study it would be going back on the decision it had taken at the last session to give priority at its twenty-second session, in 1970, to the topic of State responsibility, as well as to that of succession in respect of matters other than

treaties.⁷ Since it appeared rather difficult to divide priority between those two subjects, he suggested that the Commission should defer its decision until later in the session.

57. Mr. TABIBI thought it would be better not to tie the Special Rapporteur down by making a specific reference to public property and public debts. He should be left free under his present instructions to draw his own conclusions from the discussion in the General Assembly.

58. He did not agree with Mr. Ago that the Commission was a sovereign body; on the contrary, it was a subsidiary organ of the General Assembly and as such was required to report to the General Assembly.

59. Mr. AGO referring to the question raised by Mr. Ruda, said it would be sufficient to omit any mention of priority. As to Mr. Tabibi's remarks, all he had meant to say was that the Commission was master of its subject and should retain full freedom of action in studying it.

60. The CHAIRMAN, speaking as a member of the Commission, said he was not in favour of further restricting the subject entrusted to the Special Rapporteur, since the succession of States in economic and financial matters was only part of a wider topic. As far as priority was concerned, the text proposed for the report was in conformity with the decisions taken by the Commission at its previous session. He thought that the Commission could take a provisional decision on that text, the wording of which could be reviewed during the discussion of the report.

61. Mr. TSURUOKA supported that proposal.

62. The CHAIRMAN said that, if there was no objection, he would take it that the Commission provisionally approved the text he had read out.

It was so agreed.

63. The CHAIRMAN warmly congratulated the Special Rapporteur and sincerely thanked him for the excellent work he had submitted to the Commission.

The meeting rose at 1.20 p.m.

⁷ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, para. 104.

1010th MEETING

Friday, 27 June 1969, at 10.55 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Mr. Yasseen.

Co-operation with other Bodies

(A/CN.4/215; A/CN.4/212)

[Item 5 of the agenda]

(*resumed from the 1004th meeting*)

REPORT ON THE 1968 MEETING OF THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN invited Mr. Ruda to introduce his report (A/CN.4/215) on the 1968 meeting of the Inter-American Juridical Committee, which he had attended as observer for the Commission.

2. Mr. RUDA said that the 1968 meeting of the Inter-American Juridical Committee had been the first to be attended by an observer for the Commission and he had consequently received an especially warm welcome.

3. During the week he had spent at Rio de Janeiro, the Committee had been engaged in revising its statutes in accordance with the proposals for structural reform of the inter-American system adopted in the Buenos Aires Protocol of 1967. When that reform came into effect, the Committee would become one of the main organs of the Organization of American States (OAS); it would also become the sole legal organ, since the Inter-American Council of Jurists would be abolished. The preliminary draft of the statutes of the Inter-American Juridical Committee was annexed to his report; it was of interest because the Committee was engaged, at the regional level, in tasks similar to those of the Commission.

4. Article 1 of the draft stated that the Committee was "the juridical organ of the Organization of American States". Article 2 set forth its functions which, in addition to the progressive development and codification of international law, included that of serving the OAS "as an advisory body on juridical matters of an international nature".

5. Article 3 provided that the "permanent seat of the Inter-American Juridical Committee shall be the city of Rio de Janeiro".

6. Article 4, which dealt with the competence of the Committee, empowered it to render to "the Governments of member States legal advice on matters of public and private international law on which they consult it", and to establish "co-operative relations with universities, institutes and other teaching centres, as well as with national and international committees and entities devoted to study, teaching or dissemination of information on juridical matters of international interest".

7. Article 6 stipulated that the Committee "shall have the broadest possible technical autonomy"; it also made provision for the privileges and immunities of its members, whose number would be increased from seven to eleven under the provisions of article 7.

8. Article 9 provided that members of the Committee would be elected for a period of four years and would be eligible for re-election.

9. It was interesting to note the provisions of article 18: "Jurists elected as members of the Inter-

American Juridical Committee shall bear in mind that for the fulfilment of the purposes of the Committee it is essential that, during the meeting, they reside in Rio de Janeiro and devote their full time to the work of the Committee", and of article 19: "Failure of a member of the Committee to attend its regular meetings for two consecutive years shall result in automatic vacation of his office".

10. Article 26 laid down that members' expenses for their stay in Rio de Janeiro and their travel expenses "shall be borne by the respective States of which those jurists are nationals", while article 27 made provision for the payment of an attendance fee to members by the OAS. It was worth noting that the Brazilian Government, as host, provided the Committee with excellent premises and each of its members with an office and secretarial facilities in the same building.

11. With regard to the Committee's methods of work, article 33 specified that the results of its work, such as drafts or reports, "shall be transmitted to the General Secretariat so that it may make them known to governments and, when appropriate, transmit them to the General Assembly" of the OAS. The Committee would thus not have an opportunity of reviewing its drafts in the light of government comments, as the Commission did.

12. The items of substance considered by the Committee at its 1968 meeting had included "Harmonization of the legislation of the Latin American countries on companies, including the problem of international companies". The Committee had thus dealt with problems of the nationality of companies and the laws applicable to them, recognition of the juristic personality of foreign companies and the position of "multinational public companies", a term used for government-owned companies belonging jointly to several States, such as the merchant fleet jointly owned by Colombia, Ecuador and Venezuela, known as the "Flota Grancolombiana". On that point, the Committee had decided to request the OAS Council to convene a specialized conference to revise the Bustamante Code, or adopt a new code of private international law, to deal with the problem of companies. The Committee had prepared a draft on the mutual recognition of companies and other corporate bodies, which specified that the status of a company under commercial law was governed by the law of its place of domicile, "domicile" being defined as the legal centre of a company's administration. The draft also provided that a company duly constituted in one contracting State should be recognized as having the same juristic personality in the other contracting States. Under the item "A Uniform Law for Latin America on Commercial Documents", the Committee had decided to begin work on bills of exchange and cheques.

13. The Observer for the Inter-American Juridical Committee had already given the Commission an account of the work of that Committee on the substantive items before it.

14. Mr. CASTAÑEDA, after congratulating Mr. Ruda on his report, said that the Inter-American Juridical

Committee was considerably older than the International Law Commission and had prepared a number of drafts which had already been incorporated in Latin-American legislation. As was evident from Mr. Ruda's report, the Committee was adapting itself to the new needs of the Latin-American continent, and in particular to the task of Latin American economic integration. Both the differences and the similarities between the outlook and the general structure of the Committee and the International Law Commission provided reasons why the Commission should maintain close relations with the Committee and endeavour to increase their mutual co-operation in the future.

15. Mr. EUSTATHIADES said he was glad it had been possible for the Commission to be represented in the Inter-American Juridical Committee by the very eminent Chairman of its last session; it was well to give such practical form to co-operation between bodies pursuing similar objectives.

16. Before the establishment of the International Law Commission, those who taught international law had had the advantage of finding, in the drafts of the Inter-American Juridical Committee, texts which possessed the unusual feature of being the product of regional co-operation. Today, it was an advantage to maintain the closest possible contacts and follow the results of codification in bodies established for regional co-operation, since they faithfully reflected juridical concepts accepted by a number of States.

17. In the Council of Europe, the European Committee on Legal Co-operation fulfilled a function similar to that which the new draft statutes assigned to the Inter-American Juridical Committee.

18. Mr. NAGENDRA SINGH said that obviously the role of the International Law Commission in relation to other regional juridical associations should be a positive one, since in the absence of mutual co-operation there would be a tendency for each body to remain isolated. In initiating such co-operation between the Commission and the Inter-American Juridical Committee, therefore, Mr. Ruda had performed a most valuable service. He hoped that co-operation would continue.

19. Mr. ALBÓNICO said that Mr. Ruda was to be congratulated on his very interesting report on the Inter-American Juridical Committee, which had for many years been engaged in highly important work, and was now particularly concerned with economic problems of the Latin-American area which had legal consequences.

20. Mr. BARTOŠ said he wished to commend Mr. Ruda for having found time, despite his many duties, to represent the International Law Commission at the 1968 meeting of the Inter-American Juridical Committee. The account he had given to the Commission, together with the statement made by the Observer for the Inter-American Juridical Committee,¹ had

shown what a prominent part Mr. Ruda had played in that Committee's meeting.

21. It was unfortunate that it had not been possible for the Commission to be represented at the European Committee on Legal Co-operation the previous year. Many members of that Committee were anxious to maintain contact with the International Law Commission and to be kept informed of its work. The collaboration established both with the Inter-American Juridical Committee and with the Asian-African Legal Consultative Committee provided ample evidence of the value of such contacts for the Commission as well as for those bodies.

22. The CHAIRMAN, thanking Mr. Ruda for the excellent work he had done as the Commission's Observer at the 1968 meeting of the Inter-American Juridical Committee, said that Mr. Ruda was one of the youngest and at the same time one of the most eminent Latin-American internationalists. He himself had already had occasion to refer to the Commission's increasingly close and fruitful links with the Inter-American Juridical Committee and to express the hope that they would be maintained.

REPORT ON THE TENTH SESSION OF THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

23. The CHAIRMAN invited Mr. Tabibi to introduce his report (A/CN.4/212) on the tenth session of the Asian-African Legal Consultative Committee.

24. Mr. TABIBI said that, in accordance with the decision taken by the Commission at its twentieth session, he had had the honour to attend, as an observer, the tenth session of the Asian-African Legal Consultative Committee, which had been held at Karachi in January 1969.

25. Much of the Committee's work had been devoted to preparations for the second session of the Vienna Conference on the Law of Treaties. The question of the draft convention on the law of treaties had been on the Committee's agenda since its seventh session, which had been held at Baghdad in 1967. The Committee had concentrated on the most important articles of the draft and had prepared two volumes containing an analysis of the work of the first session of the Vienna Conference, in particular that on the most controversial issues, such as provisions for the settlement of disputes. That sound preparatory work had enabled the Asian and African delegations at the second session of the Vienna Conference to introduce their well-known compromise proposal which, almost at the last minute, had saved the Conference from failure.²

26. Although the question of the law of treaties had absorbed most of its attention, the Committee had also dealt with two other topics: the rights of refugees and the law of international rivers. The question of the rights of refugees had been brought up at the request of the Government of Pakistan, and the Government

¹ See 999th meeting, paras. 64 *et seq.*

² See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, 1969, 34th plenary meeting.*

of Jordan had also put forward certain special problems concerning Palestinian refugees. Among other aspects of the question the Committee had dealt with such matters as extension of the definition of refugees contained in its "Bangkok principles", the repatriation or return of refugees, compensation for refugees and compensation tribunals, the standard of treatment of refugees, approved documents and visas, and territorial asylum.

27. The Committee had not had sufficient time to deal at length with the question of the law of international rivers, which had been introduced by the Governments of Iraq and Pakistan, but had decided that an inter-sessional Sub-Committee should be set up at New Delhi to consider it. The proper utilization of water was a problem of the highest importance in the arid lands of Asia and Africa, and the world community as a whole would undoubtedly benefit from a study of it.

28. Mr. NAGENDRA SINGH said that, as an Asian member of the Commission, he wished to thank Mr. Tabibi for the service he had rendered the Commission by attending the tenth session of the Asian-African Legal Consultative Committee. Mr. Tabibi had made a number of noteworthy contributions to that session and his valuable advice, particularly on the draft Convention on the law of treaties, had been appreciated by all members. Since the Committee had already done outstanding work for the codification and progressive development of international law, he hoped that the Commission would continue the practice of sending observers to its meetings.

29. Mr. USTOR said he congratulated both Mr. Ruda and Mr. Tabibi on their very informative reports. The guiding principle in the world of today was that of international co-operation, much of which necessarily took place at the regional level. Legal co-operation was being carried out in almost all regions of the world; in some of them it was already institutionalized in permanent bodies, while in others it was of a more informal nature. Like other speakers, he hoped that the Commission would maintain and strengthen its ties with the Inter-American Juridical Committee, with the Asian-African Legal Consultative Committee and, last but not least, with the European Committee on Legal Co-operation.

30. Mr. TSURUOKA said he wished first to congratulate Mr. Ruda on his excellent report and to thank him for having agreed to go to Rio de Janeiro in the service of international law. He also wished to congratulate Mr. Tabibi for his very full and excellent report. Mr. Tabibi had rendered a great service both to international law and to the Asian-African Legal Consultative Committee, a body for which he (Mr. Tsuruoka) had a particular regard. In the minds of its founders, the Committee's purpose was not to see that member States adopted the same position on the issues of the day, but to provide an opportunity for frank exchanges of views on various branches of international law. Happily that tradition had been maintained, particularly at the tenth session. There might have been attempts to persuade as many member

States as possible to adopt a particular point of view, but the working of the Committee had been so democratic that such attempts had been vain. The Committee represented a vast area of the world and its members had brought a high standard of learning to its debates. Those were sufficient grounds for continuing and strengthening relations between the Committee and the Commission.

31. Mr. RAMANGASOAVINA said that both Mr. Ruda and Mr. Tabibi had presented very interesting reports.

32. The Inter-American Juridical Committee was a most useful model, because its function was to co-ordinate the different legal systems of a whole continent. The opinions of such bodies were very valuable to those concerned with the harmonization of law. The Commission always listened with close attention to the statements of observers sent to it by such committees, which did excellent work at the regional level. It was especially important that the Commission should send observers to such bodies because its own work was at the world level.

33. Mr. Tabibi's report showed that the work of the Asian-African Legal Consultative Committee had made a large contribution to the success of the Vienna Conference on the Law of Treaties. He would have liked to see more African countries represented on the Committee, which included representatives of most Asian countries. He had noted that most of the participating countries were English speaking. It would make for greater efficiency and strengthen the representative character of the Committee if more African and more French-speaking countries could take part in its work, despite the practical difficulties to which that might sometimes give rise.

34. Mr. AGO thanked Mr. Ruda and Mr. Tabibi for the full and graphic summaries they had presented of the work of the Inter-American Juridical Committee and the Asian-African Legal Consultative Committee. The contacts made with those bodies enabled the Commission to learn at first-hand what trends were developing in the different regions of the world with regard to the problems on its agenda, and contributed to the efficacy of its work.

35. The members of the Asian-African Legal Consultative Committee, and especially Mr. Tabibi, had played a considerable part in the success of the Vienna Conference. As President of that Conference, he was greatly indebted to them for their efforts to reconcile the different points of view that had been expressed there.

36. Mr. RUDA said he was grateful to Mr. Tabibi for having agreed to represent the Commission at the tenth session of the Asian-African Legal Consultative Committee. He had noted with particular interest the Committee's resolution X (6) on international rivers, a subject of great importance to Latin American countries, which were facing development problems similar to those of the African and Asian countries. International rivers also appeared as a topic on the International Law Commission's programme.

37. Mr. ROSENNE said he would like to associate himself with the expressions of appreciation to the two members who had represented the Commission at important regional meetings. He attached great significance to the regular submission of reports on the activities of regional bodies concerned with international law and hoped that the Commission's documentation on those activities would be kept as complete as possible. That documentation, which was useful for the edification of members of the Commission, also drew attention to important trends in various parts of the world. Thus, it was interesting to note the silence of regional bodies on certain issues; for example, at the previous session, the representative of the Asian-African Legal Consultative Committee had made no reference to State succession.

38. The reports on regional activities provided the Commission with authentic and objective documentation on the matters with which the regional bodies had dealt. In the past, the Commission had found valuable material in such reports on the subject of reservations to multilateral treaties. In the future, its work on State responsibility would benefit from the same exchange of authentic information.

39. He had listened with interest to Mr. Ruda's analysis of the new statutes of the Inter-American Juridical Committee and looked forward to learning what solutions were ultimately adopted.

40. As to the Vienna Conference on the Law of Treaties, he had noted Mr. Tabibi's remarks on the role of the Asian-African Legal Consultative Committee, but he believed that there were a number of aspects of the history of that Conference on which it was still too early to lift the veil. That remark, however, did not detract in any way from the well-deserved tribute paid to the role of the African delegations in the success of the Conference.

41. Mr. NAGENDRA SINGH, referring to the comments of Mr. Ramangasoavina, said it was true that African participation in the meetings of the Asian-African Legal Consultative Committee had been somewhat limited in the past. It had now been decided, however, to hold a series of meetings in Africa and the next meeting of the Committee would take place in Ghana; it was hoped that a greater number of Africans would then be able to participate in the Committee's work.

42. The CHAIRMAN said he wished to thank Mr. Tabibi for being so good as to represent the Commission in the Asian-African Legal Consultative Committee, and to congratulate him on the excellent report which he had just presented. The Commission would soon have the pleasure of hearing the Observer for the Asian-African Legal Consultative Committee give a summary of the work of that Committee which, though not as old-established as the Inter-American Juridical Committee, also carried out important and fruitful work.

The meeting rose at 12.25 p.m.

1011th MEETING

Monday, 30 June 1969, at 3.10 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Ruda, Mr. Tammes, Mr. Tsu-ruoka, Mr. Ustor, Mr. Yasseen.

State responsibility

(A/CN.4/208; A/CN.4/209; A/CN.4/217)

[Item 3 of the agenda]

1. The CHAIRMAN invited the Commission to begin consideration of item 3 of the agenda and called on the Special Rapporteur to introduce his report (A/CN.4/217).

2. Mr. AGO (Special Rapporteur) said that in presenting, in his first report, a review of previous work on codification of the topic of the international responsibility of States, his intention had been to provide the Commission with a conspectus of what had been done so far, by studying which it could derive the maximum benefit for its future work and at the same time avoid committing the errors which had stood in the way of such codification in the past. The international responsibility of States, perhaps more than any other branch of international law, including the law of treaties, had been the subject of the earliest attempts at codification. To emphasize the difficulty of the task he would remind the Commission how arduous the codification of the law of treaties had been, even though that work had been made easier by the fact that the subject-matter had been well defined and the plan to be followed relatively straightforward, and that it had been possible to refer quite extensively to the general theory of obligations in private law.

3. That did not apply where the international responsibility of States was concerned. In the first place, the greatest caution was called for in making any reference in that context to internal law, where the clearly separate development of the concepts of civil responsibility and criminal responsibility made those concepts difficult to transfer to international law. An even greater difficulty lay in the fact that, unlike the law of treaties, which was a clearly differentiated branch of international law, responsibility was generally treated in conjunction with other subjects, which, moreover, differed from each other. It was true that writers were more or less agreed on a general definition, according to which a State incurred responsibility by violating an international obligation. But it was often found that while speaking of responsibility writers were in fact attempting indirectly to define general substantive rules, the primary

rules of international law—those rules from which derived the obligations whose violation in turn entailed responsibility. That resulted in lack of clarity and further difficulties. For when responsibility was linked with other branches of international law it acquired all the difficulties inherent in defining the rules contained in those other branches. Moreover, the inevitable and erroneous conclusion was that responsibility could not be studied as such, but only in relation to a particular sector of general international law.

4. At the origin of all that lay the historical fact that the general theory of responsibility had been born—and not without reason—in the doctrine of the legal obligations of a State relating to the treatment of aliens. For in studying the consequences of violation by a State of the primary rules governing the rights of aliens, it had been found necessary to define the essential obligations of the State towards aliens and to formulate the rules which imposed those obligations on the State. Hence the confusion of the two subjects and the impression that the international responsibility of States need be defined only with reference to the sector of international law relating to the treatment of aliens.

5. Confirmation of what he had just said was provided by the Secretariat study on the status of permanent sovereignty over natural wealth and resources¹ and the second report on succession of States in respect of matters other than treaties (A/CN.4/216/Rev.1), which the Commission had just examined under item 2 (b) of its agenda. In both cases, questions had been raised regarding the boundaries between the subjects considered and State responsibility. The real point was the boundaries between those subjects and the rights of aliens.

6. Even those who opposed the idea that responsibility was indissolubly linked with the treatment of aliens and affirmed the need to consider the subject mainly with reference to other branches of international law, in particular, with reference to rules for safeguarding peace, were not always free from the error of trying to define certain essential primary rules of contemporary international law under cover of responsibility. In reality, defining those rules and the obligations that derived from them was one thing, while determining the consequences of violation of such obligations was another.

7. One should therefore beware of speaking of State responsibility when the real problem was to establish the primary bounds to be set by international law to the freedom of action of States. In other cases, a further source of error was the poverty of legal language, which used the term “responsibility” in different senses: for example, responsibility incurred through a wrongful act, and responsibility as an objective and primary obligation to repair certain consequences of a perfectly lawful act or activity.

8. The review he had given in his report confirmed those conclusions with regard both to private codification and to codification undertaken under the auspices of

regional bodies, of the League of Nations and of the United Nations².

9. Where private codification was concerned, he had referred mainly to collective attempts by learned societies. He had made exceptions in favour of two drafts by private persons: those of Professor Strupp and Professor Roth, which he had included because of their interest. Both the draft on Diplomatic Protection prepared in 1925 by the American Institute of International Law and the draft Code of International Law prepared in 1926 by the Japanese Association of International Law, chapter II of which was entitled “Rules concerning responsibility of a State in relation to the life, person and property of aliens”, considered responsibility in relation to the rights of aliens and did not treat the two subjects separately. Similarly, the resolution adopted in 1927 by the Institute of International Law in anticipation of the Codification Conference to be held at The Hague in 1930, although it was a very complete and detailed study, nevertheless considered responsibility only in relation to respect for the rights of aliens and endeavoured to define the content of the State's obligations in that respect at the same time as the consequences of failure to fulfil those obligations. Nevertheless, that study was very interesting in spite of its mixed subject-matter, because it contained many things which it would still be good to adopt and because, owing to its universal character, the Institute of International Law did not, like other bodies, represent a particular point of view.

10. Other attempts to codify responsibility had been undertaken in anticipation of the Hague Conference. In 1929, the Harvard Law School had entrusted Professor Borchard with the preparation of a draft Convention on responsibility of States for damage done in their territory to the person or property of foreigners. There again different problems had been mixed together in an attempt to make an over-all codification of the rules governing the rights of aliens and the international responsibility of States. In 1961, the Harvard Law School had undertaken a review of the Borchard draft to bring it up to date for the benefit of the International Law Commission. The text produced, which was entitled “Draft Convention on the international responsibility of States for injuries to aliens”, was not really a revision of the 1929 text, but an entirely new draft and a rather bold one. One idea it put forward was that the right impaired by the internationally wrongful act was that of the individual, not that of his State of nationality, and that the individual himself could bring an international claim direct.

11. He had also drawn attention in his report to two resolutions adopted in 1956 and 1965 respectively by the Institute of International Law and to a draft Convention on the responsibility of States for injuries caused in their territory to the person or property of aliens, prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht (German Association for International

¹ A/AC.97/5/Rev.2.

² Source references for the texts mentioned in this statement will be found in the report (A/CN.4/217), which is reproduced in vol. II of this *Yearbook*.

Law), many provisions of which dealt with problems of responsibility proper.

12. Lastly, the drafts prepared by Professor Strupp and Professor Roth were both particularly important for the work of the Commission, because they constituted attempts to codify, in the form of articles, responsibility as such, not in relation to the subject of aliens' rights.

13. Of the attempts at codification made under the auspices of regional bodies, those singled out for special attention were the drafts prepared by inter-American bodies, in particular the two drafts of the Inter-American Juridical Committee. The value of those drafts lay in the fact that one of them reflected the point of view of the United States and the other that of Latin America—two different conceptions the Commission would have to take into consideration. But there again, the rules governing the rights of aliens and responsibility were treated as interdependent. The Asian-African Legal Consultative Committee was also making a contribution on the subject.

14. The work of the League of Nations on codification was most enlightening; the texts were annexed to his report. The plenary meeting of the Hague Codification Conference of 1930 had not adopted the ten articles which had been approved by the Third Committee of the Conference, because it had been unable to agree on the articles which should have followed them. The first ten articles had dealt with general problems of responsibility, while those which followed had dealt with the status of aliens. Thus the 1930 Conference could have been successful if it had confined itself to responsibility instead of venturing onto the quicksand of aliens' rights.

15. Finally, the United Nations had attempted, through the International Law Commission, to codify the international responsibility of States. A history of that work was given in the document prepared by the Secretariat (A/CN.4/209). To facilitate comparison he had included in the annexes to his report the texts prepared for the Commission by Mr. García-Amador, its first Special Rapporteur on State responsibility.

16. Mr. García-Amador had first wished to codify responsibility in general, but at that time the Commission had preferred him to limit the scope of his first study to injury caused to aliens. The main difficulty encountered by the Commission had been due to the fact that in the bases for discussion prepared by Mr. García-Amador the individual was presented as a subject of international law beside the State, with all the consequences that followed. In addition Mr. García-Amador had tried to overcome the main difficulties that arose in regard to aliens' rights by having recourse to the notion of fundamental human rights, and at that time the Commission had not been prepared to codify the rules governing the treatment of aliens on such a novel basis.

17. Having achieved no concrete results on the basis of the successive reports of its first Special Rapporteur, the Commission had then considered the possibility of codifying responsibility apart from any other subject, in particular the rights of aliens. The basic idea guiding the

Commission in that second phase, which was well known to members, had been the idea of isolating the subject of responsibility from the other subjects with which it had often been linked, and trying to define the rules independently of any definition of other substantive rules, or primary rules of international law.

18. The main idea which had emerged from the work of the Sub-Committee set up in 1962, and later from the conclusions reached by the Commission itself in 1963 and approved by the General Assembly, was, in other words, that of the need to concentrate on the notion of violation of an international obligation and the consequences of such violation. He would like to sum up that programme in the phrase: the whole of responsibility and nothing but responsibility. According to the plan adopted by the Sub-Committee in 1963 and confirmed by the Commission in 1967, which was reproduced in paragraph 91 of his report, the Commission would first take up the problem of the origin of international responsibility, namely, the notion of a wrongful act or infringement, the determination of the components of that notion and, in particular, the determination of the conditions under which an international wrongful act could be imputed to a State. On that basis it must distinguish between the different kinds of infringement and define the circumstances in which the wrongful nature of an act or omission could be set aside. Secondly, the Commission would have to study the forms of international responsibility, the relationships between reparation and sanctions and between individual sanctions and collective sanctions, with all the consequences that followed. That was a complicated and difficult task, but there was reason to hope that the difficulties of defining responsibility as such could be overcome, especially in view of the difficulties the Commission had surmounted when codifying the law of treaties.

19. If it was to be successful, the Commission would have to devote more time to responsibility at its next session than it had hitherto. He himself had already made good progress in the work of drafting his second report, in which he hoped to be able to submit a first draft of articles to the Commission if it wished him to do so.

20. Mr. BARTOŠ said that both the Commission and the General Assembly had recommended a study of the responsibility of States incurred by the violation of rules relating to international peace and security. Although that aspect of the topic was mentioned in the report, the Special Rapporteur had said nothing about it in his introductory statement. He would like to know whether the Special Rapporteur intended to confine himself to the question of State responsibility for injury to aliens or whether he intended to follow those recommendations.

21. Mr. AGO (Special Rapporteur) said he could assure M. Bartoš that he had no intention of confining his study to the problem of injury to aliens. The topic of responsibility had to be considered as a whole; obviously therefore, it would also have to be studied with reference to the matters mentioned by Mr. Bartoš.

But there again, no attempt should be made to define the primary rules whose violation was a source of responsibility; the Commission would study the conditions in which responsibility was incurred by the violation of a rule, whatever the rule might be.

22. Mr. RUDA said the Special Rapporteur was to be commended for his valuable review of previous work on codification of the topic of State responsibility and for his excellent introductory statement.

23. A historical introduction such as that contained in the Special Rapporteur's report was necessary, and the annexes would prove particularly useful for the Commission's future work on the topic. The material he had assembled confirmed the Special Rapporteur's conclusion that the Commission should not neglect any part of the work already done on the topic, but should at the same time avoid past errors. Some success had undoubtedly been achieved in the past, but mistakes had also been made, particularly in the general approach to the subject. The time had come for the Commission to undertake a study of State responsibility in contemporary international law, with due regard to the work previously done. The topic was perhaps even more difficult than that of the law of treaties.

24. Some of the difficulties involved in such a study were connected with the introduction into past discussions of concepts of municipal law. Other difficulties, however, were attributable to the traditional treatment of the subject, particularly in the early part of the twentieth century.

25. The Special Rapporteur, with his usual clarity, had offered the Commission a satisfactory basis for its work when he had stated, in paragraph 6 of the report, his firm belief "that, for purposes of codification, the international responsibility of the State must be considered as such, i.e. as the situation resulting from a State's non-fulfilment of an international legal obligation, regardless of the nature of that obligation and the matter to which it relates." He shared the Special Rapporteur's view that it was necessary to isolate the rules governing State responsibility and to endeavour to deal exclusively with those rules, as distinct from the rules of other parts of international law. Any attempt to deal with those other substantive rules of international law would lead the Commission into difficulties that would only hamper the codification of the international law of State responsibility.

26. He had, however, some doubts about the Special Rapporteur's statement that State responsibility was the situation resulting from a State's "non-fulfilment of an international legal obligation". Viewed in that light, a study of State responsibility would be confined to the consequences of wrongful acts, whereas the international responsibility of a State could arise from lawful activities. One example was State responsibility in cases of nuclear damage, a matter on which a number of conventions had been drafted. Another example was provided by State activities in outer space; the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space was at present engaged in studying drafts dealing, precisely, with the damage that could result from certain

activities of a State in outer space which were not in any way wrongful.

27. He was grateful to the Special Rapporteur for his careful and extensive treatment in his report of the Latin American contribution to the study of the topic of State responsibility, in particular, the work done in 1925 by the American Institute of International Law at the invitation of the Governing Board of the Pan-American Union and the more recent work of official codification by inter-American bodies.

28. He supported the Special Rapporteur's intention to deal with the whole subject of State responsibility, and nothing but that subject.

29. Mr. YASSEEN, after congratulating the Special Rapporteur on his report and his masterly presentation of it, said that the Commission had now to decide how to deal with the subject. Since 1963, he himself had consistently maintained, both in the sub-Committee and in the Commission, that the Commission should study responsibility itself, in other words, the general theory of responsibility, and should not begin by considering responsibility in the various sectors of international relations. The general theory did exist, and it formed part of positive international law; the Commission should undertake both codification and progressive development of international law on State responsibility.

30. The Special Rapporteur had wisely drawn a distinction between the rules on responsibility and substantive rules. That distinction was imperative, for to study international obligations *per se* would mean studying the whole of international law.

31. Of course, the possibility of special features of the application of the general theory of responsibility arising in certain sectors of international relations must not be excluded. But the Commission should begin by working out the general principles and then see whether their application presented special features. For instance, in applying the general theory of responsibility in internal law to industrial or traffic accidents, certain special features of application had been introduced such as presumptions or reversal of the burden of proof. In international law one of the areas where the application of the general theory of responsibility might have special features was breaches of the peace, which were a matter of cardinal importance to the international community.

32. Mr. RAMANGASOAVINA said the Special Rapporteur was to be congratulated on the very full documentation he had produced on a topic which needed urgent consideration, since it had been on the Commission's agenda for many years.

33. The Special Rapporteur rightly wished to study the general principles of responsibility without going into substantive rules, and as he had confirmed in his reply to Mr. Bartoš, the study should not be limited to any particular sector of responsibility. It should extend to State responsibility for violation of the national sovereignty, independence or national integrity of other States, or of the right of nations to self-determination and the use of their natural resources.

34. That widening of the scope of the topic would naturally cause difficulties, because some principles, even

though well-established, raised awkward problems of definition. For example, despite the principles set out in Article 2 (4) of the Charter, aggression was extremely hard to define. In order to overcome such difficulties advantage should be taken of the work that had already been done, so that at least some essential rules and principles could be formulated; it would then be possible to define some of the obligations which were sources of responsibility.

35. The Special Rapporteur's review of previous work on the international responsibility of States made no mention of a trend towards the recognition of responsibility without fault. That trend had been very marked ever since the 1944 Chicago Agreement on International Civil Aviation³ right up to the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space,⁴ by way of the Conventions on the Law of the Sea.⁵ True, it might be dangerous, as the Special Rapporteur had stressed, to draw analogies between international law and municipal law, but in that case they did both seem to be developing on similar lines as a result of technical progress. To be quite complete, therefore, the review should take that trend into account.

36. Mr. CASTRÉN, associating himself with the congratulations expressed to the Special Rapporteur, said that his first report (A/CN.4/217) together with the two documents prepared by the Secretariat (A/CN.4/208 and 209) would provide a good basis for discussion, particularly the Special Rapporteur's detailed examination of García-Amador's reports and the interesting conclusions to which it had led him.

37. The introduction to the report contained some valuable observations. He agreed that the topic of State responsibility was very hard to codify and that particular attention should therefore be paid to the question of method. The decision taken by the Commission in 1963, and confirmed in 1967, to give priority to the general rules governing international responsibility,⁶ had been justified. The Special Rapporteur was right in saying that State responsibility should be dealt with as "a single and distinct general problem", and as "the situation resulting from a State's non-fulfilment of an international legal obligation, regardless of the nature of that obligation and the matter to which it relates". Special questions such as that of the responsibility of States for injuries caused to aliens in their territory could be considered later, on the basis of the general principles which emerged from the Commission's work.

38. Mr. NAGENDRA SINGH said that the Special Rapporteur deserved the thanks of the Commission for his illuminating report, in which he had not only given a historical resumé of the subject of State responsibility,

but had also brought out clearly the pitfalls to be avoided and the difficulties to be faced. He endorsed every word the Special Rapporteur had said in his introduction.

39. He agreed that the subject of international criminal responsibility had to be viewed with caution and should be avoided.

40. He agreed with the suggestion of the Sub-Committee on State Responsibility that the question of the responsibility of other subjects of international law, such as international organizations, should be left aside.⁷

41. He also agreed with the Special Rapporteur that the Commission should not adopt the approach adopted by Mr. García-Amador, the first Special Rapporteur, and, in particular, that it would be a mistake if the topic of State responsibility were made to revolve round the question of the status of aliens.

42. He noted that General Assembly resolution 1902 (XVIII) had recommended that the International Law Commission should "Continue its work on State responsibility, taking into account the views expressed at the eighteenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations". While agreeing that the Commission should include in its study the position of State responsibility in relation to the Charter, he hoped that it would not devote too much attention to that very broad aspect of the matter. He supported Mr. Yasseen's view that the Commission should adopt a general approach and concentrate its attention on violations of international obligations.

43. The Commission should also pay some attention to the latest trends and developments with respect to State responsibility, such as those arising from such subjects as the peaceful uses of outer space, the seabed and the ocean floor, referred to in the document prepared by the Secretariat (A/CN.4/209). As Mr. Ramangasoavina had said, however, caution was necessary in dealing with awkward problems like defining aggression.

44. The Special Rapporteur had endorsed the conclusions reached by the Sub-Committee on State Responsibility, and he agreed that the Commission should follow the general recommendations of that body. The subject of State responsibility had been before the General Assembly since 1952 and before the Commission since 1954, with little result. The Commission should give the Special Rapporteur full latitude to deal with the subject as he thought best; perhaps if the Commission held a winter session in 1970, some progress might at last be made.

The meeting rose at 5.45 p.m.

³ United Nations, *Treaty Series*, vol. 171, p. 346.

⁴ See General Assembly resolution 2222 (XXI).

⁵ United Nations, *Treaty Series*, vol. 450, p. 82; vol. 499, p. 312; vol. 516, p. 206; vol. 559, p. 286.

⁶ See *Yearbook of the International Law Commission*, 1963, vol. II, p. 224, para. 52 and 1967, vol. II, p. 368, para. 42.

⁷ *Op. cit.*, 1963, vol. II, p. 228, footnote 2.

1012th MEETING*Tuesday, 1 July 1969, at 10.15 a.m.**Chairman:* Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Ruda, Mr. Tammes, Mr. Tsu-ruoka, Mr. Ustor, Mr. Yasseen.

State responsibility

(A/CN.4/208; A/CN.4/209; A/CN.4/217)

[Item 3 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's first report on State responsibility (A/CN.4/217).
2. Mr. TAMMES said he was grateful to the Special Rapporteur for his valuable historical report and to the Secretariat for the useful documentation it had provided. The report was a great help to an understanding of the obstacles which for many years had hampered the codification of the topic of State responsibility. The material it contained confirmed the Special Rapporteur's persuasive thesis that the "continued confusion of State responsibility with other topics was undoubtedly one of the reasons which prevented it from becoming ripe for codification" (para. 6).
3. He therefore supported the Special Rapporteur's "vertical" method, as opposed to the "horizontal" method which mixed the obligations of State responsibility with the rules whose non-fulfilment gave rise to State responsibility. It could even be said that past insistence on State responsibility had been partly inspired by what was otherwise a legitimate desire to clarify certain disputed substantive rules of international law. The more such matters were codified, the less there would remain for State responsibility as such, and certain time-honoured topics would decrease in interest and urgency.
4. The work of the 1963 Sub-Committee, and the Special Rapporteur's excellent analysis of that work, showed that even if the topic of State responsibility were cleared of all extraneous matter, there would remain abundant material for study. The issues to be considered would centre mainly on the determination of the agent of the international wrongful act and the consequences of that act. That approach to the subject would be consistent with the consensus of opinion in the Commission when it had discussed the topic of State responsibility at its nineteenth session.¹
5. For want of a better terminology, the distinction which was being adopted could be described as a distinc-

tion between primary, material or substantive rules of international law, on the one hand, and secondary or functional rules, on the other. Primary rules were intended to influence the conduct of States directly; secondary rules, which were those of State responsibility proper, were intended to promote the practical realization of the substance of international law contained in the primary rules.

6. At the nineteenth session, he had welcomed that distinction as basically sound and progressive;² he now wished to raise some problems of classification with the aim of seeing how the "purified" topic of State responsibility could be made more manageable and brought more within reach of codification. In doing so, he fully realized that the Special Rapporteur, in paragraph 91 of his report, had intended to submit only a classification for purposes of discussion, not a rigid framework for future draft articles.

7. The first problem was that of the abuse of rights, referred to under the heading "First point: Origin of international responsibility", in sub-paragraph (2) (a) of paragraph 91. Clearly, the abuse of rights constituted by the abusive interpretation of treaty provisions would come under the heading of State responsibility. Other cases of abuse of rights, however, would be of a borderline character, for example, cases arising out of peaceful uses of the sea bed and the ocean floor beyond the limits of national jurisdiction, referred to in the Secretariat study (A/CN.4/209, paras. 41 and 42). The same was true of certain matters connected with peace and security, which Mr. Bartoš mentioned.

8. He also had some doubts about the "state of necessity", listed by the Special Rapporteur in sub-paragraph (4) of the "First point" in paragraph 91. In many fields of codification, where the need had been felt for an escape clause to cover cases of emergency, the relevant exceptions had been formulated with the utmost care. Examples could be given from the 1958 Conventions on the law of the sea, the international instruments on human rights, and the Geneva Conventions for the protection of war victims. The Special Rapporteur ought not to be burdened with the extremely difficult task of drawing up a general rule for the state of necessity, or for self-defence, which was a special case of the state of necessity. The boundaries of the topic would remain sufficiently elastic to allow the Commission to deal with such questions at a later stage.

9. The work to be undertaken on the topic of State responsibility would be essentially work of codification. He had been much impressed by the concise language used in the drafts prepared by Professor Strupp in 1927 and by Professor Roth in 1932, which were annexed to the report. Except, perhaps, with respect to the rules on denial of justice, both those drafts were based on the approach now proposed by the Special Rapporteur and were restricted to the elementary principles of State responsibility. They reflected the doctrine prevailing in about 1930, in a small number of concise rules dealing with such matters as the responsibility of the State for

¹ See *Yearbook of the International Law Commission*, 1967, vol. I, pp. 225-228.

² *Ibid.*, p. 225.

the conduct of its organs, its territorial sub-divisions and persons under its control, and questions of the exceeding of powers and of due diligence in protecting aliens from mob violence. All those subjects came under the heading of general principles, as discussed by the Commission at the previous meeting.

10. The work on the topic of State responsibility would not, however, be confined to codification. In the past, it had centred on cases of responsibility for injuries done in the territory of a State to the person or property of aliens. With scientific and technological progress, however, it had become possible for damage to be caused in the territory of another State at a great distance from its border. Cases of that type raised the question of the distinction between risk and negligence, to which reference was made in footnote 79 to the report. They were also sometimes connected with the problem of collective responsibility for joint ventures by several States, such as schemes for peaceful use of the ocean floor.

11. A question raised during the Commission's past proceedings on State responsibility, and also in the present discussion, was whether international law should admit some concept such as the *actio publica* of Roman law. Consideration might be given to the question whether the requirement of interest for initiating an international action should be extended beyond the concept of the direct interest, material or otherwise, of the injured party.

12. Another question of progressive development was that of reprisals, to which reference was made in the Special Rapporteur's classification in sub-paragraph (3), under the heading "Second point: The forms of international responsibility". That question raised the important problem of the proportionality of reprisals to the gravity of the wrongful act they were intended to sanction. The subject was one on which contemporary international law had gone beyond the former traditional rules and was governed by the prohibition of the threat or use of force.

13. A question which had not so far been mentioned was that of the feasibility of drawing a distinction, both for purposes of responsibility and for purposes of sanction, between more serious and less serious wrongful acts. A distinction of that type had been drawn in all four of the 1949 Geneva Conventions for the protection of war victims.³

14. In the short term, work on State responsibility would consist largely in the codification of established principles. In the long term, some progressive development would have to be undertaken, covering such matters as joint responsibility, responsibility for risk as well as negligence, and the proportionality of reprisals.

15. Mr. ALBÓNICO said he associated himself with the tributes paid to the Special Rapporteur for his excellent historical analysis.

16. He agreed with him on the need to draw a distinction between the rules of State responsibility as such, and the substantive rules, violation of which brought

State responsibility into play. Although both types of rule were substantive in character, it was convenient in the present context to reserve the term "substantive rules" for those whose non-fulfilment gave rise to State responsibility.

17. In studying the rules of State responsibility, special emphasis should be placed on objective responsibility, which was connected more with the concept of damage than with that of a wrongful act. In municipal law, the doctrine of objective liability had been applied to such matters as industrial accidents involving workmen's compensation. In the case of railway accidents, it had been recognized that a presumption of negligence could be derived from the mere fact that a collision had occurred. Of course, concepts of municipal law should not be imported bodily into international law, but they could have an influence on its information.

18. An example of State responsibility could be taken from the law of extradition. If a State extradited a person to his own country on the understanding that he would be tried for a particular offence, and his own country then tried him for a different offence, that was an act of bad faith and entailed the obligation to make reparation.

19. In contemporary international law, there was a clear tendency to broaden the scope of the objective responsibility of the State, so that such subjects as abuse of rights, state of necessity and collective sanctions deserved consideration.

20. The Special Rapporteur should be instructed to prepare draft rules on State responsibility as such. They should be general rules, but it would be appropriate also to draft a few rules for special cases; they should not, however, include the subject of compensation for injury to the person or property of aliens, which had caused so much controversy in the past, partly for reasons of national pride.

21. Among the special subjects that should be dealt with was that of State responsibility for the violation of human rights, which was not covered by the general rules on State responsibility because the individual was not recognized as a subject of international law. Another special subject was that of State responsibility arising from relations between neighbouring States in such matters as the use of common rivers and lakes. Another was the question of damage caused by outer space activities, to which the doctrine of objective responsibility was particularly relevant.

22. The outline programme of work adopted by the Sub-Committee in 1963 might prove in some respects inadequate for present purposes. Some problems which had appeared urgent in 1963 had become even more urgent in 1969, for example, those connected with outer space activities, while others, such as those arising from human rights, had become especially relevant as a result of recent violations.

23. He was in favour of a broad approach to the work on State responsibility. The Special Rapporteur should deal with the rules of State responsibility proper, but should at the same time select from State practice certain subjects for special treatment in the future.

³ United Nations, *Treaty Series*, vol. 75.

24. Mr. KEARNEY said the Special Rapporteur's report contained an excellent analysis of how the extremely difficult topic of State responsibility should be dealt with. He wished to thank him particularly for the attention he had given to the contributions of the Inter-American Juridical Committee and the Harvard Law School.

25. One aspect of the subject of State responsibility which had not yet been touched on and which he hoped the Special Rapporteur would take into account was the problem of the settlement of disputes. In view of his recent experience as President of the Vienna Conference on the Law of Treaties, the Special Rapporteur was certainly familiar with the difficulties to which that problem could give rise. One thing which the Vienna Conference had established was that when a topic of international law of wide scope and far-reaching effects on international relations was dealt with in the process of codification, it was a grave mistake not to deal simultaneously with the problem of settling any disputes that might arise. If the Commission had faced that problem boldly when preparing its draft articles on the law of treaties, the Vienna Conference would probably have run a much smoother course and produced more satisfactory results. In fact, however, a solution of the problem of settlement of disputes had been achieved only by way of last-minute improvisation and compromise.

26. In the field of State responsibility, adequate attention to the problem of the settlement of disputes was particularly necessary, since a wide variety of cases might arise. One example was the case of an accident at sea, when a naval vessel of one country collided with a merchant vessel of another; that was a relatively simple case which could usually be settled by the payment of damages. When dealing with the problem of pollution of international waterways, on the other hand, it was necessary to consider an entirely different series of possible remedies. Only a few days ago, for example, the entire water supply of the Netherlands had been endangered by the accidental discharge of insecticides into the Rhine some hundred miles from the Netherlands border. In the over-populated world of today, that type of problem was bound to arise with increasing frequency and the Commission should give due consideration to the best way of dealing with it. The usual procedure for righting wrongs of that kind was to restore the situation to what it had been before; under the common law system of private law, that might take the form of issuing injunctions to prevent persons from taking certain undesirable kinds of action. It was extremely difficult, however, to construct such a system of remedies at the international level; in its final decision in the *Haya de la Torre* case⁴ for example, the International Court of Justice had clearly indicated that it considered itself debarred from applying that type of remedy. He hoped, however, that the Special Rapporteur would consider that problem carefully.

27. He would like to know whether the Special Rapporteur proposed to deal with those problems of State

responsibility arising in connexion with the law of treaties which had not been dealt with in the Vienna Convention on the Law of Treaties.⁵ That Convention dealt with problems relating to the termination and suspension of treaties; there remained, however, a number of questions, such as reparation for breach of agreement, which should be settled within the scope of the topic of State responsibility.

28. Mr. BARTOŠ said that the Special Rapporteur well deserved the congratulations he had received, not only because of his learned report, but also because of the enthusiasm he had shown in studying a subject of great importance.

29. The question of the status of aliens certainly had an important place in the study of State responsibility, and jurists had written much on it. The material was abundant, and further sources might be cited in addition to those in the annexes to the report. Problems of State responsibility arose when the United Nations Covenants on human rights⁶ were not respected; a number of international treaties already in force contained clauses relating to the status of aliens, and the Bustamante Code itself give a prominent place to that important subject.

30. However, ideas of law in general and consequently of international law had evolved on that question, and attitudes varied from country to country. In Latin America, that evolution had been reflected both in the political sphere and in the law. An illustration was provided by the difficulties that had arisen in that connexion in relations between the United States and such countries as Mexico and Peru, concerning the property of aliens. In Europe, the ideas held by members of the Council of Europe differed sharply from those held in eastern Europe. Yugoslavia took an intermediate position on the matter. The countries of the "third world" very often invoked the principles relating to the status of aliens to protect the rights of their own nationals, but sometimes rejected them when dealing with the status of aliens in their own territory.

31. The evolution of the world brought changes in the legal superstructure. The notion of an international minimum standard for all human beings, instead of just for aliens, was coming to the fore. That was the European doctrine of positive international law on human rights, expressed in the Council of Europe more clearly than by the United Nations. But though the protection thus accorded to the individual was no longer just a matter between States, it had not done away with diplomatic protection of aliens whose rights were violated.

32. It was therefore open to question whether the status of aliens today was the best choice among the possible subjects to be studied, despite the abundance of material from the past. He was not, however, opposed to the Special Rapporteur's approach. The Special Rapporteur started from the idea that principles concerning the status of aliens did exist, but he (Mr. Bartoš)

⁴ *I.C.J. Reports 1951*, p. 71.

⁵ A/CONF.39/27.

⁶ See General Assembly resolution 2200 (XXI).

would not be content to consider only the scope of rights and obligations in that sphere.

33. Violations of those rights constituted international delinquencies and accordingly raised the problem of sanctions. There too, evolution had taken place. There was no longer any question of sending a gunboat to the delinquent State, or of carrying out a bombardment or even occupying its territory as in the past.

34. Evolution had also introduced into international law a distinction between individual responsibility and State responsibility. Even before the First World War, the individual responsibility of members of armed forces violating the laws of war had been admitted at The Hague Conference. The conventions laid down, moreover, that the State was responsible for violations committed by members of its armed forces.⁷ The notions of personal responsibility and State responsibility had also been subsequently included in the Treaty of Versailles⁸ and the Potsdam Agreements.⁹ There were many treaties in which the State was declared to be responsible even for faults committed by private persons or concession-holders in its territory, for example, in connexion with the law of the sea, telecommunications and rail transport. In the *Corfu Channel* case, the International Court of Justice had found against Albania for failing to comply with its obligation to exercise vigilance over its territorial waters like any sovereign State.¹⁰

35. The notion of international responsibility in general, not only criminal responsibility, should be extended to matters relating to international peace and security. He recognized, however, that the Special Rapporteur was right in deciding to confine himself for the time being to general principles and to defer consideration of their application to various matters which necessarily had a mainly political bearing. Naturally, there was no question of evading those problems. The status of aliens might be taken first, to be followed successively by administrative negligence and fault, and questions of public law in the strict sense; but it would also be necessary to consider purely political questions, which would bring out clearly the various levels at which State responsibility existed.

36. Despite the changes that had occurred in international life and the development of international law since the texts cited by the Special Rapporteur had been drafted, there was still an international obligation to respect certain principles governing the status of aliens—a universal obligation from which no exemption was possible. He hoped that, after studying the consequences of violation of that obligation, the Special Rapporteur would pass on to the other subjects, finishing with acts against international peace and security, in accordance with the General Assembly's recommendations and the wishes of the Commission.

37. The CHAIRMAN, speaking as a member of the Commission, congratulated Mr. Ago on his report and thanked him for assembling in a single extremely useful document the various texts which made up the annexes to it. It was regrettable that the study of the topic should still be only at the preliminary stage, but the report provided a good basis for discussion and settled some very important questions of method.

38. The Special Rapporteur had considered whether the rules of responsibility should be studied independently of the substantive rules. He himself concurred with those who wished the Commission to give special attention to the question of State responsibility with regard to the maintenance of peace and other general principles of international law. The Soviet conception of contemporary international law was well expressed in a work by a former member of the Commission.¹¹ The author rejected the idea of the criminal responsibility of the State in international law, but stressed some new aspects of State responsibility. He noted that the right of the victor was giving way to the responsibility of the State for acts of aggression. With regard to the subjects of law, it had formerly been held that violations of international law concerned only the State in breach and the injured State, whereas nowadays violations which constituted a breach or threat of a breach of the peace affected the rights of all States. Hence, States other than the State directly injured might act in such cases to compel the offending State to abide by international law. A further new aspect noted by the same writer was that the types and forms of State responsibility could now be classified by three criteria: first, according to the nature of the violation of international law—and he drew a distinction between those which threatened peace and all others; second, according to the consequences of the violation—and he drew a distinction between political responsibility and material responsibility; and third, according to the nature of the legal relationships resulting from the violation with, on the one hand, the obligation to make reparation for the injury and, on the other, sanctions.

39. Although the substantive rules breached by a State might be left aside for the moment and the study confined to certain basic principles in the preliminary stage, it was obvious that when the Commission came to consider sanctions, it could not ignore the wrongful act itself. For sanctions, even military sanctions, could be imposed in the event of a breach or threat of a breach of the peace, though it could not be said that international law made provision in general for the possibility of military sanctions. Hence it was only provisionally that the wrongful act would be left aside; it would be necessary to revert to it when the Commission examined the forms of international responsibility—the second point for study proposed in the report. That idea should be made quite clear in the discussion, since it was important that the Sixth Committee and the General Assembly should understand that, although the Commission was adopting a general approach to the

⁷ See The Hague Conventions and Declarations of 1899 and 1907, ed. J. B. Scott, New York, 1918.

⁸ *British and Foreign State Papers*, vol. CXII, p. 1.

⁹ *Op. cit.*, vol. 145, p. 852.

¹⁰ *I.C.J. Reports 1949*, pp. 23 and 36.

¹¹ G. I. Tunkin, *Droit international public: problèmes théoriques*, Paris, 1965.

topic of responsibility, it would give priority in its future draft articles to the most serious international delinquencies—those which endangered international peace and security.

The meeting rose at 1 p.m.

1013th MEETING

Wednesday, 2 July 1969, at 10.20 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Ruda, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Mr. Yasseen.

State responsibility

(A/CN.4/208; A/CN.4/209; A/CN.4/217)

[Item 3 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's first report on State responsibility (A/CN.4/217).

2. Mr. USTOR, after congratulating the Special Rapporteur on the lucidity of his report, said that he had been struck by the comparison he had made in his introductory statement between the difficulties in codifying the topics of State responsibility and the law of treaties.¹ There could be no doubt that any task of codification of international law involved considerable difficulties and he would remind the Commission of the views expressed by Sir Hersch Lauterpacht in 1955, in an article entitled "Codification and Development of International Law", where he had said: "... the experience of codification under the United Nations fully confirms the lessons of past attempts to the effect that there is very little to codify if by that term is meant no more than giving, in the language of Article 15 of the Statute of the International Law Commission, precision and systematic order to rules of international law in fields 'where there already has been extensive State practice, precedent and doctrine'. For, once we approach at close quarters practically any branch of international law, we are driven, amidst some feeling of incredulity, to the conclusion that although there is as a rule a consensus of opinion on broad principle—even this may be an over-estimate in some cases—there is no semblance of agreement in relation to specific rules and problems. Thus, for instance, with regard to the law of treaties, perhaps

the only principle of wider import as to which there is no dissent is that treaties ought to be fulfilled in good faith. . . . Apart from that general unavoidable acceptance of the basic principle, *pacta sunt servanda*, there is little agreement and there is much discord at almost every point".² And it should be noted that the law of treaties had the advantage of being based on a much larger body of State practice than State responsibility. The Special Rapporteur was right when he held that the codification of State responsibility would prove even more difficult.

3. The Special Rapporteur had explained that he wished to separate the general principles of State responsibility from the particular rules applicable to international wrongful acts; in that respect, he had followed the Commission's decision at its fifteenth session to give priority in codification to the definition of general rules—a decision it had reaffirmed at its nineteenth session when approving the programme of work reproduced in the Special Rapporteur's first report para. 91).³ That programme was generally acceptable, but it should be divided into two main parts, the first covering codification of the general principles of State responsibility, and the second applying particular rules to individual cases of international delinquency. While he agreed that, as a general rule, it was dangerous to draw analogies between international law and internal law, he would venture to do so in at least one case: that of the criminal codes of the continental European States. The first part of those codes usually dealt with general principles of criminal responsibility relating, among other things, to the difference between an attempted and an accomplished crime, whereas the second part dealt with individual crimes and misdemeanours. By analogy, the code or convention which the Commission was to draw up on State responsibility could follow the same lines: the first part could consist of a statement of general principles, and the second part of a series of rules showing how those general principles should apply to certain types of international wrongful acts. That view was supported by the Commission's decision at its fifteenth session to give priority to the definition of the general rules governing the international responsibility of States,⁴ which did not, of course, mean that the topic would be exhausted with the codification of those general rules.

4. In the second part of its study, the Commission should give an enumeration of the wrongful international acts incurring responsibility, beginning with the gravest delinquencies, such as breaches of international peace and security and infringement of the right of peoples to self-determination. He agreed with the Chairman that the safeguarding of international peace and security was a crucial part of the Commission's work and that it would mainly involve the progressive development of international law. He also agreed with the Special Rapporteur that there was not a very large

² The *American Journal of International Law*, vol. 49, 1955, p. 17.

³ See *Yearbook of the International Law Commission*, 1967, vol. II, p. 368, para. 42.

⁴ *Op. cit.*, 1963, vol. II, p. 224, para. 52.

¹ See 1011th meeting, paras. 2-3.

body of precedent and doctrine in that field, since it was a relatively new one in international law. Mr. Bartoš had, to be sure, mentioned the precedent of the Potsdam Agreement⁵ and he hoped that the Special Rapporteur would bear that and similar precedents in mind. He should also take into account the gravest types of international delinquency referred to by Mr. Tammes, who had rightly pointed out that all States had the right to defend the cause of peace. Mention should also be made of the duty of the Secretary-General, as laid down in Article 99 of the Charter, to "bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security".

5. With regard to the limits of the topic of State responsibility, they were inherent in the title itself; it was clearly confined to the responsibility of States and should not be extended beyond that point.

6. As to Mr. Kearney's view that the Commission should give prominence to the question of the settlement of disputes, he considered that that question constituted a topic in itself and should not be dealt with piecemeal. The Commission should be satisfied if it succeeded in codifying the substantive rules governing State responsibility in general, without trying to deal with the question of the settlement of disputes.

7. Mr. EUSTATHIADES said he fully associated himself with the tributes paid to the Special Rapporteur and the hopes expressed for the success of the task entrusted to him by the Commission, and congratulated him on his excellent statement introducing his report. He agreed with the Special Rapporteur that the Commission would be well advised to confine its study to State responsibility; but it should first of all define very precisely what it meant by the rules of State responsibility. The Commission could allow the Special Rapporteur full freedom to delimit his subject as he thought fit, provided that he took full account of the new trends, which could not be ignored in a modern work of codification such as that expected from the Commission; at the same time, some general directions could be given during the discussion.

8. Like the Special Rapporteur, he thought that a distinction should be made between responsibility as such and substantive rules; but the expression "substantive rules" might cause some uncertainty, for it was evident that what was really meant was "other substantive rules", namely rules governing matters other than responsibility, since the rules on responsibility, particularly those which did not concern its application, were also substantive rules. No doubt what the Special Rapporteur had meant to say was that the rules governing State responsibility were not independent rules, but complementary to substantive rules and important only in connexion with the breaking of a rule, that was to say, an internationally wrongful act. That was a very traditional approach, but international law was developing beyond the traditional rules and in view of certain new trends it would be well to consider responsibility incurred not only for wrongful

acts, but also for acts that were not wrongful, for example, responsibility for "risk" in such fields as nuclear energy, outer space and civil aviation. In those cases, the rules were not complementary, since responsibility existed even though no rules had been broken; there was no international delinquency as understood in traditional law, unless an international delinquency was defined in terms of the obligation to make reparation, not in terms of breach of a rule.

9. In any event, a first point to be noted was that the concept of a substantive rule as delimiting the topic of responsibility was not decisive. With reference to Mr. Tammes' remarks, he observed that substantive rules were involved in the subject-matter of responsibility, for example, rules relating to the abuse of rights, state of necessity and self-defence. A further question to be considered was whether some of the rules on such matters as denial of justice, particularly with reference to the requirement of exhaustion of local remedies, were rules of responsibility or rules for its application.

10. It was also important to make a very clear distinction between the substantive rules which governed responsibility and the rules which governed its application. It was perhaps from that angle that the problem of the treatment of aliens, among others, should be considered. The first question at issue was that of injury to aliens, which showed that the treatment of aliens could not be excluded *en bloc* from the topic of responsibility. That question was connected with denial of justice and the exhaustion of local remedies, and thus with diplomatic protection: in other words, with the application of responsibility. The Special Rapporteur's report and the documents submitted by the Secretariat showed that both writers and regional bodies had always dealt with the question from the point of view of application, but that in considering application they had in fact discussed substantive rules. The persistence with which writers had studied the problem of the treatment of aliens showed the importance of the subject, both from the practical point of view and from the point of view of the formulation of rules of international responsibility.

11. Moreover, there had been a tendency to link the question of the treatment of aliens with that of the protection of human rights. For example, Chapter III of the draft on "Responsibility of the State for injuries caused in its territory to the person or property of aliens", prepared by Mr. García-Amador in 1957, dealt with "Violation of fundamental human rights".⁶ That work reflected the trend towards equal treatment of aliens and nationals. If the protection of aliens was henceforth to be merged with the protection of human rights, the Commission would have to provide for the necessary means of practical application, since it would no longer be a question of diplomatic protection, but of collective guarantees either under the Charter or under some regional instrument. The disputes arising would then no longer be duels between two States, for

⁵ See previous meeting, para. 34.

⁶ See *Yearbook of the International Law Commission, 1957*, vol. II, pp. 112-116.

no State would be able to infringe the rights of aliens, that was to say human rights, without being called to account by the community of States under the provisions for their joint international protection. In other words there would be a collective guarantee, under which the guilty State would be the same as under the system of diplomatic protection of aliens, but the injury would no longer concern only the State of the injured person's nationality; a community of States would be concerned and would be able to give effect to responsibility. Collective guarantees within the framework of State responsibility would therefore have to be included among the general rules and, especially, among the means of application.

12. In addition to responsibility for risk and respect for human rights, there was a third new trend which reflected progress towards the idea of collective guarantees: the notion of the gravity of violations, to which the Chairman had referred when quoting a work by Mr. Tunkin.⁷ The Commission should give close attention to those new trends. State responsibility could no longer be based exclusively on the traditional foundations. Perhaps the Commission could keep to the traditional line for the general rules of responsibility, but it should certainly not disregard the new trends, which mainly affected application procedure. Hence it was important that the Commission should study the various procedures for applying the rules of responsibility, for it was not enough to lay down general rules on responsibility without establishing application procedure. That aspect of the matter, which was of the greatest practical importance, should perhaps be dealt with separately.

13. Since the subject-matter of responsibility which was to be codified should also be based on progressive development, he thought it necessary to consider a number of new trends: first, the responsibility of the individual; secondly, the responsibility of international organizations; thirdly, responsibility for risk and joint responsibility; fourthly, equal treatment of aliens and nationals; fifthly, grave violations; sixthly, the criminal responsibility of the State; and lastly, the joint responsibility of the State and of the individual for the same breach of the same rule. The Commission was not called upon to deal with the responsibility of individuals or of international organizations, which were not within its terms of reference. With regard to responsibility for risk and joint responsibility, the discussion had shown that they could be included among the general rules of responsibility. The question of equal treatment of aliens and nationals belonged both to the general rules and to the application procedure, and it raised the question of collective guarantees.

14. To come to the question of grave violations, it would be remembered that the General Assembly had asked the Commission to study problems relating to international peace and security, to the right of peoples to self-determination and to other leading principles, the violation of which was regarded as grave. There had been some support for inclusion of the question

of grave violations, in addition to that of the status of aliens; he did not think it would be any hindrance at the stage when the general principles of responsibility were being studied. The difficulties would only appear when the forms of reparation, in other words, the consequences of responsibility, came to be considered, particularly in connexion with the application of responsibility.

15. In considering the criminal responsibility of the State, it was necessary to take account of the development which had led, in positive law, to various applications of that notion. True, it could be dangerous to transfer to international law notions derived from internal law. International law drew no distinction between civil and criminal responsibility. Nevertheless, a penal element did sometimes appear. That applied to sanctions such as exclusion from the United Nations, suspension of the exercise of certain rights and measures by the Security Council in the event of failure to comply with a decision of the International Court of Justice; in such cases the notion of reparation gave way to that of penalty. But that was a question which could be examined later, for it related mainly to the application of responsibility.

16. Lastly, there was a clear trend towards recognition of a dual international responsibility in the matter of war crimes in the broad sense, such as breaking the laws of war, crimes against the peace and crimes against humanity. The same act could involve both the responsibility of the State and the individual, responsibility of its agents. The Commission should deal with that individual responsibility, not as a separate subject, as Mr. García-Amador had done, but perhaps under the general rules of responsibility and certainly under the procedure for its application.

17. He linked those new trends in international law, and the seven points he had mentioned earlier, more with the application of responsibility than with the general rules of responsibility, not only because he believed that that approach was legally correct, but also for reasons of order and working method. They could be examined separately, perhaps with reference to the forms of responsibility constituting the second point of the programme in paragraph 91 of the Special Rapporteur's report. The application of responsibility, which was of great practical importance, would raise certain difficulties because of the great diversity of cases, and it was therefore desirable, for that reason also, that it should be kept separate from the general rules of responsibility.

18. Mr. CASTAÑEDA said that the important topic of State responsibility and the excellent report submitted by the Special Rapporteur merited fuller consideration than the Commission had been able to give them during the present discussion. The report contained much valuable material, but it would have been useful also to include a reference to article VII of the American Treaty on Pacific Settlement—the "Pact of Bogota"—of 1948, which was already in force and binding on a dozen States of the western hemisphere. The parties to that Treaty undertook "not to make diplomatic representations in order to protect their

⁷ See previous meeting, para. 38.

nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective State".⁸

19. He supported the Special Rapporteur's approach to the topic of State responsibility. Previous attempts to codify it had been hampered by its being combined with the question of injuries to the person or property of aliens, so that the difficulties of that question were added to those inherent in the topic of State responsibility as such. The method now proposed of isolating the topic of State responsibility proper would help the Commission, and the international community, in its task of codification.

20. That method would, however, involve a number of problems. In the first place, it was important to remember why, in the past, the subject of State responsibility had been combined with that of injury to aliens. The reason was essentially historical: it was that the two subjects had been indissolubly linked in the practice of the nineteenth and the early twentieth centuries. As a result, even in the early codification work of the United Nations, in the period 1954-62, they had been combined in the traditional manner by the General Assembly, the Commission and the then Special Rapporteur.

21. The Commission could, of course, decide to separate the two subjects; it certainly had sufficient technical autonomy to do so. And that decision would accord with the conclusions reached in 1963 by its Sub-Committee,⁹ which had been implicitly endorsed by the General Assembly.

22. The Commission would have to consider, however, whether it wished to eliminate from the scope of the work of codification those matters which it was now proposed to leave aside. The substantive rules of international law in question were not only those concerning injury to aliens, but also those relating to violations of the obligations of States regarding the maintenance of world peace and security.

23. As far as the rules relating to the maintenance of peace and security were concerned, he would agree that they did not call for work on State responsibility by the Special Rapporteur and the Commission. Those rules were contained in the United Nations Charter, but were also to be found in the most unexpected places; one example was a little-known resolution by the Security Council on an incident relating to a fort in Yemen, in which the Security Council had held that armed reprisals were contrary to the Charter.¹⁰ A great deal of work had also been done on those rules by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. The Commission itself, at its very first session in 1949, had adopted a draft Declaration on Rights

and Duties of States.¹¹ Unfortunately, that Declaration had not become a binding instrument, but its contents were nevertheless relevant to the subject of maintenance of peace and security.

24. With regard to injury to the person or property of aliens, he could not accept the argument that that subject was not ripe for codification. The Commission's twenty years' experience had shown that it was possible to carry out successful codification and progressive development of subjects which, on the traditional view, were not ripe for codification. For a subject to be considered ripe, it had formerly been customary to require that there should be a considerable body of practice, that the practice should be both uniform and general, that there should be a substantial body of case-law, and even that there should be some degree of uniformity in the views expressed by writers. In 1958, however, the first United Nations Conference on the Law of the Sea had adopted the Convention on Fishing and Conservation of the Living Resources of the High Seas, which embodied in article 6 the revolutionary idea that "A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea".¹² That idea was not based on pre-existing practice, any more than the principles embodied in the Convention on the Continental Shelf,¹³ which had been adopted almost unanimously by the same Conference. Both those Conventions were now in force and binding on a considerable number of States. The rules embodied in them related to matters which had not been considered ripe for codification at the time, but they had been adopted in response to the interest expressed by the international community, which had felt the need to regulate certain matters.

25. A similar need now existed in regard to injuries to the person or property of aliens. Despite the division of opinion among writers and the lack of uniformity both in State practice and in the case-law, it was desirable that the subject should be codified. And he agreed with Mr. Bartoš that contemporary international law showed a trend towards the recognition of international standards of treatment for all human beings, not merely for aliens. The developments relating to human rights in the Council of Europe were particularly significant in that respect, and the United Nations had adopted the International Covenants on human rights,¹⁴ which would in due course no doubt attract the necessary number of ratifications and enter into force.

26. Another important contemporary development related to the question of compensation, which was, in a sense, being increasingly transferred from the strictly legal field to that of international economic co-operation, or at least to that of bilateral treaty relations. Reference had been made to the Convention on the

⁸ United Nations, *Treaty Series*, vol. 30, p. 86.

⁹ See *Yearbook of the International Law Commission*, 1963, vol. II, pp. 227 *et seq.*

¹⁰ See Security Council resolution 188 (1964).

¹¹ See *Yearbook of the International Law Commission*, 1949, p. 286.

¹² United Nations, *Treaty Series*, vol. 559, p. 290.

¹³ *Op. cit.*, vol. 499, p. 312.

¹⁴ See General Assembly resolution 2200 (XXI).

settlement of investment disputes between States and nationals of other States,¹⁵ prepared by the International Bank for Reconstruction and Development. That Convention, however, had only been accepted by investing countries and a few of the developing countries with the lowest per capita income. He himself did not believe that the best way of attracting foreign investment was to extend special safeguards. His own country, Mexico, was one of the developing countries which was attracting the largest influx of foreign capital, although it had always made a point of not extending special privileges or giving any special guarantees to foreign investors. Mexico had not signed any of the international instruments formulated for that purpose.

27. The question of compensation to aliens for nationalization was particularly urgent and important at the present moment. A vast agrarian reform scheme had just been introduced in Peru which would affect foreign interests. Many other examples could be cited which explained the present concern of the international community over the problem. It was therefore quite impossible for the Commission to exclude from the process of codification the question of injury to the person or property of aliens. Perhaps, as suggested by some members, the Commission might treat it as a special section of State responsibility at some future date.

28. He agreed that the topic of State responsibility should include the questions of reparation and sanctions, including reprisals. It was not possible, however, to examine the question of reprisals without including armed reprisals. The question of remedies, to which Mr. Kearney had referred during the discussion,¹⁶ was also one that should be included in the topic of State responsibility. As to the rules on compensation, they could no doubt be considered as substantive rules governing the obligations of States towards aliens. It was, however, also possible to regard compensation as part of the important subject of reparation and thus to include it as one of the aspects of State responsibility.

29. It would also be of interest to cover the subject of responsibility for "risk" in cases where a State's conduct did not constitute a breach of an international obligation—a matter to which a brief reference was made in the report (footnote 79). Although, from a technical point of view, it might be argued that the subject fell outside the study of wrongful acts and should therefore not be dealt with under the heading of State responsibility, it was highly desirable to deal with it because of the increasing importance of the doctrine of risk in contemporary international law. That doctrine had originated in municipal law following the large-scale use in industry and transport of instruments, machinery and vehicles which involved risks to individuals. The idea had thus emerged of liability divorced from any notion of fault and of compensation to be paid without any wrong being estab-

lished; it was sometimes described in municipal law as the doctrine of objective liability. In 1967 Mr. Padilla Nervo had pointed out the relevance of the doctrine of risk to damage caused by atomic radiation and fall-out from nuclear weapons tests—a subject which had then been of great topical interest¹⁷.

30. Such questions as denial of justice, exhaustion of local remedies as a requirement for establishing international responsibility, and the problem of the nationality of claims should also be covered. The question of the nationality of claims did not arise only in cases of injury to the person or property of aliens, but also in other cases.

31. He had every confidence in the leadership of the Special Rapporteur to guide the Commission in its difficult work on State responsibility.

32. Mr. AGO, Special Rapporteur, said he was glad that his preliminary report had provoked such a helpful discussion. For the time being, he would only try to clarify a few points.

33. First of all, in case his introductory statement had created a different impression, he wished to make it clear that he had no hard and fast views on any of the questions discussed. Secondly, he would not like certain ideas which he did not hold to be attributed to him; for example, it had never been his intention to exclude the question of wrongful acts, which was the heart of the subject of State responsibility. Thirdly, the various points in the outline programme of work had been included in his report merely as a guide; they were not the only points that would be dealt with. In some cases they represented chapter headings, but in others they merely served to show that at some stage it would have to be decided where a particular point was to be considered. Lastly, the necessary delimitation of the subject must be understood rather loosely; there could be no question of building a Great Wall of China round it. For example, the reason why it was better not to embark on a study of the substantive rules on the status of aliens was that the Commission would thus obtain a clearer view of the problems of responsibility proper; but that did not mean that the subject of the status of aliens must be excluded. On the contrary, if the Commission did manage to codify that subject, it would be rendering an inestimable service to the international community. Problems had to be taken in order, so as to prevent the difficulties relating to one of them from contaminating the others. Codification was a long-term process and the Commission should begin with what was within its reach. The rest could be left to its successors.

34. The CHAIRMAN said that further discussion of item 3 would be adjourned till later in the session.

The meeting rose at 1 p.m.

¹⁵ United Nations, *Treaty Series*, vol. 575, p. 160.

¹⁶ See previous meeting, paras. 25-27.

¹⁷ See *Yearbook of the International Law Commission*, 1957, vol. I, p. 156, paras. 55-59.

1014th MEETING*Thursday, 3 July 1969, at 10.20 a.m.**Chairman:* Mr. Nikolai USHAKOV

Presents: Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Ruda, Mr. Tammes, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218)

[item 1 of the agenda]

(resumed from the 999th meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 22 (General facilities)¹

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 22.

2. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

*Article 22**General facilities*

The host State shall accord to the permanent mission full facilities for the performance of its functions, having regard to the nature and task of permanent missions to the Organization. The Organization shall assist the permanent mission to obtain such facilities and shall accord to it those which lie within its competence.

3. The Special Rapporteur's text of article 22 (A/CN.4/218) had consisted of a single sentence. In view of the comments made by members of the Commission, the Drafting Committee had considered it better to deal with the obligations of the host State in one sentence and the obligations of the international organization in another.

4. The first part of the first sentence followed the Vienna texts² exactly. Several members of the Commission had doubted whether it was necessary to retain the second part of that sentence; the Drafting Committee had decided to do so in order to emphasize the fact that the nature and tasks of diplomatic missions and permanent missions might differ. There were small permanent missions to international organizations of a technical character, which were very different from the permanent missions to major international organizations such as the United Nations. The Drafting Com-

mittee had, however, thought it necessary to put the words "permanent mission" in the second part of the sentence in the plural in order to make it clear that, although there might be differences between permanent missions according to the international organization to which they were accredited, there were none between permanent missions to the same organization.

5. The second sentence of article 22 imposed two kinds of obligation on the organization. First, it had to assist the permanent mission in obtaining the facilities which the host State was required to accord to it and which the organization itself was unable to accord; secondly, it had to accord certain facilities itself, but they were of the same kind as those accorded by the host State. That difference was brought out by the use of the words "which lie within its competence".

6. The text before the Commission had been adopted by the Drafting Committee unanimously.

7. Mr. CASTRÉN said that the new text was an improvement on the previous draft. The Drafting Committee had been right to distinguish between the obligations of the host State and those of the organization; it had also been right to put the verb "accord" in the French text in the present tense and to insert the word "full" before the word "facilities", as had been done in the Vienna Conventions.

8. Nevertheless, there were still some drafting changes that could be made. First, the words "to the Organization" at the end of the first sentence seemed unnecessary, since the whole draft was concerned with permanent missions to international organizations.

9. Secondly, it was not possible, at all events in French, to speak of facilities which lay within the competence of an organization; it was the right to accord such facilities which lay within the competence of the organization. The second sentence of the article might therefore be reworded on the following lines: "The Organization shall, within its competence, assist the permanent mission in obtaining such facilities or shall accord them to it". An advantage of that wording would be that the qualification concerning competence would refer also to the assistance which the organization gave the sending State to enable it to obtain the facilities which the host State was required to provide.

10. Mr. NAGENDRA SINGH said he fully supported the Drafting Committee's text of article 22, which was a distinct improvement on the previous version. As he saw it, there were five tests of good drafting where the present draft articles were concerned. The first was due regard for the text of the 1961 Vienna Convention on Diplomatic Relations; the second was due regard for the draft articles on special missions, even though they had not yet been adopted as a convention; the third was that the substance of the subject under consideration should have an impact on the drafting, so that changes might have to be made to adapt the Vienna Convention text to the requirements of permanent missions; the fourth was that the language should be clear and unambiguous; and the fifth was that the different language versions should be identical in meaning.

¹ For previous discussion, see 993rd and 994th meetings.

² See United Nations, *Treaty Series*, vol. 500, p. 108, article 25, and. vol. 596, p. 286, article 28.

11. All those requirements had been met in the text now submitted for article 22, except perhaps the last. He found the English version perfect; it did not suffer from the inadequacies of the French version pointed out by the previous speaker, which would have to be looked into.

12. Mr. YASSEEN said that the Drafting Committee had been right to distinguish between the obligations of the host State and the obligations of the organization. But it was not clear to him what the word "nature" meant in that context: all permanent missions were of the same nature. Again, the words "for the performance of its functions" seemed to him to express, in advance, the idea contained in the last part of the first sentence. If the last part of that sentence was to be retained, at least the word "nature" should be deleted.

13. Mr. USTOR said that since the Drafting Committee, of which he was a member, had adopted the text now under discussion, it had occurred to him that an improved formulation could be found for both article 22 and article 23. The general facilities mentioned in article 22, and the special facilities in respect of accommodation mentioned in article 23,³ were essentially for the host State to grant. As to the international organization concerned, the permanent mission could request it to assist in obtaining facilities from the host State; it could also request it to accord any facilities which were within its competence. That idea was well expressed in the second sentence of article 22, but in article 23 it was only mentioned in paragraph 2.

14. The whole presentation could perhaps be improved by confining the provisions of article 22 to the first sentence and transferring the second sentence to a new article 23 *bis*, to be placed after article 23, and to be drafted on the following lines:

"The Organization shall assist the permanent mission to obtain the facilities mentioned in articles 22 and 23 and shall accord to it those facilities which lie within its competence".

15. The provisions of that article would govern those of both the preceding articles, and the reference to the organization could be dropped from paragraph 2 of article 23.

16. Mr. KEARNEY said that article 22 as now drafted solved most of the problems raised during the Commission's previous discussion. In order to remove a certain contradiction between the first and the second sentences, however, he suggested that the words "full facilities for the performance of its functions", which had been taken from the 1961 Vienna Convention on Diplomatic Relations, be replaced by the language originally used by the Special Rapporteur: "the facilities required for the performance of its functions". The present text implied that the host State would be able to grant full facilities, or all ("*toutes*") facilities, as stated in the French version; that statement was not consistent with the second sentence, which stated that

the granting of some facilities lay within the competence of the organization.

17. The point raised by Mr. Yasseen regarding the word "nature" in the last clause of the first sentence could be met by substituting some such word as "purpose". The clause itself was useful and should be retained.

18. Mr. BARTOŠ said he had no objection to the word "full", in the first sentence of the article, being deleted in order to avoid contradiction with the second part of the sentence, provided that the words "the necessary" were inserted in its place.

19. The reference to the "nature" of the permanent mission was not essential, but he saw no reason to criticize it and consequently had not opposed either its retention or its deletion. Permanent missions to an international organization were not always unconnected with the diplomatic mission proper; it often happened that an embassy performed the functions of a permanent mission to an international organization or that the head or a member of a permanent mission to an international organization represented a State in several international organizations. Facilities were accorded to the permanent mission in accordance with its status; that was the sense of the Special Rapporteur's proviso about the nature of the mission. If it was not desired to state the proviso expressly it could be deleted, as Mr. Yasseen had proposed, but the idea should then be explained in the commentary.

20. The second sentence of article 22 expressed two very different ideas. First, the organization acted as a sort of intermediary between the permanent missions and the host State; there, the article merely gave general application to a rule which already existed in practice. The second part of the sentence showed that the international organization could also itself accord certain facilities to permanent missions. For instance, organizations had libraries or laboratories which they placed at the disposal of members of permanent missions. It was true that article 22 expressed that idea in general terms whereas article 23 gave it specific application.

21. The Headquarters Agreement concluded between the United Nations and the United States of America provided that, in the event of armed conflict between the United States and States which sent representatives or observers, or any of their nationals in other capacities, to the Organization, the Organization was required to provide them with accommodation on its own premises; but there had not yet been any case in which that clause had been applied. Indeed, during the Korean war, representatives of the Chinese volunteers had been permitted by the United States Government to reside at the Waldorf Astoria Hotel in New York. There might be other examples. It was therefore useful to make it quite clear that only the facilities lying within the competence of the organization were accorded directly by the organization to permanent missions.

22. Mr. RAMANGASOAVINA said that the proposed new text of article 22 was a definite improvement on the earlier version, which seemed to confuse the

³ See next meeting, para. 2.

facilities accorded by the host State with those accorded by the organization. The Drafting Committee had found a form of words which clearly distinguished between the two, as the Commission had desired.

23. The second part of the first sentence was not unnecessary. The task of a permanent mission was not the same as that of a diplomatic mission, consular mission or special mission. Moreover, the two parts of that sentence were complementary, especially if the words "full facilities" were replaced by the words "the facilities required", as had been suggested. As to the second sentence, it was true that the words "*qui relèvent de sa compétence*" in the French version did not quite meet the case. The second part of the second sentence might be reworded to read "*et lui accorde celles-ci dans la limite de sa compétence*". That wording would have the additional advantage of concordance with the English word "within". To bring the French version still closer to the English, the verbs might be put in the future tense.

24. Mr. TSURUOKA said he thought Mr. Kearney's proposal might improve the existing text by removing some of its ambiguity.

25. The second part of the first sentence was not essential, but there was no objection to keeping it, as the position would then be clearer in the cases mentioned by Mr. Bartoš. He had no particular objection to the word "nature", though the words "for the performance of its functions" could, strictly speaking, be regarded as sufficient, since what followed merely clarified the meaning of the first phrase.

26. The second sentence dealt with the facilities accorded by the organization itself. In his view, those facilities were not of the same kind as the facilities which the host State accorded to the permanent mission, and the proviso regarding competence was therefore justified. He would agree, however, to the sentence being amended as suggested by Mr. Raman-gasoavina.

27. The CHAIRMAN, speaking as a member of the Commission, said that article 25 of the Vienna Convention on Diplomatic Relations and article 28 of the Vienna Convention on Consular Relations were nearly identical. But article 22 of the present draft, which was the corresponding provision, had been worded more restrictively. Since it had been agreed that permanent missions should, in general, enjoy the same privileges and immunities as diplomatic missions, he saw no reason why a distinction should be made with regard to facilities, which were a minor matter.

28. He did not see how a distinction could be made between missions on the basis of their nature. Permanent missions to international organizations, like diplomatic and consular missions, were of a representative character, and that was the reason for the privileges and immunities granted to them. Again, although the functions of a permanent mission were described in article 7 of the draft,⁴ no article referred to the "task"

of such a mission. The function of all permanent missions to international organizations of universal character, to which the articles were to apply by virtue of article 2,⁵ was the same: it was to represent member States. Consequently, the phrase "having regard to the nature and task of permanent missions", which erroneously implied that there could be differences between permanent missions according to the organization to which they were accredited, should be deleted. However the phrase was worded, it was bound to weaken the force of the rule that the receiving State was required to provide full facilities for the performance of the mission's functions. It would be better to keep to the text of the Vienna Conventions, including the word "full".

29. He did not see why the words "permanent mission" should be in the singular in the first part of the first sentence and in the plural in the second part.

30. With regard to the second sentence, although the host State was required to accord to the permanent mission full facilities for the performance of its functions, the organization was not automatically obliged to assist the permanent mission. It might be better to add the words "where necessary", as in paragraph 2 of article 23.

31. The word "facilities" was rather vague. His understanding was that it included accommodation; if so, paragraph 2 of article 23 was perhaps unnecessary. He did not object to the proviso on competence, whether the existing wording or some other wording was used; but if it was retained it would be necessary to specify in the commentary what facilities were accorded by the organization itself.

32. As he had pointed out during the first reading, it was nowhere stated that the organization must assist the sending State in obtaining the privileges and immunities provided for;⁶ yet that was a much more important matter than facilities. He had therefore suggested that the Special Rapporteur should include a separate article on the subject. That article might read "The organization shall, where necessary, assist the sending State and its permanent mission in obtaining the privileges, immunities and facilities provided for by the present articles". His suggestion had not been taken up at the time, but he still thought such an article would be useful; the obligation of the organization would be moral rather than legal. If his suggestion were accepted, the second sentence of article 22 would have to be amended accordingly.

33. Mr. BARTOŠ reminded members that before leaving Geneva the Special Rapporteur had made a point of emphasizing, for the benefit of the future Drafting Committee, the importance of the words "having regard to the nature and task of permanent missions to the Organization". He had explained that their purpose was to stress the difference between diplomatic missions proper, whose task was essentially political, and missions to specialized international organizations,

⁴ Yearbook of the International Law Commission, 1968, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

⁵ Ibid.

⁶ See 994th meeting, paras. 33-35.

whose task might be highly technical, as it was in the case of missions to organizations dealing with medical, chemical, meteorological and other matters.⁷ The facilities accorded would necessarily differ in the two cases, depending on the nature of the organization.

34. The Drafting Committee had deliberately put the word "Organization" in the singular, with a capital "O", so as to make it clear that all missions to one particular organization, of whatever kind, should receive the same treatment.

35. Mr. ALBÓNICO proposed that, in the first sentence of article 22, the clause "having regard to the nature and task of permanent missions to the Organization" be deleted, and that in the second sentence, the word "also" be inserted after the words "The Organization shall". He further proposed that, in the Spanish version, the word "*dependen*" be replaced by the word "*sean*", since the facilities in question belonged to the Organization, they were not dependent on it.

36. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee could hardly take the place of the Special Rapporteur, who knew better than anyone else the underlying reasons for his choice of certain terms. He (Mr. Castañeda) could, however, give his opinion on those points raised during the discussion on which agreement had been reached in the Drafting Committee.

37. Mr. Castrén had asked whether it was necessary to specify at the end of the first sentence that the permanent missions were permanent missions "to the Organization". As in article 1 (c) of the Vienna Convention on Diplomatic Relations, the word "Organization" as used in article 22 meant "the organization in question". The intention was to prevent any difference in treatment between the missions to a single organization; hence those words served a useful purpose and should be retained.

38. Mr. Castrén had also suggested that the words "those which lie within its competence", at the end of the second sentence, be deleted and that the words "within its competence" be inserted at the beginning of the sentence, after the words "The Organization shall". But if that were done, the sentence could be interpreted as meaning that the organization must provide facilities other than those within its competence, whereas the organization was only required to assist the missions in obtaining the facilities within its competence. He would, however, be prepared to accept that suggestion, provided the Drafting Committee could find satisfactory wording for the last part of the sentence.

39. Several members had criticized the use of the phrase "having regard to the nature and task", but the majority seemed to be in favour of retaining it.

40. It was true, as the Chairman had pointed out, that all missions had the same essential function, but the reference in the article was to specific tasks and those varied from mission to mission; the facilities

granted to missions should therefore vary accordingly. To Mr. Tsuruoka he would reply that the purpose of the phrase was to bring out the difference between permanent missions and diplomatic missions.

41. He agreed that the word "nature" was not very felicitous and that the Drafting Committee should find something better, it being understood that the meaning should be "purpose", as Mr. Kearney had said. It was the different purposes of the organizations that determined the kind of facilities to be accorded. It was for the Commission to decide whether it preferred to use the word "nature" or the word "purpose".

42. He had no objection of substance to Mr. Ustor's proposal for a new article to be inserted after articles 22 and 23, except that the new article would refer to two very different articles and would tend to complicate the convention. However, he was quite willing to follow the Commission's wishes on that point.

43. Like Mr. Kearney, he thought it would be preferable to replace the words "full facilities" in the first sentence of article 22, by the words "the facilities required", which had been used in the Special Rapporteur's original text. There was no reason to follow the text of the Vienna Convention exactly at that point, since it had been departed from a few words further on by the addition of the phrase "having regard to the nature and task of permanent missions to the Organization". Moreover, the text as it stood suggested that the host State was obliged to accord all kinds of facilities to permanent missions, whereas the organization need only accord certain facilities.

44. According to the information he had been able to obtain regarding the rendering of the words "shall accord" by the word "*accorde*", in the French version—which Mr. Ramangasoavina wished to replace by "*accordera*"—French legal texts were usually drafted in the present indicative; the future tense was only used in military orders.

45. The Chairman had proposed the addition of a new article stating that the organization must assist the sending State in obtaining privileges, immunities and facilities for its permanent mission. Subject to the Commission's views he (Mr. Castañeda) thought it might be enough to strengthen the second sentence of article 22, since it was an article of a general character, by saying, for example, that the organization "shall assist the permanent mission in obtaining such facilities and privileges and immunities".

46. The Chairman had also pointed out that it was contradictory to put the word "mission" in the singular at the beginning of the first sentence and in the plural at the end. The reason was that the last part of the sentence referred not to a single mission, but to all the missions accredited to the organization in question; the idea was to prevent any difference in treatment between missions to one and the same organization.

47. He could accept the Chairman's suggestion that the words "where necessary" be inserted after the words "The Organization shall" in the second sentence.

48. He did not consider, however, that the word "also" should be inserted before the word "assist" at

⁷ *Ibid.*, para. 48.

the beginning of the second sentence, since the first and second sentences did not refer to the same thing.

49. The CHAIRMAN, speaking as a member of the Commission, said he agreed that instead of adding a new article, as he had proposed, the second sentence of the article should be amended on the lines he had suggested.

50. Mr. EUSTATHIADES said that, although he had no objection to the substance of that proposal, he did not think it was desirable to include in article 22 the idea that the organization must ensure that privileges and immunities were accorded. The article was of a general character and provided an introduction to the next article, which was more specific. The Chairman's proposal could be inserted later in the draft.

51. There was no justification for including the phrase "having regard to the nature and task of permanent missions to the Organization". Although it was used in article 22 of the draft on special missions, where it had been included for the first time—it did not appear in the corresponding articles of the Vienna Conventions on Diplomatic and Consular Relations—the reasons which had led the Commission to use the words in that instance did not apply to permanent missions. The Commission had then been referring to the particular characteristics of special missions, their task and their field of activity, which were clearly defined for each special mission. On that point, paragraph (2) of the commentary on article 22 of the draft on special missions, and articles 2 on 3 of that draft, were instructive.⁸ Permanent missions, on the other hand, all had the same characteristics and the same functions. Since their nature and tasks did not differ, the phrase was inappropriate in the present draft.

52. Mr. YASSEEN said that he too was against retaining that phrase, since the article provided that the host State should accord to the permanent mission not all facilities of whatever kind, but full facilities for the performance of its functions. There was therefore no need for that additional phrase, since the task of the mission could not go beyond its functions.

53. The Chairman's proposal was incomplete, for, while the organization was required to assist permanent missions in obtaining certain facilities from the host State, it was also required to provide them with certain facilities. The idea of those two obligations should be retained. In order to avoid having to repeat it in every article, it might be possible to include in a single article all aspects of the assistance which the organization was required to give to permanent missions.

54. Mr. USTOR said he supported the Chairman's amendment to the second sentence of article 22, since he fully agreed that the organization should have some say in the privileges and immunities to be accorded to the permanent mission and its members.

55. He noted, incidentally, that the Chairman's amendment did not include any reference to the "members" of the permanent mission. It was obviously the legal right

and duty of the organization to take care of the privileges and immunities of both the permanent mission and its members, and in view of the importance of that matter, he agreed with Mr. Yasseen that a separate article should be devoted to it.

56. Mr. BARTOŠ said he approved of the substance of the proposals made by the Chairman and Mr. Ustor.

57. With regard to the drafting, article 22 should have two paragraphs. Paragraph 1 would provide that the host State and third States were required to accord to sending States and to their permanent missions the privileges and immunities provided for in the articles. Paragraph 2 would be worded as proposed by the Chairman. The article would be followed by a new article on facilities in general, for it was more logical to start with the obligation of States to accord privileges and immunities, and then to say the organization was required to ensure that those privileges and immunities were accorded.

58. The CHAIRMAN suggested that article 22 be referred back to the Drafting Committee, on the understanding that it would get in touch with the Special Rapporteur and prepare alternative versions taking account of the comments made during the discussion.

*It was so agreed.*⁹

The meeting rose at 1 p.m.

⁹ For resumption of the discussion, see 1030th meeting, para. 53.

1015th MEETING

Monday, 7 July 1969, at 3.15 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Ustor.

Relations between States and international organizations

(A/CN.4/218)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 23 (Accommodation of the permanent mission and its members)¹

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 23.

⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, pp. 359 and 348-349.

¹ For previous discussion, see 993rd and 994th meetings.

2. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 23

Accommodation of the permanent mission and its members

1. The host State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its permanent mission or assist the latter in obtaining accommodation in some other way.

2. The host State and the organization shall also, where necessary, assist permanent missions in obtaining suitable accommodation for their members.

3. Although article 22 had been referred back to the Drafting Committee and article 23 was closely linked with it, the Commission could nevertheless start considering article 23, which was a specific application of the general principle laid down in article 22.

4. The English text of article 23 had been left unchanged. In the French text, the Drafting Committee had merely replaced the words "*doit . . . faciliter*" and "*doivent . . . aider*" by the present indicative of the same verbs, for the sake of uniformity and to conform with French legal usage.

5. The Drafting Committee had retained the word "acquisition", although some members of the Commission had objected that the laws of the host State sometimes prevented the sending State from acquiring property in its territory; it considered that "acquisition" was appropriate in most cases and that the second part of the sentence, "or assist the latter in obtaining accommodation in some other way", was general enough to cover all other eventualities.

6. It had also decided not to delete the words "by the sending State" in paragraph 1, as some members had suggested, because they appeared in article 21 of the Vienna Convention on Diplomatic Relations² and since the situations were precisely the same, if those words were omitted in might give the impression that a different rule was being stated, which was not the case. The Committee had considered that the second part of the sentence would cover cases in which the sending State could not acquire property in its own name.

7. The Drafting Committee had decided to ask the Special Rapporteur to expand the passage in the commentary concerning acquisition.

8. The CHAIRMAN, speaking as a member of the Commission, said that if the Commission decided, as he had suggested at the previous meeting,³ to draft a separate general article on the organization's obligation to help the sending State and permanent missions to obtain facilities and the requisite privileges and immunities from the host State, there would be no need to mention the organization in article 23, paragraph 2.

9. In any event, the host State and the organization should not be placed on the same footing, as they seemed to be in paragraph 2, for it was the host State

that was primarily responsible for facilitating the obtaining of accommodation by permanent missions and their members. The organization intervened only in case of need. The article should therefore state, as he had already proposed for the second sentence in article 22, that "the organization shall assist where necessary". The Commission would not, of course, be able to decide those two points until it had taken a decision on article 22 and the proposed separate article.

10. Mr. BARTOŠ reminded members that, on reflection, the Special Rapporteur had come to the conclusion that the organization had a specific obligation in the matter of accommodation, since it might be obliged to find accommodation for members of permanent missions itself, either by lodging them on its own premises if they were subjects of a sending State which was in armed conflict with the host State, to whom the host State was bound to grant free passage, but not also the right to reside in its territory, or, when there was a serious housing shortage, by building accommodation, as FAO had done in Rome. According to the information he had been able to obtain, some regional organizations, such as Euratom and the Danube Commission, had also built housing for the members of permanent missions accredited to them. Article 23 should therefore mention the organization's obligation, which went beyond simply applying to the host State, unless the Commission decided to include the separate article suggested by the Chairman. Until the views of Member States on the subject were known, he thought it might perhaps be advisable to put paragraph 2 in brackets.

11. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Bartoš, but it was nevertheless necessary to bring out the difference between the obligation of the host State, which could assist the permanent mission directly, and the obligation of the organization, which could only assist it by applying to the host State; for even if the organization did build special housing, it could only do so with the host State's consent.

12. Mr. CASTAÑEDA (Chairman of the Drafting Committee), speaking as a member of the Commission, said he doubted whether it was really necessary to wait till a separate general article had been drafted before taking a decision. The general article would not necessarily be incompatible with paragraph 2 of article 23 since it would be of a general character, whereas paragraph 2 was quite specific.

13. What remained to be specified was whether the organization had to assist permanent missions in obtaining accommodation or had to ensure that they did obtain accommodation, and whether its responsibility was, so to speak, subsidiary to that of the host State. Hence the Drafting Committee could either try to improve the drafting of paragraph 2, or wait until the Commission had taken a decision on the separate article.

14. Mr. USTOR said he was prepared to support paragraph 1 as it stood. He wished to place on record, however, that he interpreted the phrase "premises necessary for its permanent mission" as including, in certain

² United Nations, *Treaty Series*, vol. 500, p. 106.

³ See para. 32.

cases, both office premises and apartments for lodging the members of the permanent mission.

15. Mr. TSURUOKA said he doubted whether the word "premises" could be interpreted as also covering the accommodation of members of the permanent mission. He would like that dissenting view to be mentioned in the commentary.

16. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said it was for the Special Rapporteur to draft the commentary as he thought fit. The Drafting Committee had decided, however, to recommend him to place special emphasis on certain specific points in the light of the Commission's discussions.

17. Mr. ROSENNE said he would like to state for the record that in his opinion an interpretation of a draft article given by a member of the Commission before its adoption did not have the same force as an explanation or interpretation given by the Special Rapporteur. The two cases must be considered to rank differently in the hierarchy of interpretative sources.

18. Mr. USTOR said that, without making a formal proposal to that effect, he hoped that both the Special Rapporteur and the Commission would adopt his interpretation of the language of paragraph 1.

19. The CHAIRMAN suggested that the Commission should approve paragraph 1 of article 23, provisionally approve paragraph 2 and authorize the Drafting Committee to redraft the latter paragraph if necessary, bearing in mind that either article 22 might be amended or a new separate article might be drafted.

It was so agreed.

ARTICLE 24 (Inviolability of the premises of the permanent mission)⁴

20. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 24.

21. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 24

Inviolability of the premises of the permanent mission

1. The premises of the permanent mission shall be inviolable. The agents of the host State may not enter them, except with the consent of the permanent representative.

2. The host State is under a special duty to take all appropriate steps to protect the premises of the permanent mission against any intrusion or damage and to prevent any disturbance of the peace of the permanent mission or impairment of its dignity.

3. The premises of the permanent mission, their furnishings and other property thereon and the means of transport of the permanent mission shall be immune from search, requisition, attachment or execution.

22. The Drafting Committee had merely replaced the expression "head of the mission", at the end of para-

graph 1, by "permanent representative", in conformity with the definition in article 1 (e).⁵ Some members of the Drafting Committee had, however, expressed the opinion that it might be advisable to reconsider the terminology at the second reading, since the permanent representative was not necessarily the head of the mission. The main point was to state clearly that it was the consent of the person leading the mission that was required.

23. Some members of the Commission wished a new paragraph to be added providing that, in case of fire in the mission's premises, the consent of the permanent representative could be assumed. The Vienna Convention on Diplomatic Relations did not contain any such clause, but one was included in article 31 of the Vienna Convention on Consular Relations,⁶ and it had been introduced into the draft on special missions. The Sixth Committee had discussed the point at the twenty-third session of the General Assembly and had adopted by 48 votes to 5, with 29 abstentions, an amendment by Argentina to article 25 of the draft on special missions, which read: "Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the head of the special mission or, where appropriate, of the head of the permanent mission."⁷ The Sixth Committee had considered that it was a question of substance, not merely of drafting. The Drafting Committee had not wished to take any decision, since it was for the Commission to decide whether it wished to add some such paragraph to article 24.

24. Mr. EUSTATHIADES said the Commission should accept the Drafting Committee's opinion and approve the substitution of the expression "permanent representative" for "head of the mission". In the light of the definition given in article 1 (e) the Commission had hitherto acted on the assumption that the permanent representative was the head of the mission or the person replacing him, but it was no time to start a discussion on that point; it would be better to wait till the Commission reverted to the definitions article.

25. With regard to the question of fire or other disasters, the Special Rapporteur had agreed to his suggestion that it be explained in the commentary that the article did not cover cases of *force majeure*. In view of the Sixth Committee's reception of the Argentine amendment just read out by Mr. Castañeda, the least the Commission could do was to include it in the commentary, though he himself would have no objection to its incorporation in the text of the article.

26. Mr. ROSENNE said that he saw certain difficulties in the present text of article 24. The article seemed to assume, for example, that the premises in question would be used exclusively by the permanent mission; but there

⁵ Yearbook of the International Law Commission, 1968, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

⁶ United Nations, Treaty Series, vol. 596, p. 288.

⁷ See Official Records of the General Assembly, Twenty-third Session, Annexes, Agenda item 85, document A/7375, paras. 188-195.

⁴ For previous discussion, see 994th meeting, para. 58, and 995th meeting.

might be cases in which the permanent mission shared premises with a diplomatic or consular mission, or possibly with both.

27. Moreover, he thought it would be better to adopt a less rigid text for paragraph 1, including something on the lines of the Argentine amendment referred to by Mr. Castañeda.

28. Mr. KEARNEY said that Mr. Rosenne had raised an interesting question concerning the possibility of taking emergency action in a building of mixed occupancy. In dealing with cases of *force majeure*, time was usually of the essence and it was not possible to observe all the niceties of diplomatic procedure. Most permanent missions in large cities did not occupy separate and exclusive buildings, and their members generally lived in apartment houses. In those conditions, it could be a very real problem to obtain permission from the head of a permanent mission to enter the premises of one of his subordinates, who might live several miles away. That was why he had favoured the inclusion of a paragraph to cover such a contingency;⁸ he would not press the point, however, if the Commission thought it could be dealt with in the commentary. He suggested, therefore, that the Commission should defer a final decision until it had an opportunity of seeing what the Special Rapporteur proposed to include in his commentary.

29. Mr. CASTAÑEDA (Chairman of the Drafting Committee), speaking as a member of the Commission, said that an explanation in the commentary would not suffice. The commentary was invaluable for interpreting the meaning of a legal rule in an article, but it could never be a substitute for a rule. If the Commission wished to make it a rule that in certain circumstances the consent of the permanent representative was assumed, it must say so.

30. The fact that there was no clause of that kind in the Vienna Convention on Diplomatic Relations was not conclusive. Public safety was more seriously threatened by a fire in the premises of a permanent mission, which were usually in a building occupied by other offices too, than by a fire in the premises of a diplomatic mission, which often consisted of a house with a garden round it. A rule to cover such emergencies should be stated in the article itself, provided that some formulation could be found which was not open to abuse. He therefore formally proposed the addition to article 24 of a paragraph worded like the Argentine amendment, but with the substitution of the words "the permanent representative" for "the head of the special mission or, where appropriate, of the head of the permanent mission".

31. Mr. NAGENDRA SINGH said that the first problem was whether to adhere to the rigid rule of absolute inviolability states in article 24, which was based on article 22 of the 1961 Vienna Convention on Diplomatic Relations,⁹ or to adopt a flexible approach

on the lines of article 31 of the 1963 Vienna Convention on Consular Relations. Personally, he was in favour of flexibility because of practical considerations: it was not always possible to obtain the consent of the permanent representative in an emergency.

32. The second problem was whether to introduce the element of flexibility in the commentary or in the article itself. On that issue, he shared the views of those who favoured the inclusion of a suitable provision in the article.

33. The last problem was how best to amend article 24. He was in favour of introducing the Argentine amendment to article 25 of the draft on special missions, which was more or less intermediate between the positions of the Diplomatic and Consular Conventions. He suggested that the Drafting Committee be invited to consider how that text, which the Chairman of the Drafting Committee had read out, could be incorporated in article 24.

34. Mr. CASTRÉN said that at first sight he had been in favour of retaining the Drafting Committee's wording of paragraph 1, since the situation of permanent missions to international organizations should, as a general rule, be assimilated to that of permanent diplomatic missions rather than that of special missions.

35. For the practical reasons given by Mr. Castañeda, however, he would accept the suggested addition. The Commission would thus be drawing the attention of governments to the point, and it could take a final decision when it had examined their comments.

36. Mr. BARTOŠ said he agreed with Mr. Castrén. Regular diplomatic missions generally occupied a building of which they had exclusive use, whereas permanent missions to international organizations were usually installed in blocks of flats or offices. Any disaster on their premises was therefore likely to endanger those occupying premises in the same building.

37. Since the commentary would lose its legal force once the convention had been adopted, he thought that special case should be provided for in the text of the article itself.

38. Mr. ELIAS said he supported the inclusion of the text proposed by Mr. Castañeda, either as part of paragraph 1 or as an independent paragraph. Unless a provision of that type was included, article 24 would be self-contradictory. On the one hand it would require the host State to ensure the inviolability of the permanent mission, while on the other, it would deprive the host State of the means of discharging that responsibility.

39. The proposed amendment would also have the advantage of enabling the authorities of the host State to discharge their general responsibility for the protection of life and property. It was essential to make provision for emergencies by amending the article itself. It would not be sufficient just to include a passage in the commentary, because the commentaries would fade away once the draft articles were adopted. Moreover, the substance of the matter was much too important to be relegated to the commentary.

⁸ See 995th meeting, para. 3.

⁹ United Nations, *Treaty Series*, vol. 500, p. 106.

40. There remained the very valid point raised by Mr. Rosenne regarding a permanent mission housed in premises which also served for a diplomatic mission and as a consulate. The Drafting Committee should consider that situation. In such cases of multiple representation, the question of priority would have to be settled in order to determine whose consent must be sought to enter the premises.

41. Mr. USTOR said he was in favour of retaining the Drafting Committee's text, which conformed to the wording of the corresponding provision of the 1961 Vienna Convention on Diplomatic Relations. Cases of emergency of the type under discussion were extremely rare and, when they occurred, were usually dealt with by obtaining the consent of the head of mission concerned. It would be an unduly perfectionist approach to try to include a special provision on the subject in a convention of a general character, such as the one now being drafted. A convention of that type could not cover every possible case. Consequently, he could not support the amendment proposed by Mr. Castañeda.

42. If the text was left as it stood, the position for permanent missions would be the same as it was for diplomatic missions under the 1961 Vienna Convention on Diplomatic Relations. Cases of emergency would be governed by the general rules of international law. The relevant rules were the rule of good faith, on the part of both the mission and the host State, and the general rule that, in cases of extreme necessity the normal rules did not prevail. Perhaps a very general statement on the subject might be included in the commentary, but the main point was to maintain the essential principle of the inviolability of the permanent mission, as had been done for diplomatic missions in the 1961 Vienna Convention. The legal position of permanent missions should not be weakened in any way and the rule of inviolability should be upheld without qualification.

43. Mr. RUDA said he supported the Drafting Committee's decision to use the term "permanent representative" instead of "head of the permanent mission" in paragraph 1. A State would sometimes designate a head of its mission to a particular organ of the United Nations, such as the General Assembly, but would still have a permanent representative, who was a different person.

44. The case of triple representation mentioned by Mr. Rosenne was not uncommon. To take an example, the permanent mission of Argentina to the International Atomic Energy Agency at Vienna was housed in the same premises as the embassy and the consulate. There were similar cases, he believed, in Geneva. He therefore supported the suggestion that the Special Rapporteur and the Drafting Committee should give careful consideration to that problem.

45. He supported Mr. Castañeda's proposal to amend article 24 to cover emergencies. In article 25 of the draft on special missions, the Commission had included a provision on the subject, with the following explanation in paragraph (4) of the commentary: "The Commission

added this provision to the draft on the proposal of certain governments, although it was opposed by several members of the Commission as they considered that it might lead to abuses".¹⁰ The provision in question had been amended by the Sixth Committee, which had adopted a somewhat less rigid formula that ensured an adequate balance between the need to preserve the principle of inviolability of the premises and the need to preserve public safety. The adoption of Mr. Castañeda's amendment on those lines would have the advantage of enabling the Commission to obtain the views of governments on an important question.

46. Mr. RAMANGASOAVINA said he agreed that the term "head of the mission" should be replaced by "permanent representative". The latter term was the more accurate. The head of a permanent mission might be someone appointed in an honorary capacity who did not reside at the place where the mission was accommodated.

47. The addition proposed by Mr. Castañeda certainly made the principle of the inviolability of the premises of the permanent mission more flexible. He was in favour of such flexibility, especially because a flat statement that the permanent representative's consent was required might work against the interests of the permanent mission it was desired to protect, for the host State might be deprived of the means to fulfil its special duty under paragraph 2.

48. Mr. IGNACIO-PINTO said he naturally did not question the need to ensure the inviolability of the mission's premises. Nevertheless, the host State could not be so tied down by that principle that, if a disaster occurred, it must remain inactive because it had been unable to obtain consent from the person empowered to give it. It had already been shown that it was not always easy to know who was empowered to give such consent. It would be an extraordinary position if, when a fire broke out on the premises of a permanent mission, the host State could not protect other permanent missions in neighbouring premises merely because it had been unable to obtain the consent of the person empowered to give it on the mission's behalf.

49. Subject to any subsequent comments by governments, such a case of *force majeure* should be provided for in the text of the convention itself, not merely in the commentary.

50. Mr. ROSENNE said that the Drafting Committee should carefully examine the wording of paragraph 3, in particular the words "and other property thereon". That language covered only property of the mission situated in the mission's premises. In fact, it was necessary to ensure the inviolability of the property of the mission wherever such property might be situated. It was quite common for a member of a permanent mission to have in his private residence some property belonging to the mission, but article 30¹¹ only covered the personal possessions of the persons concerned. Hence, if article 24

¹⁰ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 360.

¹¹ See 1018th meeting, para. 5.

remained as it stood, property of the mission outside its premises would not be covered either by article 24 or by article 30.

51. Mr. TSURUOKA said he did not believe that the proposed addition to paragraph 1 of article 24 was prompted by an excessive desire for perfection. On the contrary, it reflected a very pragmatic view, and he therefore supported it. The Drafting Committee should perhaps consider, however, whether it was desirable, in a general convention, to deal with *force majeure* in the form of a specific case.

52. Mr. EUSTATHIADES said that, first, he questioned whether limiting the exception to serious threats to public safety was justified. True, it might facilitate adoption of the text, but it might also lead to regrettable inactivity on the part of the authorities in the case of less obviously serious disasters.

53. Secondly, he agreed that provision should be made for the special case of a permanent diplomatic mission and a permanent mission to an international organization occupying the same premises; but it must be remembered that it was because a special mission was to some extent subordinate to the permanent diplomatic mission that, under the text adopted by the Sixth Committee, consent could be given either by the head of the special mission or by the head of the permanent diplomatic mission. Since the situation of permanent missions to international organizations was different, the solution should be different too. The Drafting Committee should consider those two points.

54. Lastly, respect for the text of the 1961 Vienna Convention on Diplomatic Relations should not be carried too far merely for fear of a *contrario* reasoning. If the 1961 Convention was not satisfactory on a particular point, there was no reason to adhere to it. In the present instance, in any event, different treatment of permanent diplomatic missions and permanent missions to international organizations was sufficiently justified by the difference, which had been pointed out, in the kind of premises they occupied.

The meeting rose at 5.55 p.m.

1016th MEETING

Tuesday, 8 July 1969, at 10.10 a.m.

Chairman : Mr. Nikolai USHAKOV

Present: Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramanga-soavina, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor.

Relations between States and international organizations

(A/CN.4/218)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 24 (Inviolability of the premises of the permanent mission) (continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of article 24 as proposed by the Drafting Committee.

2. Mr. ALBÓNICO said that, in his view, the original text of article 25 of the draft on special missions² offered adequate safeguards in case of fire or other disaster; the amendment proposed by Argentina and subsequently adopted by the Sixth Committee³ was unnecessary.

3. He could accept the text of paragraph 1 of article 24, as proposed by the Drafting Committee, on the understanding that agents of the host State could not enter the premises of the permanent mission except with the consent of the head of the mission, as provided in the Commission's original text of article 25 of the draft on special missions.

4. He could also accept paragraphs 2 and 3 of article 24, since they reflected the corresponding provisions of the Vienna Convention on Diplomatic Relations.⁴

5. Mr. ROSENNE said it was unfortunate that the Special Rapporteur was not present, so that the Drafting Committee could have the benefit of his views. In his opinion, the Drafting Committee should be free to scrutinize the texts of the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations⁵ and the draft on special missions adopted by the Sixth Committee at its twenty-third session⁶ and to pick out what was most appropriate for the present draft article 24. The Drafting Committee should not feel itself obliged to give priority to the text of the Diplomatic Convention if it considered it inadequate, incomplete or outdated in any particular respect, since that Convention dealt with quite different matters from those under consideration.

6. The discussion had shown that the premises of the permanent mission could be of two kinds, either a detached set of offices or apartments, or buildings which were open to occupancy by others. There was also, however, a third category, namely, premises occupied by a permanent mission in the headquarters building of

¹ See previous meeting, para. 21.

² See *Yearbook of the International Law Commission*, 1967, vol. II, p. 360.

³ See previous meeting, para. 23.

⁴ United Nations, *Treaty Series*, vol. 500, pp. 106-108, article 22.

⁵ *Op. cit.*, vol. 596, p. 288, article 31.

⁶ See *Official Records of the General Assembly, Twenty-third Session, Annexes*, Agenda item 85, document A/7375, annex I, article 25.

an international organization itself. Such premises were to be found, for example, in the headquarters building of the United Nations Educational, Scientific and Cultural Organization in Paris and in that of the International Civil Aviation Organization in Montreal.

7. In the light of those facts, he wondered whether it was possible for the Commission to propose a categorical text, while at the same time making certain mental reservations to the effect that it could not be applied in many situations which were known to exist.

8. The CHAIRMAN, speaking as a member of the Commission, said there was a very close analogy between permanent diplomatic missions and permanent missions to international organizations, since their tasks were virtually the same. The latter should therefore be given the same privileges, immunities and facilities as the former.

9. Admittedly, article 31 of the 1963 Vienna Convention on Consular Relations provided that the consent of the head of the consular post might be assumed in the situation in question. But State practice did not follow that provision. In most cases, States concluded special agreements on the establishment of consular posts, and those agreements did not include the exception to the inviolability rule contained in article 31 of the 1963 Convention. That applied, in particular, to the many agreements concluded between socialist countries.

10. The solution adopted by the Sixth Committee for special missions could be justified where such missions were not permanent. But for permanent missions to international organizations, it was the 1961 Convention on Diplomatic Relations that should be taken as a model, not the draft on special missions.

11. In any event, the arguments in support of the amendment were technical rather than legal. The aim was to prevent the possible consequences of a fire or other disaster. But nowadays there were many technical methods of doing that without entering the premises of a permanent mission in defiance of the principle of inviolability.

12. In any case, a host State that wished to force an entry into the premises of a permanent mission could always resort to abuse; but in doing so, it would be breaking legal rules and the Commission's task was not to codify abuses. Moreover, the harm done to relations between States by entering the premises of a permanent mission without permission, on the pretext of some disaster, was far more serious than the possible consequences of inability to intervene.

13. Finally, if such a limitation of the inviolability of premises was accepted in the case of permanent missions, there might be a temptation in some quarters to extend it by analogy to the legal status of diplomatic missions. He was therefore entirely against the proposed amendment and hoped the Commission would abide by the text of the 1961 Convention on Diplomatic Relations.

14. Mr. ROSENNE said that he regretted having to disagree with the Chairman, but he thought the Commission should avoid drawing false analogies between

permanent diplomatic missions and permanent missions to international organizations. The key to the whole question was reciprocity, which in the case of permanent missions to international organizations did not exist, since the juridical position of the host State was different from that of the receiving State of a regular diplomatic mission.

15. Mr. BARTOŠ said that he supported the amendment.

16. However, in order to avoid any consequences for permanent diplomatic missions which might result from that exception to the principle of inviolability, an exception to the exception should be made where a permanent diplomatic mission and a permanent mission to an international organization were lodged under the same roof. For if a fire or other disaster occurred, it would not be possible to make a distinction between the premises of the diplomatic mission and those of the permanent mission; the legal régime of the diplomatic mission would take precedence and the exception provided for in the amendment would not apply. Unless an exception were made for that case, the result would be discrimination between diplomatic missions, according to whether or not they occupied the same premises as a permanent mission of their State to an international organization.

17. Mr. USTOR, replying to Mr. Rosenne's point, said that the source of the privileges and immunities of permanent diplomatic missions lay, first, in their representative character, and secondly, in the need to perform their diplomatic functions without hindrance. In his opinion, the situation of permanent missions to international organizations was the same, since they had a representative character and the performance of their duties necessitated the same privileges and immunities as those accorded to permanent diplomatic missions.

18. Certainly, the element of reciprocity did play a large part with respect to diplomatic missions, but the very fact that reciprocity did not play any part with respect to permanent missions to international organizations militated against the acceptance, in the present case, of the provisions contained in the Argentine amendment and the corresponding provision of article 31 of the Vienna Convention on Consular Relations.

19. Mr. EUSTATHIADES said that a layman listening to the Commission's discussions might conclude from the references made to discrimination and reciprocity that the host State itself was liable to set fire to the premises of the permanent mission, or at least to let them burn without taking any action. The difficulty could not be overcome unless the good faith of the host State was presumed. Some legal means must be found to enable the host State to intervene in emergencies where its intervention could only be to the advantage of both the permanent mission and its neighbours.

20. Among the special cases to be considered, that of a permanent mission housed in the same building as the international organization must not, of course, be overlooked. But the Drafting Committee's task would be unduly complicated if it were asked to find a general formula covering that case as well, so it should either

be dealt with in a separate paragraph or mentioned in the commentary.

21. While the Commission should not mistrust the host State too much, it should not go to the other extreme either. The wording of the Argentine amendment adopted by the Sixth Committee allowed the host State a great deal of latitude, for everything depended on how the phrase "that seriously endangers public safety" was interpreted. He therefore considered that while the proposition underlying the Argentine amendment, which was quite right, should be accepted, the idea of "endangering public safety" should be replaced by that of "requiring prompt protective action", which was the formula used in article 31 of the Vienna Convention on Consular Relations, and seemed more satisfactory.

22. Mr. RUDA said he would like to remove what appeared to be a misconception concerning the Argentine amendment. The most important part of article 25 of the Commission's draft on special missions was the idea of the inviolability of the premises of the mission. The Argentine amendment had not been primarily concerned with the question of public safety; that condition came into consideration "only in the event that it has not been possible to obtain the express consent of the head of the special mission or, where appropriate, of the head of the permanent mission".

23. Mr. KEARNEY said that, since the Commission had to draft a rule to cover situations which it could not anticipate in all respects, it should accept the limitation imposed by the Argentine amendment. In addition to the examples cited by Mr. Rosenne, he could think of at least two cases in which premises in Vienna were occupied jointly by United States personnel accredited to the International Atomic Energy Agency and personnel attached to the United States diplomatic or consular missions. In view of the number of unknown situations which might arise, therefore, the best solution would be to adopt the language of the Argentine amendment, with the inclusion of some such phrase as "where appropriate".

24. The CHAIRMAN, speaking as a member of the Commission, said that the absence of reciprocity justified stronger protection of the permanent mission's premises, since the sending State could not take retaliatory measures, as it could in the case of diplomatic relations.

25. With regard to permanent missions housed in blocks of flats or offices, he was not totally opposed to special consideration being given to such cases, but he found it almost impossible to accept the thesis that there was a difference in legal régime. At the very most, it might be stated in the commentary that the situation was technically different, without inferring any legal consequences. He was not, however, opposed to the Drafting Committee's trying to deal with the point, either in the text of the article or in the commentary.

26. Mr. RAMANGASOAVINA said that the wording of the Argentine amendment was ambiguous. The phrase "in the event that it has not been possible to obtain the express consent" of the permanent representative could cover two very different cases: one was

where the permanent representative could not be reached; the other was where he could be reached but refused his consent. In the latter case, if the disaster seriously endangered public safety, could the host State disregard the refusal? The Commission should state its position clearly to help the Drafting Committee.

27. Mr. RUDA said he hoped that the Drafting Committee would give due consideration to Mr. Rosenne's observation concerning the words "other property thereon", in paragraph 3.⁷

28. With regard to Mr. Ramangasoavina's point, if the head of the permanent mission expressly refused his consent, the inviolability of the premises must be respected.

29. Mr. TSURUOKA said that what the Commission had to do was to make provision for a case of *force majeure*. If it was compatible with public safety for the competent authorities of the host State to stand idly by, there could be no question of *force majeure*. He himself would not interpret the amendment adopted by the Sixth Committee as Mr. Ruda had done.

30. At first sight, Mr. Eustathiades' proposal that article 31 of the Vienna Convention on Consular Relations should be taken as a basis seemed to have some advantages, since that article referred not to the rather vague notion of "public safety", but to disasters "requiring prompt protective action", which was far more objective; moreover, the ambiguity in the text adopted by the Sixth Committee, of which Mr. Ramangasoavina had complained, was not to be found in article 31 of the Convention on Consular Relations.

31. He was still in favour of adding a paragraph based on the idea accepted by the Sixth Committee, but thought it would be better to keep closer to the wording of the Convention on Consular Relations. Generally speaking, protection of the interests of the diplomatic mission should take precedence over protection of the interests of the host State, since the latter was in a far stronger position and could call on all the resources of the State. The Commission must, however, make allowances for popular feeling, which, though unjustified, was none the less widespread. Many people believed that diplomats shamelessly exploited the advantages of their status for their personal benefit and to the detriment of the local population. The Commission should therefore be careful, when drafting an article of that kind, to strike a proper balance between the interests involved.

32. Mr. RAMANGASOAVINA said he was not convinced by Mr. Ruda's interpretation of the Argentine amendment. Like Mr. Ushakov, he believed that it was necessary to prevent any possibility of abuse by the host State, and that the wording of the amendment did not make it clear whether it had been impossible to obtain the consent of the head of the mission because he had refused to give it, or because it had not been possible to reach him.

33. In deciding how serious a disaster might be, the authorities could not rely solely on the judgement of the

⁷ See previous meeting, para. 50.

fire brigade; the head of the mission must have a say in the matter. That was why it had been laid down in principle in paragraph 1 that the consent of the permanent representative was required. In order to bring out clearly that the agents of the host State could not disregard a refusal by the permanent representative, the words "as provided in paragraph 1" should be added after the words "express consent", in the Argentine text.

34. Mr. IGNACIO-PINTO said that some solution must be found to enable the agents of the host State to enter the premises of a permanent mission in case of absolute necessity, even without the consent of the permanent representative, when persons or property not belonging to the mission were in danger.

35. The CHAIRMAN observed that the majority of the Commission were in favour of adding a new paragraph stating that, in certain circumstances, the consent of the permanent representative might be assumed. Some members wished it to be worded on the lines of the Argentine amendment to article 25 of the draft on special missions, but other preferred the wording of article 31 of the Vienna Convention on Consular Relations. Others, again, proposed a revised version of article 25 of the draft on special missions. The Drafting Committee should therefore prepare alternative texts reflecting those three positions, and if the Commission did not succeed in reaching agreement a vote would have to be taken.

36. Speaking as a member of the Commission, he drew attention to the danger of preparing several texts on different bases. He would prefer the Commission to follow either article 25 of the draft on special missions or article 31 of the Vienna Convention on Consular Relations. The Drafting Committee could certainly consider the possibility of including, either in the body of the article or in the commentary, a provision to cover the case in which the premises of the permanent mission were in a block of flats or offices.

37. The Drafting Committee might also prepare a variant for paragraph 3 in the light of the discussion. Personally, he was in favour of keeping the present wording, which was modelled on the corresponding article of the Vienna Convention on Diplomatic Relations.

38. Mr. ROSENNE suggested that the Drafting Committee be asked to reconsider the text of article 24 in the light of the discussion. That procedure would conform with the Commission's customary practice. If the Drafting Committee so wished, it could submit two variants for a particular passage, but the Commission should not actually request the Drafting Committee to prepare alternative texts.

39. With regard to emergency situations, he himself preferred the formula used in the second sentence of paragraph 2 of article 31 of the 1963 Vienna Convention on Consular Relations. The Commission could not, however, overlook the fact that, in its discussion of the draft on special missions, the Sixth Committee had not accepted that formula, but had adopted a compromise wording. In the circumstances, he would not press for

the 1963 formula, since it was unlikely to prove generally acceptable.

40. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said he agreed with Mr. Rosenne. The Drafting Committee obviously could not prepare as many variants as there had been opinions expressed. The majority of the Commission seemed to be in favour of providing that, under certain conditions, the consent of the permanent representative might be assumed. It was for the Drafting Committee to decide what form of words was likely to receive the most support; at present, it seemed to be the text of the Argentine amendment to article 25 of the draft on special missions. The majority of the Sixth Committee had certainly had good reason for being reluctant to accept the more radical formula of the Vienna Convention on Consular Relations and preferring the compromise text. The situation in the Commission was the same. Several members were prepared to adopt a rather less rigid formula, and the Drafting Committee might therefore think fit to support it, subject to the amendment suggested by Mr. Ramangasoavina. The Drafting Committee should be left free to choose between several possibilities and then submit a single text to the Commission. That also applied to paragraph 3. The Drafting Committee would decide what was the best form of words in the light of the proposals made in the Commission.

41. The CHAIRMAN suggested that the Drafting Committee be asked to prepare the text it considered most appropriate for article 24. The Commission would take a decision on that text when it was submitted and would vote, if need be, on any amendment that might be proposed orally.

It was so agreed.

ARTICLE 25 (Exemption of the premises of the permanent mission from taxation.)⁸

42. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 25.

43. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 25

Exemption of the premises of the permanent mission from taxation

1. The sending State and the permanent representative shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the permanent mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State or the permanent representative.

⁸ For previous discussion, see 994th meeting, para. 58, 995th and 996th meetings.

44. As in article 24, and for the same reasons, the Drafting Committee had substituted the term "permanent representative" for the term "head of the mission". That was the only change in the drafting.

45. The Drafting Committee had considered a substantive question which arose in connexion with paragraph 2. Mr. Ustor had pointed out that the restriction in it worked against sending States which had to lease premises for their permanent mission because they could not afford to buy them. The Drafting Committee had decided to recommend the Commission to adopt the article in its present form and to ask the Special Rapporteur to deal with the problem in the commentary, together with the comments of Governments.

46. The Drafting Committee had also decided to ask the Special Rapporteur to make a more detailed study of the question of reimbursement of dues and taxes, to find out what the practice was in the different countries and then to see if paragraph 2 needed amendment.

47. Mr. ROSENNE said he had some misgivings about the reference to the permanent representative in both paragraphs of article 25. That wording was based on the assumption that the premises of the permanent mission would be either in the name of the sending State or in that of the permanent representative personally. In fact, the title to the premises of a mission was often a very complicated matter and there were cases in which the property was neither in the name of the sending State nor in that of the permanent representative. He therefore suggested that the reference to the permanent representative be dropped from both paragraphs.

48. Article 25 would then be clearly confined to the exemption of the premises of the mission from taxation; the question of the personal exemption from taxation of the permanent representative and the members of the diplomatic staff of the mission was dealt with in article 35.⁹ If it were desired to introduce the personal element into article 25, that could only be done by drawing on the language of article 24 of the draft on special missions, which had been adopted by the Sixth Committee,¹⁰ and referring to "the members of the permanent mission acting on behalf of the mission", instead of to "the permanent representative". The best course, however, would be to drop the personal element from article 25 altogether.

49. Mr. KEARNEY said he supported Mr. Rosenne's suggestion, which would make for clarity. In a federal State, property taxes were usually levied by local authorities. In the United States, there had been considerable controversy between the State Department and various local authorities over the interpretation of the tax exemption provisions of host agreements. A clarification of the text would be very helpful in situations of that kind.

50. Mr. ELIAS said that he too supported Mr. Rosenne's idea. In article 25, the emphasis should

properly be placed on the exemption of the premises as such, as was done in article 32 of the 1963 Vienna Convention on Consular Relations.¹¹ The Drafting Committee should be instructed to take that article as a model. There would then be no danger of overlapping with the provisions of article 35 of the draft which, like article 49 of the 1963 Vienna Convention, dealt with the exemption of certain persons from taxation.

51. Mr. CASTAÑEDA (Chairman of the Drafting Committee), speaking as a member of the Commission, said that the dues and taxes referred to in article 25 were not levied on the owner of the mission's premises personally, but on the building; it would therefore be more correct to state, as in article 32 of the Vienna Convention on Consular Relations, that the premises of the permanent mission "shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered".

52. Mr. ROSENNE said he supported Mr. Elias's suggestion. Paragraph 2 of the article should also be amended, however, by replacing the words "the permanent representative" by the words "the person acting on behalf of the sending State"; that would bring the wording into line with paragraph 2 of article 32 of the Vienna Convention on Consular Relations.

53. Mr. USTOR said that in 1960, when the Commission had formulated article 32 of the draft on consular relations, the article had consisted of only one paragraph which exempted from taxation "the consular premises, whether owned or leased". In paragraph (2) of the commentary, the Commission had stressed that the exemption was "an exemption *in rem*" and had gone on to say that "if this provision was interpreted as according exemption from taxation only to the sending State and head of consular post, but not to the building as such, the owner could charge these taxes and dues to the sending State or head of post under the contract of sale or lease, and the whole purpose which this exemption sets out to achieve would in practice be defeated".¹² Clearly a provision like paragraph 2 of the present article 25 had no place in such a system. For if no exemption were granted to the owner of a building who leased premises to the sending State or the permanent representative, the result would be an increase in the rent, so that the sending State would pay the tax indirectly. A State which was obliged to rent premises for its permanent mission would thus be treated less favourably than a State which could afford to buy property to house its mission.

54. In the circumstances, he suggested that the Commission either drop paragraph 2 or include in the commentary an explanation of the point he had raised.

55. Mr. ELIAS said he was not in favour of dropping paragraph 2. The question whether the property tax should be borne by the owner or by the tenant was

⁹ See 1020th meeting, para. 29.

¹⁰ See *Official Records of the General Assembly, Twenty-third Session, Annexes, Agenda item 85, document A/7375, annex I.*

¹¹ United Nations, *Treaty Series*, vol. 596, p. 288.

¹² See *Yearbook of the International Law Commission, 1960*, vol. II, pp. 163 and 164.

usually settled by the terms of the agreement between them.

56. Mr. BARTOŠ said that in the lengthy discussions on that point at the Vienna Conference on Consular Relations the conclusion had been reached that a question of internal fiscal legislation was involved and that it would be better to pay the dues and taxes, which were sometimes hard to separate from the rent, and then obtain a refund, as was the practice in the United Kingdom, for example.

57. The question raised by paragraph 2 was not so much one of finance as of the existence of treaties of reciprocity. Some States, even wealthy ones, could not acquire property in other States because they did not grant the same privileges in their own territory.

58. He saw no objection to deleting paragraph 2, but he doubted whether the General Assembly would support that decision.

The meeting rose at 1 p.m.

1017th MEETING

Wednesday, 9 July 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor.

Relations between States and international organizations

(A/CN.4/218 and Add.1)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 25 (Exemption of the premises of the permanent mission from taxation) (continued).¹

1. The CHAIRMAN invited the Commission to continue consideration of article 25 as proposed by the Drafting Committee.

2. Mr. NAGENDRA SINGH said that, in order to meet the point raised by Mr. Rosenne,² it would be advisable either to delete the words "and the permanent representative" in paragraph 1, or to replace them by "and the members of the permanent mission acting

on behalf of the mission", as in article 24 of the draft on special missions.

3. Otherwise, he fully supported the text proposed by the Drafting Committee, which closely followed the wording of the corresponding article 23 of the Vienna Convention on Diplomatic Relations.³ That wording granted the exemption from taxation to the sending State and to its representative. He did not support the idea of making the exemption apply to the property itself. An exemption of that kind would not create any problem where the premises were owned by the sending State, since the property of a sovereign State would be exempt from taxation in the host State; but in the case of premises leased to a mission by a private owner the position would be more complex. He himself would not favour an exemption *in rem*, which would benefit the owner of the building, usually a national of the host State. At New Delhi, the rent restriction legislation in force prevented an owner of leased premises from passing on to the lessee the full amount of the tax levied on the premises. For those reasons, he favoured the retention of paragraph 2.

4. Mr. ALBÓNICO said that, as he understood it, article 25 granted exemption from taxes assessed on the property itself and not from taxes on income derived from the property. The wording of paragraph 1 should therefore be brought more closely into line with the corresponding passage of article 32 of the 1963 Vienna Convention on Consular Relations.⁴

5. He was prepared to accept the concluding proviso "other than such as represent payment for specific services rendered", but was not altogether clear about its scope and meaning. A full explanation of it should be given in the commentary.

6. He also favoured the retention of paragraph 2, but there again the exception stated should be fully explained in the commentary, since the discussion had shown that its meaning was not at all clear.

7. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that two main points had emerged from the Commission's discussion. The first was that, as Mr. Rosenne had proposed, the words "the permanent representative" should be replaced by the words "the members of the permanent mission acting on behalf of the mission", in order to make the text consistent with article 24 of the draft on special missions.⁵ The reason why that wording had been used in the case of special missions was that a special mission did not always have a head, as was clear from article 9. In the case of a permanent mission, the sending State might wish to have the premises put in the name of a member of the mission, rather than in that of the permanent representative or in its own name. The Drafting Committee could therefore adopt Mr. Rosenne's proposal; but that would mean that article 25 would still be based on the idea behind its present wording.

³ United Nations, *Treaty Series*, vol. 500, p. 108.

⁴ *Op. cit.*, vol. 596, p. 288.

⁵ See *Official Records of the General Assembly, Twenty-third Session, Annexes, Agenda item 85, document A/7375, annex I.*

¹ See previous meeting, para. 43.

² *Ibid.*, paras. 47 and 48.

8. The second point, which several members had pointed out, was that it was neither the sending State nor the permanent representative that was exempted from dues and taxes, but the premises of the mission. That meant that the present drafting was not correct and it would be advisable to go back to the wording of the Vienna Convention on Consular Relations. If the present formulation were retained, the French version might be brought closer to the English by amending it to read "*impôts . . . relatifs aux locaux*" instead of "*impôts . . . au titre des locaux*". In any event, the article should be referred back to the Drafting Committee without any decision being taken on it for the moment.

9. There remained the case in which the permanent mission leased the premises it occupied. Two different views had been expressed on that point with reference to paragraph 2, and the Drafting Committee would have to decide which to adopt.

10. The CHAIRMAN suggested that article 25 be referred back to the Drafting Committee, with instructions to submit to the Commission either a redraft of the present text or a new text prepared in consultation with the Special Rapporteur on the basis of the corresponding article of the Vienna Convention on Consular Relations.

It was so agreed.

ARTICLE 26 (Inviolability of archives and documents)⁶

11. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 26.

12. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 26

Inviolability of archives and documents

The archives and documents of the permanent mission shall be inviolable at any time and wherever they may be.

13. The Drafting Committee had made no drafting changes and had no comments to offer.

Article 26 was adopted.

14. Mr. ROSENNE said that article 26 was absolutely correct and he fully supported its provisions.

15. He wished, however, to draw attention to the fact that, following its discussion of the corresponding article of the draft on special missions, the Sixth Committee had adopted an amendment inserting an additional sentence which read: "They should, when necessary, bear visible external marks of identification".⁷ That new provision had the effect of destroying the inviolability which it was the purpose of the article to grant.

⁶ For previous discussion, see 994th meeting, para. 57 and 995th meeting.

⁷ See *Official Records of the General Assembly, Twenty-third Session, Annexes, Agenda item 85, document A/7375*, paras. 196-203.

ARTICLE 27 (Freedom of movement)⁸

16. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 27.

17. Mr. CASTAÑEDA (Chairman of the Drafting Committee), said that the Drafting Committee proposed the following text:

Article 27

Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure to all members of the permanent mission freedom of movement and travel in its territory.

18. The Drafting Committee had made no changes. Several of its members had, however, expressed differing views on a question of substance raised by Mr. TSURUOKA, namely, whether the host State could impose limits on the freedom of movement of members of a permanent mission. It was not for the Drafting Committee to decide that question; it had therefore provisionally approved article 27 and recommended that the Commission should consider the matter further in due course.

19. The Drafting Committee had decided to delete paragraph 3 of the commentary (A/CN.4/218) since it dealt with matters of fact, reference to which was not necessary in the context.

20. Mr. TSURUOKA said it was true he had considered that the present wording of article 27 might be open to abuse and lead to excessive claims by members of permanent missions. For example, it would be wrong, though consistent with the letter of article 27, for a member of a mission accredited to the United Nations in New York to claim the privileges and immunities to which he was entitled as a member of a permanent mission, wherever he happened to be in United States territory. That would clearly not be consistent with the spirit of article 27.

21. Such freedom of movement, together with enjoyment of the privileges and immunities attaching to their status, was justified in the case of consuls, since it enabled them to perform their functions, even though in principle it was restricted to their jurisdiction and did not extend to the entire territory of the host State. But there seemed to be no good reason for granting it to permanent representatives or members of a permanent mission, who had functions to perform only at the headquarters of the international organization to which they were accredited. Hence, either the wording of article 27 should be amended or it should be accompanied by a very full commentary.

22. Mr. ALBÓNICO said that freedom of movement guaranteed in article 27 should be qualified in the same manner as in the corresponding article 27 of the draft on special missions, which had been approved by

⁸ For previous discussion, see 995th meeting, para. 16.

the Sixth Committee.⁹ It would be appropriate to restrict freedom of movement to what was "necessary for the performance of the functions" of the mission, because a permanent mission's activities were more limited than those of a diplomatic mission or a consulate; they were confined to the functions it performed with the international organization concerned. It would not be appropriate to grant members of permanent missions unrestricted freedom of movement on the pattern of article 26 of the 1961 Vienna Convention on Diplomatic Relations or article 34 of the 1963 Vienna Convention on Consular Relations.

23. Mr. ROSENNE said that, with regard to the draft articles in general, he would favour the idea of re-emphasizing the functional element in an appropriate manner.

24. With regard to article 27, he had no objection to the text as far as it went, but he thought it did not exhaust all the possibilities. There was a fundamental difference between the type of diplomatic activity conducted by a permanent mission and the activities of diplomatic missions, consulates and special missions. In the first place, there was no bilateral agreement to establish the permanent mission. In the second place, there was no element of personal *agrément* for the appointment of the head of the permanent mission and its members.

25. Regardless of how broadly, or how narrowly, the rights and duties of the host State were expressed in article 27, the article did not sufficiently bring out the essential obligation of the host State never to impose restrictions capable of interfering with the proper functioning of the permanent mission or with the representation of the sending State to the organization. It would not be possible to cover that point by means of a mere reference in the commentary. It was essential to guarantee the freedom of entry of members of a permanent mission into the host State, and also into any country in which the organization held a meeting. Such freedom of entry should also be guaranteed to all persons attached to a mission for the purposes of a specific meeting.

26. Mr. USTOR said that freedom of movement was an important right for members of a permanent mission and should be maintained in the broad terms in which it was expressed in article 27. It was worth noting that freedom of movement was not limited in any way in either of the Vienna Conventions; in particular, consular officers were not restricted to their consular districts. The example of special missions was not relevant because special missions were of a temporary character. The members of a permanent mission to an international organization often lived for many years in the host country and they should be allowed to travel in that country.

27. There was, in fact, a bilateral agreement involved: the agreement between the host State and

the international organization. It was always open to the host State to see that any restrictions it considered necessary were included in that agreement. Article 4 of the draft¹⁰ covered that possibility.

28. The present situation was that prospective host States were competing with each other to attract international organizations and would certainly be willing to guarantee freedom of movement. He was therefore strongly in favour of retaining article 27 as it stood.

29. He would support the sound idea of dealing elsewhere in the draft with the question of persons attached to a permanent mission. In certain cases the host State had a moral obligation to allow other persons, such as press correspondents, to come to the seat of an international organization.

30. Mr. RUDA said that he too supported article 27 as it stood. The only grounds on which the host State could validly restrict freedom of movement were grounds of national security, and the article already covered that point. Any attempt to introduce a limitation based on the functional element would unduly restrict the freedom of movement of members of permanent missions. He was himself accredited as a permanent representative to the United Nations in New York and every week-end he travelled outside the city. It would be intolerable if permanent representatives were prevented from spending a holiday in the country in which the seat of the organization was situated. Their position must not be made less favourable than that of consuls, whose freedom of movement was not restricted to their consular districts.

31. The commentary should be made fuller and more explicit, but he approved of the Drafting Committee's decision to drop paragraph 3.

32. Mr. CASTRÉN said he agreed with the two previous speakers. The text of the corresponding articles in the Vienna Conventions on Diplomatic Relations and on Consular Relations was preferable to that of article 27 of the draft on special missions. In order to prevent any danger of abuse by the host State, it would be better not to add the reservation which had been included in the case of special missions and was justified by their temporary nature. If difficulties arose, it would always be possible to resort to consultations, for which provision would be made in the draft articles.

33. With regard to the commentary, it would be better to retain paragraph 3, since it was linked with paragraph 2; if the one paragraph was deleted, the other would have to be deleted too and the commentary would be silent on the subject of restrictions.

34. Mr. TSURUOKA said he thought that too much stress was being laid on possible abuses by the host State and not enough on the risk of abuses by the permanent representative or the members of the mission. It was not, perhaps, essential to mention that aspect of the question in the article itself, but attention should be drawn to it in some other way in the

⁹ See *Official Records of the General Assembly, Twenty-third Session, Annexes, Agenda item 85, document A/7375, annex I.*

¹⁰ *Yearbook of the International Law Commission, 1968, vol. II, Report of the Commission to the General Assembly, chapter II, section E.*

interests of the proper application and correct interpretation of the regime of diplomatic privileges and immunities to be confirmed by the convention that would result from the draft articles.

35. Mr. NAGENDRA SINGH said that while he fully appreciated the problems mentioned by Mr. Tsu-ruoka, he thought it would be impossible to limit freedom of movement on the basis of the functional element. A permanent representative could not be confined to his residence and his office. He therefore supported article 27 as it stood and suggested that the commentary should stress the need for members of a permanent mission to avoid any abuse of their rights.

36. Mr. EUSTATHIADES said he agreed with Mr. Castrén that it was more appropriate in the case of permanent missions to refer to the Vienna Conventions on Diplomatic and Consular Relations than to the draft on special missions, since the temporary nature of special missions justified restricting the freedom of movement of their members to what was necessary for the performance of their functions. He was in favour of keeping the text of article 27 as it stood and retaining paragraph 3 of the commentary.

37. The key to the problem was the relationship between article 27 and the articles on consultations and on non-discrimination. In the last resort, any difficulty would be overcome by application of the article on consultations.

38. The application of the article on non-discrimination to situations arising out of article 27 was, however, a delicate matter. The Commission's discussions on article 27 had shown that it wished to lay down not only the rule of non-discrimination, but also the rule of reciprocity. But it was hard to see how the collective relations between the host State and the member States of an international organization to which it was the host could be a substitute for bilateral relations and eliminate, for the host State, reciprocity with a member State of the organization. The fact that a host State maintained special relations with a member State, including the case of non-recognition, could not prevent an international organization from establishing or maintaining its headquarters in that State. It would be better, therefore, to keep the present wording of article 27 and, instead of deleting paragraph 3 of the commentary, to add to it a reference to consultations and non-discrimination, including reciprocity.

39. Mr. ELIAS said he was in favour of keeping article 27 as it stood, since to do otherwise would give the head of a permanent mission lesser privileges and immunities than the head of a consular post. A permanent representative to the United Nations enjoyed a status which was not inferior to that of an ambassador. The possibility of abuse existed for diplomatic representatives and consuls too, so it was not a valid reason for depriving permanent representatives of their rightful status. It was also desirable to maintain some degree of uniformity with the corresponding provisions of the two Vienna Conventions.

40. The CHAIRMAN, speaking as a member of the Commission, said that, like most members, he thought

article 27 should be adopted as it stood. In addition to the arguments already put forward, it could be said that, if the phrase "necessary for the performance of their functions" were added, it might give the impression that the host State could decide what was necessary for the performance of the functions of members of a permanent mission; and that was not a matter for the host State, but for the international organization.

41. With regard to Mr. Rosenne's suggestion, he would like to hear what persons would be covered by the provision on freedom of entry he wished to add to the draft.

42. Mr. ROSENNE said he entirely disagreed with the suggestion that an international organization had any voice in determining the functions of a permanent mission; it was for States to decide what the functions of their missions would be.

43. The duty of the host State to allow all members of a permanent mission unrestricted entry into its territory was a very important point which had not been dealt with in the draft. It was essential to make explicit provision for the freedom of entry not only of members of the permanent staff of the mission, but also of temporary members, such as an expert whose services were required by the permanent mission in connexion with a particular meeting.

44. The draft contained an article on "facilities for departure"—article 47 (A/CN.4/218/Add.1)—but it should also include an article on facilities for entry, which would explicitly state the host State's duty in that respect. An article of that kind had not been included either in the Vienna Convention on Diplomatic Relations or in the Commission's draft on special missions, because in those cases it was not necessary; since provision was made for the receiving State's consent to the establishment of a diplomatic mission, or to the sending of a special mission, and for *agrément* or its equivalent for the individuals concerned, the question of freedom of entry was covered automatically. In the case of permanent missions, the host State was not called upon to agree to the establishment of the mission and there was no *agrément* or equivalent procedure.

45. The question of freedom of entry should not be left to be implied from article 27, or to be covered under the provisions of article 4. The Drafting Committee should perhaps be invited to prepare a separate article on the right of unrestricted entry into the territory of the host State.

46. The CHAIRMAN suggested that the Secretariat be asked to transmit to the Special Rapporteur Mr. Rosenne's request that a new article be prepared on the freedom of entry of members of permanent missions.

It was so agreed.

47. The CHAIRMAN asked whether Mr. Albónico still wished to press his suggestion for the inclusion of a limitation on freedom of movement.

48. Mr. ALBÓNICO said that he had been convinced

by the arguments put forward by Mr. Ruda and other members that no limitation should be placed on the freedom of movement of members of a permanent mission; the proviso relating to national security was adequate to protect the interests of the host State. He therefore withdrew his suggestion.

49. Mr. TSURUOKA said that although he agreed to the adoption of the present wording of article 27, he would like his opinion on the possible abuse of privileges and immunities by members of permanent missions to be noted either in the commentary or in the Commission's report.

50. The CHAIRMAN said the Secretariat would take that request into account.

Article 27 was adopted.

ARTICLE 28 (Freedom of communication)¹¹

51. The CHAIRMAN, in the temporary absence of the Chairman of the Drafting Committee, invited Mr. Ustor to introduce the Committee's text for article 28.

52. Mr. USTOR said that the Drafting Committee proposed the following text:

Article 28

Freedom of communication

1. The host State shall permit and protect free communication on the part of the permanent mission for all official purposes. In communicating with the Government of the sending State, its diplomatic missions, its consular posts and its special missions, wherever situated, the permanent mission may employ all appropriate means, including couriers and messages in code or cipher. However, the permanent mission may install and use a wireless transmitter only with the consent of the host State.

2. The official correspondence of the permanent mission shall be inviolable. Official correspondence means all correspondence relating to the permanent mission and its functions.

3. The bag of the permanent mission shall not be opened or detained.

4. The packages constituting the bag of the permanent mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the permanent mission.

5. The courier of the permanent mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the permanent mission may designate couriers *ad hoc* of the permanent mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the permanent mission's bag in his charge.

7. The bag of the permanent mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages

constituting the bag but he shall not be considered to be a courier of the permanent mission. The permanent mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

53. The Drafting Committee had made a number of slight changes in the Special Rapporteur's text (A/CN.4/218). For example, in the second sentence of paragraph 1, it had substituted the expression "consular posts" for the word "consulates", in order to conform with article 1, paragraph 1 (a), of the Vienna Convention on Consular Relations.¹² It had also deleted the word "diplomatic" before the word "couriers" in the same sentence, in order to avoid any possible confusion with the couriers of permanent diplomatic missions.

54. With regard to the expression "diplomatic missions", in the second sentence of paragraph 1, the Drafting Committee thought that it would be appropriate to explain in the commentary that it covered three kinds of diplomatic mission, namely, permanent diplomatic missions, permanent missions to international organizations, and special diplomatic missions of a permanent character.

55. Paragraph 7 was drafted on the lines of the corresponding paragraphs of the Vienna diplomatic and consular Conventions. The phrase "By arrangement with the appropriate authorities", at the beginning of the third sentence of the Special Rapporteur's draft, which had been included in article 28, paragraph 8, of the draft on special missions, had been deleted because, in the view of the Drafting Committee, no such special arrangements were necessary.

56. Mr. ROSENNE proposed that, in order to avoid possible difficulties of interpretation in the commentary, a reference to the other permanent missions of the sending State be included in the second sentence of paragraph 1 of the article. The sentence might read: "In communicating with the Government of the sending State, its diplomatic missions, its consular posts, its special missions and its other permanent missions wherever situated . . .".

57. Mr. CASTRÉN said he supported Mr. Rosenne's proposal; he also approved of the changes to the initial text made by the Drafting Committee.

58. Mr. RAMANGASOAVINA said that the restriction constituted by the phrase "for all official purposes", in paragraph 1, was entirely correct. He appreciated that a similar restriction could not be imposed in article 27, since there could be no question of denying freedom of movement for private travel to members of a permanent mission.

59. Nevertheless, in view of the possibilities of abuse pointed out by Mr. Tsuruoka, it should be possible, on the basis of the restriction in article 28, to draft a general article emphasizing that the legal régime for permanent missions was functional, which would clarify the meaning of several articles, particularly

¹¹ For previous discussion, see 995th meeting, para. 27.

¹² United Nations, *Treaty Series*, vol. 596, pp. 262-264.

article 27, without restricting their scope more than was necessary.

60. Mr. RUDA said he could accept the text proposed by the Drafting Committee, subject to the amendment proposed by Mr. Rosenne.

61. Mr. NAGENDRA SINGH said the Drafting Committee was to be congratulated on having produced a new text which satisfied all members of the Commission. He was prepared to accept that text, subject to the amendment proposed by Mr. Rosenne, which he fully endorsed.

62. The CHAIRMAN, speaking as a member of the Commission, said he agreed that it might be useful to mention other permanent missions in paragraph 1. It might be as well to specify, however, that what was meant was permanent missions to other international organizations.

63. With regard to possible abuses and the protection of the host State against them, under article 44 (A/CN.4/218/Add.1) it was the duty of members of a permanent mission to respect the laws and regulations of the host State, which meant that they must not take advantage of the privileges and immunities conferred upon them by the articles to contravene those laws and regulations. That gave the host State sufficient protection, at least in law. The Commission might bear Mr. Ramangasoavina's suggestion in mind, however, when it came to consider article 44.

64. Mr. USTOR, referring to Mr. Rosenne's amendment, said that the question arose what precisely was meant by the words "other permanent missions". Such missions might conceivably be not only permanent missions to international organizations, but also any other permanent missions of the sending State. In the interests of clarity, therefore, he suggested that the beginning of the second sentence of paragraph 1 be amended to read: "In communicating with the Government of the sending State, its diplomatic missions, its other permanent missions, its consular posts and its special missions, wherever situated . . .".

65. Mr. ROSENNE said that he could accept that amendment.

66. The CHAIRMAN, speaking as a member of the Commission, said he wondered whether the expression "permanent mission" without further qualification might not denote something other than a permanent mission to an international organization and whether it would not therefore be preferable to insert the qualification he had proposed.

67. Mr. ROSENNE said perhaps the Chairman had overlooked article 1 (d),¹³ which stated that a permanent mission was "a mission of representative and permanent character sent by a State member of an international organization to the Organization". That was obviously the meaning to be given to the expression in paragraph 1.

68. Mr. ELIAS, supported by Mr. TSURUOKA, proposed that Mr. Rosenne's amendment be adopted, subject to the deletion of the word "other" in the expression "other permanent missions".

69. Mr. ROSENNE and Mr. USTOR said that they could accept that further amendment.

70. The CHAIRMAN suggested that, if there were no objection, the Commission adopt article 28, with the insertion in paragraph 1 of the words "its permanent missions" after the words "its diplomatic missions".

Article 28, thus amended, was adopted.

The meeting rose at 12.50 p.m.

1018th MEETING

Thursday, 10 July 1969, at 10.25 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor.

Relations between States and international organizations

(A/CN.4/218 and Add.1)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 29 (Personal inviolability)¹

1. The CHAIRMAN, in the temporary absence of the Chairman of the Drafting Committee, invited Mr. Ustor to introduce the Drafting Committee's text for article 29.

2. Mr. USTOR said that the Drafting Committee proposed the following text:

Article 29

Personal inviolability

The persons of the permanent representative and of the members of the diplomatic staff of the permanent mission shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

¹³ *Yearbook of the International Law Commission, 1968, vol. II, Report of the Commission to the General Assembly, chapter II, section E.*

¹ For previous discussion, see 995th meeting, para. 41.

3. That text followed the lines of the corresponding provisions of the Vienna Convention on Diplomatic Relations² and the draft on special missions.³

Article 29 was adopted without comment.

ARTICLE 30 (Inviolability of residence and property)⁴

4. The CHAIRMAN invited Mr. Ustor to introduce the Drafting Committee's text for article 30.

5. Mr. USTOR said that the Drafting Committee proposed the following text:

Article 30

Inviolability of residence and property

1. The private residence of the permanent representative and of the members of the diplomatic staff of the permanent mission shall enjoy the same inviolability and protection as the premises of the permanent mission.

2. Their papers, correspondence and, except as provided in paragraph 3 of article 31, their property, shall likewise enjoy inviolability.

6. Mr. ROSENNE said that there was a certain linkage between paragraph 2 of article 30 and paragraph 3 of article 24; he suggested, therefore, that when the Drafting Committee considered the observation he had made regarding the property of the permanent mission in connexion with article 24,⁵ it should be free to propose a modification of article 30 if necessary.

Subject to possible modification as suggested by Mr. Rosenne, article 30 was adopted.

ARTICLE 31 (Immunity from jurisdiction)⁶

7. The CHAIRMAN invited Mr. Ustor to introduce the Drafting Committee's text for article 31.

8. Mr. USTOR said that the Drafting Committee proposed the following text:

Article 31

Immunity from jurisdiction

1. The permanent representative and the members of the diplomatic staff of the permanent mission shall enjoy immunity from the criminal jurisdiction of the host State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the host State unless the person in question holds it on behalf of the sending State for the purposes of the permanent mission;

(b) An action relating to succession in which the person in question is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

² United Nations, *Treaty Series*, vol. 500, p. 110, article 29.

³ See *Official Records of the General Assembly, Twenty-third Session, Annexes*, Agenda item 85, document A/7375, annex I, article 29.

⁴ For previous discussion, see 995th meeting, para. 44.

⁵ See 1015th meeting, para. 50.

⁶ For previous discussion, see 995th meeting, para. 48.

(c) An action relating to any professional or commercial activity exercised by the person in question in the host State outside his official functions;

[(d) An action for damages arising out of an accident caused by a vehicle used outside the official functions of the person in question.]

2. The permanent representative and the members of the diplomatic staff of the permanent mission are not obliged to give evidence as witnesses.

3. No measures of execution may be taken in respect of a permanent representative or a member of the diplomatic staff of the permanent mission except in cases coming under sub-paragraphs (a), (b) [and] (c) [and (d)] of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a permanent representative or a member of the diplomatic staff of the permanent mission from the jurisdiction of the host State does not exempt him from the jurisdiction of the sending State.

9. The word "they" in sub-paragraph 1 (a) of the Special Rapporteur's draft (A/CN.4/218) had been replaced by the words "the person in question" for the sake of greater clarity; the latter expression had also been used in sub-paragraphs (b) and (c).

10. One member of the Drafting Committee had proposed the inclusion of paragraph 1 (d), enclosed in square brackets, which reproduced the text of article 31, paragraph 2 (d) of the draft on special missions. The Commission would have to decide whether it wished to approve that particular exception.

11. Mr. RUDA said he could not agree to the inclusion of paragraph 1 (d), since in his opinion article 31 should be based on article 31 of the Vienna Convention on Diplomatic Relations rather than on article 31 of the draft on special missions. Actions for damages could arise out of many other accidents than those caused by vehicles, and it would not be appropriate for the Commission to single out one special case.

12. Mr. ROSENNE said that the problem which paragraph 1 (d) attempted to solve was a very important one, but it would have to be approached with caution, since in some States, a civil action for damages arising out of a motor vehicle accident could be joined with a criminal or quasi-criminal charge. While reserving his own position on the matter, therefore, he proposed that the Commission approve paragraph 1 (d) on first reading, with a view to obtaining the views of Governments.

13. Mr. RAMANGASOAVINA said that the proposed sub-paragraph (d) would be a useful addition to paragraph 1. The public must be protected against loss or damage caused by traffic accidents. Admittedly, the result would be that members of permanent missions would be treated differently from members of diplomatic missions; but on the other hand, the Vienna Convention on Consular Relations⁷ and the draft on special missions both contained a similar provision. He had already drawn attention at an earlier meeting

⁷ United Nations, *Treaty Series*, vol. 596, p. 298, article 43.

to some of the disadvantages of omitting a provision of that kind.⁸

14. However, since the members of a permanent mission must be expressly protected against criminal actions, he was in favour of specifying that sub-paragraph (d) referred to civil actions.

15. Mr. CASTRÉN said he was not in favour of a provision which modelled the legal status of permanent missions on that of special missions and consular posts, when they ought rather to be assimilated to diplomatic missions. Sub-paragraph (d) should therefore be deleted.

16. In any case there was no need to specify that the sub-paragraph related to civil actions, since full immunity from criminal jurisdiction was already provided by the first sentence of paragraph 1, and the list of exceptions related to civil actions exclusively.

17. Mr. ALBÓNICO said that he had two objections to article 31 as proposed by the Drafting Committee. First, paragraph 1 provided that the permanent representative and the members of the diplomatic staff of the permanent mission should enjoy immunity from the civil and administrative jurisdiction of the host State, but it made no mention of the host State's jurisdiction over commercial and trade matters, which in many States were of equal importance.

18. Secondly, if sub-paragraph (d) of paragraph 1 were adopted, it would jeopardize the whole system of immunities embodied in the Vienna diplomatic and consular Conventions. He therefore proposed that sub-paragraph (d) be deleted.

19. Mr. NAGENDRA SINGH said that, as a matter of sheer legal logic, he agreed with Mr. Ruda that article 31 should be based on article 31 of the Vienna Convention on Diplomatic Relations.

20. On the other hand, he agreed with Mr. Raman-gasoavina that it was necessary to protect the common man of the host State against damage arising out of traffic accidents. He was inclined, therefore, to accept Mr. Rosenne's proposal that the Commission, instead of deleting paragraph 1 (d) at the present stage, should approve it on first reading, with a view to obtaining the views of Governments.

21. He hoped Mr. Ustor would provide some clarification regarding the precise scope of criminal and civil jurisdiction.

22. Mr. USTOR said that the basic idea of article 31 was that the head and members of a permanent mission to an international organization should, as far as possible, be placed on the same footing as the head and members of a permanent diplomatic mission. In his opinion, therefore, it would be dangerous to introduce the notion, expressed in paragraph 1 (d), that a member of a permanent mission to an international organization could be liable for damages arising out of an accident caused by a vehicle "used outside the official functions of the person in question". The immunity of diplomats from both criminal and civil jurisdiction,

as established in the Vienna Convention on Diplomatic Relations, was complete. It was true that there had been a trend at the beginning of the present century towards making a distinction between the official and unofficial acts of diplomats, particularly in the Italian courts, but as a result of protests by the diplomatic corps, it was now generally accepted that immunity applied to acts performed by diplomats both within and outside their official functions.

23. With regard to the question of protecting the interests of the people of the host State, he believed that adequate protection was provided by the laws on compulsory third-party insurance which were already in force in most States and which diplomats also were obliged to respect.

24. In reply to Mr. Nagendra Singh's question concerning the distinction between criminal and civil jurisdiction, he would say that that distinction was generally clear, but that certain difficulties might arise in connexion with administrative jurisdiction, which in some countries, including his own, might permit the imposition of fines for minor violations of traffic regulations.

25. Mr. ELIAS said that Mr. Albónico's suggestion regarding the inclusion of a third category of jurisdiction in paragraph 1, namely, commercial and trade jurisdiction, would only complicate the text and make it too unwieldy. He was, therefore, in favour of retaining the first part of paragraph 1 as it stood.

26. With respect to sub-paragraph (d), he agreed with Mr. Ustor that it was undesirable, because it introduced the idea of a distinction between the official and the unofficial functions of the permanent mission. Such a distinction was already hard enough to make in ordinary commercial law and would be even more difficult to make in diplomatic law.

27. He could not agree with Mr. Rosenne's proposal that the Commission should adopt sub-paragraph (d) on first reading in order to obtain the views of Governments, since it would not be right for the Commission to circulate a text about which it was not absolutely sure.

28. Mr. TSURUOKA said everyone agreed that victims of accidents should not be left helpless; there was no question about that. On the other hand, the immunity from jurisdiction should be as full as possible. The problem was to reconcile those two requirements. In his opinion, a provision such as that added in sub-paragraph (d) would do so, but the wording was perhaps not entirely satisfactory. The Commission should remember that the number and speed of vehicles was constantly growing, with a corresponding increase in the risk of accidents.

29. Perhaps a passage could be included in the commentary on article 44, on the obligation to respect the laws and regulations of the host State (A/CN.4/218/Add.1), to the effect that the host State might require all members of permanent missions to take out insurance against third-party risks.

30. Mr. KEARNEY said that he favoured the inclusion of paragraph 1 (d). It had been argued that that

⁸ See 995th meeting, paras. 60 and 61.

sub-paragraph would tend to place members of a permanent mission to an international organization in a less advantageous position than members of a permanent diplomatic mission, but he could see no substance in that approach. Recent discussions in connexion with the Vienna diplomatic and consular Conventions and the draft articles on special missions had shown that Governments were deeply concerned about the problem of road traffic accidents and that there was a growing feeling that the immunities of diplomats should be curtailed when the individual concerned was not acting in his official capacity. It would be short-sighted to evade such an obvious problem on the pretext that a corresponding clause had not been included in the Vienna Convention on Diplomatic Relations.

31. It has also been argued that it was difficult to distinguish between the official and unofficial functions of a permanent mission. Such distinctions, however, frequently arose in municipal law. For example, in connexion with the law of agency, the law of master and servant, and such like, a considerable body of precedents already existed and it should not be difficult to adapt them to the present case.

32. A number of special problems did arise in connexion with compulsory third party liability insurance, particularly in his own country and other States with a federal form of government, where the insurance requirements might vary considerably from one state to another. It must also be borne in mind that quite often the amount of compulsory insurance was not sufficient to compensate an injured party to the full extent of his injuries and that in such cases the uninsured portion of damages had to be collected by a court judgement against the individual responsible for them. That was particularly true today, when the negligence of a single individual on a crowded highway might result in injuries to several road users.

33. With regard to Mr. Tsuruoka's suggestion that the Commission should include some clause on the question of insurance—a suggestion which had also been made in the Drafting Committee by Mr. Ago—he feared that a rather complicated separate article would be needed to ensure that innocent persons were really protected in cases where the individual responsible for their injuries had not taken out the necessary insurance policy.

34. Mr. EUSTATHIADES said he agreed with Mr. Tsuruoka that some means should be found to reconcile the protection of the privileges and immunities enjoyed by the agents of a sending State with the protection of individuals. Accidents were so frequent that the matter required special regulation. It had already been provided for in the Vienna Convention on Consular Relations, in article 31 of the draft on special missions and in the special clauses in the Council of Europe's draft on State immunity. To the considerations put forward by Mr. Tsuruoka he would add the need to protect the agents of a sending State from the hostility of public opinion. The fact that the Vienna Convention on Diplomatic Relations did not contain any parallel provision was no hindrance.

35. The main difficulty was how to distinguish clearly between official functions and private activities. That was why any proposal based on that distinction aroused opposition. He himself would be in favour of keeping paragraph 1 (*d*), if only to learn the views of Governments, but most members of the Commission did not seem to agree. If that sub-paragraph were deleted, the only other possible solution would be a provision on compulsory insurance, but he was not sure that the proper place for a provision of that kind was in article 44, on the obligation of permanent missions to respect the laws and regulations of the host State. It would be better to introduce it into article 31 and to ask the Special Rapporteur to emphasize the importance of the matter in the commentary by saying that the Commission had wished to draw the attention of Governments to the need to make insurance compulsory and even to the possibility of a special agreement requiring them to do so. If a mention in the commentary was not enough, a special request to Governments to consider such an agreement should be prepared.

36. If the Commission decided to retain sub-paragraph (*d*) and if it thought that the drafting should be reviewed more closely, it might follow Mr. Rosenne's suggestion. He certainly agreed with Mr. Castrén that the present text made it quite clear that immunity from criminal jurisdiction was complete. If some members still thought the text was ambiguous, however, it might perhaps be sufficient to make the second sentence of paragraph 1 into a separate paragraph.

37. With regard to Mr. Albónico's observation, it might be stated in the commentary that civil jurisdiction was to be understood in the broad sense, as including commercial jurisdiction.

38. Mr. BARTOŠ said that the question of territorial jurisdiction over actions for damages arising out of traffic accidents had been raised at the first Vienna Conference by the Netherlands delegation⁹ and had been discussed at length on several occasions since. From what he had been able to learn, insurance for damage caused by motor vehicles was always more expensive for diplomats than for ordinary citizens and in some countries insurance companies would not insure a diplomatic agent unless he first waived his immunity from territorial jurisdiction.

39. Compulsory insurance of motor vehicles already existed in many countries, but it did not apply *ipso jure* to diplomatic vehicles, because of the immunity from jurisdiction. If the Commission wished insurance to be made effectively compulsory also for members of permanent missions to international organizations, he thought it would have to include an express provision in the draft for the future convention. A provision of that kind already existed in a similar Convention binding the countries of the Council of Europe,¹⁰ which made it mandatory to insure all vehicles in the country in which they were registered and contained a clause

⁹ See *United Nations Conference on Diplomatic Intercourse and Immunities, 1961, Official Records*, vol. I, pp. 166 and 170.

¹⁰ *European Treaty Series*, No. 29, Strasbourg, 1969.

making all disputes relating to traffic accidents subject to the territorial jurisdiction, even when diplomats were concerned.

40. In view of the present trend, he was in favour of an express rule in the text rather than a mere recommendation. The provision proposed by the Drafting Committee was not adequate; it was too difficult in practice to make a clear distinction between the use of vehicles for official functions and for private activities. The question deserved closer study and should be dealt with in a separate article.

41. For the moment, however, the Commission had only to decide the general question whether it should recognize that diplomatic agents enjoyed immunity from jurisdiction in that special field too, or whether it should not. If the Commission decided to recognize such immunity, it would have to find a more precise form of words that would leave no doubt about the scope of the immunity, and it should therefore avoid such ambiguous expressions as "official functions".

42. Perhaps Mr. Tammes would explain the precise meaning of the Netherlands proposal, which had been discussed on many occasions in the United Nations General Assembly and at international conferences.

43. Mr. IGNACIO-PINTO said that paragraph 1 (d) should be retained, because it was especially important to protect the citizens of the country in which diplomatic agents had to perform their functions. It was to be regretted that the Vienna Convention on Diplomatic Relations contained no such provision, but the Commission now had an opportunity to improve on what had been done in 1961.

44. With regard to the drafting, it would be better not to mention "official functions", because of the inevitable difficulties that expression would lead to in practice. Nevertheless, he agreed with some other members of the Commission that the text could be submitted to Governments as it stood in order to test their reactions, with a view to subsequently proposing a separate agreement on rules for compulsory insurance. Merely to mention that possibility in the commentary would not be enough; the Commission should submit a definite proposal to Governments that they consider drawing up a separate agreement on the subject.

45. Mr. ROSENNE said he was very concerned over the problem of traffic accidents, which was one of exceptional delicacy. It was the duty of the Commission to strike a balance between the conflicting interests involved—a point to which Mr. Tsuruoka had drawn attention. Before it could reach a decision, however, the Commission would need much more information, particularly on insurance law and practice. It was not a subject on which the Secretariat could be expected to produce a paper; members would have to conduct some private research themselves.

46. There was a strong feeling that there had been a serious gap in the Commission's 1959 draft on diplomatic intercourse and immunities and that it had not been filled in the 1961 Vienna Convention on Diplomatic Relations. At the 1961 Vienna Conference, the delegation of Israel had sponsored a draft on

"Consideration of Civil Claims" which had been adopted as resolution II of the Conference—¹¹ the resolution to which the Special Rapporteur had referred both at an earlier meeting and in paragraph 1 of his commentary on article 33, on consideration of civil claims (A/CN.4/218). The problem had become much more serious since 1961, and in most cities, the volume of traffic and the number of accidents were continually increasing.

47. He had not been at all convinced by the argument that the proposed paragraph 1 (d) introduced the functional concept, which was claimed to be destructive of the principle of immunity. That concept appeared in several other places in the draft.

48. A much more important point was what action governments would have to take to deal with the grave problem of traffic accidents involving diplomatic agents. Reference had been made during the discussion to the question of insurance and to the system of compulsory insurance. From his experience of handling claims for damages arising out of traffic accidents, he could say that the main difficulty was that insurance companies usually required proof of liability before paying any damages. In normal circumstances, proof of liability was provided by the judgement of a competent court; but the existence of diplomatic immunity prevented the insurance system from operating in the normal way. Compulsory insurance could not settle that problem, which was the crucial one.

49. Another serious difficulty was that of determining the proper defendant or respondent in a claim. There were several systems: in some countries, it was the motorist alone; in others it was the individual or individuals jointly or singly responsible for the tort; in yet others, action could be taken against the motorist jointly with the insurance company; lastly, in some legal systems, action could be taken against the insurance company alone.

50. The problem was further complicated by the trend, apparent in some countries, towards bringing insurance for road accidents within the scope of the State insurance system, because of the widespread character of the risks. Nevertheless, even under that system, some judicial determination of the party liable could be required. Moreover, that kind of insurance did not always cover the whole of the damage, which could be very considerable in the case of multiple accidents; and where additional coverage was made available in the form of private insurance, the problem posed by immunity would continue to arise.

51. All things considered, he still thought it was important to include a text on the lines of paragraph 1 (d) in order to put the issue squarely before Governments. In the light of government comments on that sub-paragraph and of the research to be made by members of the Commission, it would be possible to take a decision on second reading. He recognized, however, that members were divided on the question, and if the majority ultimately decided against retaining

¹¹ See *United Nations Conference on Diplomatic Intercourse and Immunities, 1961, Official Records*, vol. II, p. 90.

paragraph 1 (*d*) he would urge that the Commission follow its normal practice of including in the commentary an adequate summary of the present discussion of the text proposed by the Drafting Committee.

52. Mr. ELIAS said that while he agreed with Mr. Kearney on the problem of enforcing the system of compulsory insurance, he did not think an analogy could be drawn between sub-paragraphs (*c*) and (*d*) of paragraph 1. Sub-paragraph (*c*) dealt with the well-known distinction in international law between the acts performed by a diplomatic agent in the exercise of his normal functions and those performed by a diplomatic agent while engaged in trade or in a private professional activity. In sub-paragraph (*d*), on the other hand, it was proposed to draw a distinction between driving a vehicle in the course of official functions and driving outside those functions. It would be extremely difficult to determine, for example, whether driving by a diplomatic agent to visit a colleague should be considered as part of his official functions. For those reasons, he still believed that the best course was to drop sub-paragraph (*d*) altogether.

53. Mr. RAMANGASOAVINA said the Commission must find a middle course between two imperative needs: to ensure that the provisions it adopted did not indirectly permit abuse of privileges and immunities to go unpunished, and to ensure that the victims of accidents were protected. An attempt had been made in paragraph 1 (*d*), as in the preceding articles, to strike a balance by distinguishing between official functions and non-official activities.

54. The compulsory insurance solution would cause serious problems, for in many countries, including Switzerland, insurance companies paid claims only on the strength of a judgement by a competent court. To obtain a judgement when a diplomat was involved, either he had to be asked to waive his immunity, which he was not always willing to do, or the sending State had to be asked to withdraw his immunity, which it was not always willing to do either, or proceedings had to be instituted in the sending State, making use of the *exequatur* which was a very complicated procedure. Moreover, the competence of the court of the sending State might be contested by virtue of the rule *locus regit actum*. Public opinion was against immunity from jurisdiction because so many victims of accidents received no compensation.

55. He was therefore in favour of retaining paragraph 1 (*d*) provisionally to see how Governments reacted. A provision of that kind was already to be found in the draft on special missions and in the Vienna Convention on Consular Relations and its absence from the Vienna Convention on Diplomatic Relations was regrettable.

56. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said he was in favour of retaining paragraph 1 (*d*) for the reasons given by several members of the Commission.

The meeting rose at 1.5 p.m.

1019th MEETING

Friday, 11 July 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor.

Relations between States and international organizations

(A/CN.4/218 and Add.1)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 31 (Immunity from jurisdiction) (continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of article 31 as proposed by the Drafting Committee.

2. Mr. USTOR said that article 31 represented the codification of existing law, in that it provided for complete immunity from criminal and civil jurisdiction.

3. Article 33 (A/CN.4/218), however, added a very important safeguard, for under its provisions, States would undertake to waive immunity in respect of civil claims in the host State "when this can be done without impeding the performance of the functions of the permanent mission". Furthermore, the host State could always impose the requirement of compulsory insurance and the persons enjoying privileges and immunities would have to comply with that requirement by virtue of article 44 (A/CN.4/218/Add.1), which obliged them to respect the laws and regulations of the host State. Those two articles together afforded sufficient protection to the private interests at stake, especially as many countries had a complete social security system which was available to the victims of traffic accidents.

4. It had been asserted that insurance companies might be unwilling to pay compensation to the victim of a traffic accident in the absence of judicial recognition of liability. In those countries where insurance was not in the hands of private enterprise, State-controlled insurance institutions performed a social function and took the necessary steps to ascertain whether a claim was well-founded. The supporters of paragraph 1 (*d*) of article 31 pursued the commendable aim of providing a solution to the problem which might arise in countries where private insurance companies did not perform that function.

¹ See previous meeting, para. 8.

5. Paragraph 1 (d), however, hardly provided a satisfactory solution of the problem and he would continue to oppose it for three reasons. First, it would be a serious departure from the principle of immunity, which was an important principle of international law, based on the sovereign equality of States and on the rule that municipal courts had no jurisdiction over a foreign State. It would be a very grave step to give up any part of the principle of immunity, which was an important element in the maintenance of good relations between States and was essential to the efficient performance of the functions of permanent missions. The sacrifice of such a principle would far outweigh any advantages that might be claimed for the proposed provision.

6. Secondly, an obvious weakness of paragraph 1 (d) was the qualification that the accident must have been caused by a vehicle "used outside the official functions of the person in question", a distinction virtually impossible to apply. Moreover, the gravity of an accident did not depend on the purpose for which the vehicle was being used.

7. Thirdly, a provision such as paragraph 1 (d) provided no guarantee that a court decision in favour of the victim of an accident would in fact be executed; the person enjoying immunity could be transferred to his own country.

8. The proposed provision in fact did no more than pay lip-service to the interests of victims of accidents, while inflicting great damage on the paramount interests of international relations. It would provide no real solution of the problem under discussion; that solution should be sought in other directions, such as co-operation on an international basis between the insurance companies and the social security institutions of the various countries.

9. Mr. ROSENNE said he maintained the view he had expressed at the previous meeting. He had since obtained, through the courtesy of the United Nations Office at Geneva, a copy of a publication by the Swiss Federal Political Department which showed that in 1963, international officials and members of permanent missions had been involved in 67 accidents out of a total of 9,370 in the Canton of Geneva, and in 1964 in 70 accidents out of 9,270. While one vehicle out of every nine in Geneva was involved in an accident each year, the proportion for vehicles belonging to international officials and members of permanent missions was only one in thirty. The relevant passage of that official publication concluded with the following words: "While this difference is largely attributable to the inclusion of motorcycles and motorised bicycles in the statistics, the fact remains that these figures clearly refute the opinion widely held in some quarters that diplomats are dangerous drivers".²

10. Mr. BARTOŠ said that under Yugoslav law, there were two kinds of insurance: social insurance and private insurance. Under the social insurance system the insured enjoyed complete autonomy: they were entitled

to a share of the profits, in the form of improved benefits, but they also had to make good any deficit. Consequently, the social insurance system could not be required to insure anyone and everyone. The private insurance institutions enjoyed a similar autonomy; so much so that they had successfully contested, before the Federal Constitutional Court, a legislative decree obliging them to insure motorists on conditions other than those which they themselves had fixed. The result was that some persons were unable to obtain insurance if they wished to depart from the rules laid down by the Union of Insurance Institutions and even lost the right to hold a driving licence, which was conditional on having an insurance policy. In Yugoslavia there was thus no guarantee that a diplomat would be able to obtain insurance.

11. Mr. ALBÓNICO said he understood the reference to "criminal jurisdiction" in paragraph 1 in a broad sense: the immunity would cover such matters as fines for traffic offences.

12. With regard to the meaning of the expression "civil and administrative jurisdiction" in the same paragraph, he had been satisfied by the explanations given by Mr. Elias that civil jurisdiction should be taken to cover the jurisdiction of commercial courts.

13. The provisions of sub-paragraphs (a) and (b) of paragraph 1 embodied exceptions to immunity from jurisdiction which had been long established in international law. He had some doubts, however, about the provisions of sub-paragraph (c), which dealt with an action relating to "any professional or commercial activity" exercised in the host State. Article 45, on professional activity (A/CN.4/218/Add.1), specified that "The permanent representative and the members of the diplomatic staff of the permanent mission shall not practise for personal profit any professional or commercial activity in the host State". It was therefore difficult to see in what circumstances the provisions of sub-paragraph (c) could apply.

14. With regard to sub-paragraph (d), he maintained his view that it did not provide a satisfactory balance between the two interests involved. It should be dropped, on the understanding that the case it contemplated would be one of those covered by article 33; the sending State would then be required either to waive the immunity or to "use its best endeavours to bring about a just settlement of the claims". The position should be made clear in the commentary on article 33.

15. The CHAIRMAN, speaking as a member of the Commission, said he was against retaining paragraph 1 (d). It had been proposed that the wording should be amended, but it reproduced article 31, paragraph 1 (d) of the draft on special missions word for word, and the Commission would be inconsistent if it altered a formulation which it had itself adopted two years before.³

16. With regard to the substance, the provision would not help to protect citizens of the host State, owing to

² Département Politique Fédéral, Berne, Septembre 1966, "Les organisations internationales et le Canton de Genève: une analyse de leur interdépendance", pp. 54 and 55.

³ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 362.

the difficulty of determining, in the event of an accident, whether the agent involved was or was not performing official functions. A further difficulty arose from the fact that it was not for the courts to decide that issue. Where bilateral relations existed, it was for the host State to decide, but the same did not apply to relations with an international organization; the organization alone was competent to say whether a member of a mission accredited to it was or was not engaged in performing his official functions.

17. It was true the Commission had already proposed an exactly similar text in its draft on special missions, but he very much doubted whether the Sixth Committee would endorse it in the case of permanent missions. To include it in the draft might mean impairing the privileges and immunities not only of members of permanent missions, but also of ordinary diplomats, whom the general public were probably inclined to assimilate to members of permanent missions.

18. He agreed with Mr. Ustor and Mr. Albónico that article 33 would provide a better means of solving the problem; the provision that if the sending State did not waive immunity it must "use its best endeavours to bring about a just settlement of the claims" could be strengthened. Such a provision would make it quite possible to secure compensation for nationals of the host State who were victims of an accident. In Moscow, settlements of that sort were generally reached without difficulty between the Ministry of Foreign Affairs and the embassy to which the diplomatic agent belonged.

19. He was therefore against retaining paragraph 1 (d) and in favour of adding to the commentary an explanation of the position regarding traffic accidents.

20. Mr. KEARNEY, referring to Mr. Albónico's remarks on paragraph 1 (c), said that it had probably been included by the Special Rapporteur to cover the case in which the host State granted permission to exercise a professional activity. Clearly, in that case taxes would be due. Paragraph (2) of the Commission's commentary on article 49 of the draft on special missions⁴ stated that: "Some Governments proposed the addition of a clause providing that the receiving State may permit persons referred to in article 49 of the draft to practise a professional or commercial activity on its territory. The Commission took the view that the right of the receiving State to grant such permission is self-evident."

21. With regard to paragraph 1 (d), he believed that its wording was capable of improvement, but he agreed with the Chairman that, since it had been accepted for special missions, it was undesirable to alter it at the present stage. He would urge that the provision be retained, with a view to obtaining comments by Governments to show whether they approved of its inclusion or not.

22. He had been struck by the Chairman's remarks regarding the ease with which claims arising out of traffic accidents involving diplomats were settled in Moscow. Those remarks well illustrated the difference

between diplomats covered by the 1961 Vienna Convention on Diplomatic Relations⁵ and members of permanent missions who would be covered by the present draft. In the case of diplomats, the problem was a bilateral one and the receiving State could always declare a diplomat *persona non grata* if the ambassador of his country failed to co-operate in reaching a satisfactory settlement. The host State of an international organization had no such remedy at hand and was therefore unable to obtain such results.

23. It had been suggested that article 33, on consideration of civil claims, would provide a solution of the problem with which paragraph 1 (d) of article 31 was intended to deal. For article 33 to do that, however, its provisions would have to be amended. They were at present worded merely as an expression of hope and they would need to be put in the form of a binding commitment for the sending State. The concluding words "shall use its best endeavours to bring about . . ." would have to read "shall bring about a just settlement of the claims".

24. The CHAIRMAN asked whether members agreed with Mr. Eustathiades that the term "civil jurisdiction" also covered commercial jurisdiction, and that a statement to that effect should be included in the commentary.⁶

25. Mr. BARTOŠ said that once the commentary had gone the text would not be explicit enough. In some countries the two jurisdictions differed completely in regard to the value of preparatory work.

26. Mr. CASTRÉN said it was true that the commentary would go, but the preparatory work could always be consulted in case of doubt.

27. Despite the arguments put forward by the supporters of paragraph 1 (d), he thought it would be better not to keep it, but simply to draw the attention of Governments, in the commentary, to the fact that the provision had given rise to a long discussion and that opinion had been very much divided.

28. He agreed with Mr. Kearney that it was desirable to strengthen the wording of article 33.

29. Mr. ELIAS said he noted that Mr. Albónico had been satisfied with his explanation that the term "civil jurisdiction" also covered commercial jurisdiction.

30. It remained for the Commission to decide whether it wished to retain paragraph 1 (d). A decision should be taken one way or the other, in order to direct the Drafting Committee. His own view was that the subparagraph should be dropped. The references that had been made to article 33 were very pertinent. If that article were amended as suggested by Mr. Kearney, it would be very surprising if paragraph 1 (d) of article 31 were retained also.

31. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said it was clear that opinions were very divided. As the Commission usually preferred a unanimous decision to a vote and as, in the present instance,

⁴ *Ibid.*, p. 367.

⁵ United Nations, *Treaty Series*, vol. 500, p. 96.

⁶ See previous meeting, para. 6.

it did not have to decide on a final form of words, but simply to draw the attention of Governments to a question and submit a text for their consideration, the best course might perhaps be to keep sub-paragraph (d) of paragraph 1 in brackets in order to show plainly where it would be placed and how it would be worded, and then to explain the reasons for it in the commentary, where Governments could be asked whether they wished it to be retained or not.

32. Mr. BARTOŠ said he supported Mr. Castañeda's proposal, on the understanding that the Governments would be clearly asked in the commentary to state whether they considered that the notion of civil jurisdiction included commercial jurisdiction. The Special Rapporteur should also be asked to point out to Governments that special commercial jurisdiction had not been mentioned either in the earlier Conventions or in the present draft, because the Commission had taken the view that it was covered by civil jurisdiction. Incidentally, that was a further argument against adding a reference to separate commercial jurisdiction at the present stage, since it might give the impression that such jurisdiction was excluded from the earlier Conventions.

33. Mr. RAMANGASOAVINA said that administrative jurisdiction had been expressly mentioned because in some countries there was recourse to a special jurisdiction when the government was a party to a suit. Civil jurisdiction was a very general notion and if the Commission wished to specify everything it covered, it would not be enough to add a reference to commercial jurisdiction. The various courts which came under civil jurisdiction, such as commercial courts, social courts and labour courts, were more in the nature of a specialization of competence. As a general rule, the term "civil jurisdiction" was used in contradistinction to criminal jurisdiction.

34. Mr. ROSENNE said he agreed with the interpretation of the words "civil and administrative jurisdiction" given by the previous speaker.

35. With regard to paragraph 1 (d), he agreed that it would be unfortunate and unnecessary to divide the Commission by a vote at the present stage and he supported Mr. Castañeda's suggestion that the provision be left in brackets with an appropriate explanation in the commentary.

36. Mr. RUDA shared the view that it was desirable to draw the attention of Governments to the serious problem that the Commission had been discussing. That aim could be achieved either by the method suggested by Mr. Castañeda, or by putting the text of the proposed sub-paragraph (d) in the commentary, with the explanation that opinion in the Commission had been divided on the subject. To retain the provision in brackets in the article itself might give the impression that the Commission was inclined to favour its inclusion.

37. If the majority preferred the method suggested by Mr. Castañeda, however, he would not oppose it, provided it was made clear in the commentary that the Commission had not taken any decision in the matter. But whatever comments might be made by Governments, the Commission would remain free to take whatever

decision it wished. The fact that the majority of comments were for or against a provision was not binding upon the Commission.

38. Mr. BARTOŠ said that formerly codes had made a general distinction only between civil procedure and criminal procedure, but for the past twenty years or so there had been a growing tendency to draw a finer distinction between courts according to their competence. In Switzerland, for instance, there was even a special court of final appeal for insurance cases, which was distinct from the federal court of final appeal. Other countries had set up special courts for commercial cases and even for housing cases. It was obviously impossible to make provision for all those details in the draft articles. It would be enough to specify in the commentary that the term "civil jurisdiction" was to be understood in the old private law sense, and that the distinction intended was between two broad classes of action, not between two kinds of court. The Special Rapporteur should be instructed to include that idea in the commentary.

39. Mr. ALBÓNICO said he noted that the Commission agreed that the expression "civil jurisdiction" should be interpreted broadly as covering the jurisdiction of, for example, commercial courts, insurance courts and labour courts. There was therefore no need to change the wording of article 31 on that point, it being understood that an explanation would be given in the commentary.

40. With regard to paragraph 1 (c), he was satisfied with the explanation given by Mr. Kearney, but would like to have it reproduced in the commentary to make it clear that the provision was intended to cover cases in which the host State granted permission for the exercise of a professional or commercial activity.

41. With regard to paragraph 1 (d), it had been generally agreed that the commentary should state that opinion in the Commission had been divided; some members wished to retain the paragraph, while others, like himself, would prefer to see it dropped, provided that it was made clear in the commentary on article 33, that that article covered the case.

42. The CHAIRMAN said it was agreed that the Special Rapporteur would explain in the commentary the difference between the jurisdictions referred to in the draft articles.

43. No drafting change to paragraph 1 (d) had been proposed, so he concluded that the Commission wished to retain it in the form proposed by the Drafting Committee.

44. In the light of the discussion, he suggested that sub-paragraph (d) be kept in brackets and that, in the commentary, the Special Rapporteur should draw the attention of Governments to the fact that the Commission had discussed that provision at length, but had been unable to reach any decision because opinions differed too widely.

It was so agreed.

Subject to that reservation, article 31 was adopted.

ARTICLE 32 (Waiver of immunity)⁷

45. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 32.

46. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

*Article 32**Waiver of immunity*

1. The immunity from jurisdiction of the permanent representative or members of the diplomatic staff of the permanent mission and persons enjoying immunity under article 39 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by the permanent representative, by a member of the diplomatic staff of the permanent mission or by a person enjoying immunity from jurisdiction under article 39 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

47. A number of minor drafting changes had been made at the request of members of the Commission. In paragraph 1 the words "permanent representatives" and "permanent missions" had been put in the singular. In paragraph 3 the words "of the" had been substituted for the words "of a" before "permanent mission".

48. The Drafting Committee had examined one important substantive matter, but that had not led to any change in the text. At the beginning of paragraph 1 it was stated that the sending State might waive the immunity from jurisdiction. It had been asked whether that immunity also applied to the obligation to give evidence as a witness. The Drafting Committee had thought it unnecessary to decide the point, since it was only a technical question of procedure. The Special Rapporteur had, however, mentioned to the Drafting Committee that it would be well to specify in the commentary on article 32 that paragraph 2 also applied to article 31, paragraph 2, which concerned giving evidence. The Drafting Committee had considered that it would be better to expand the commentary to explain that the immunity from jurisdiction mentioned in article 32 applied to all the immunities listed in article 31.

49. Several members of the Drafting Committee had asked whether it would not be better to state that point in the text of the article itself, but the majority had been against doing so. In any case, the difference between the two solutions was not very great: the legal consequence of not mentioning all the immunities in detail in article 32 could not be to exclude waiver of immunities other than immunity from jurisdiction in the strict sense.

50. The CHAIRMAN, speaking as a member of the Commission, said that article 32 of the Vienna Convention on Diplomatic Relations⁸ was worded in the same way as article 32 of the Special Rapporteur's draft and did not specifically mention giving evidence as a witness. Any express statement in the present draft might lead to article 32 of the Convention on Diplomatic Relations being interpreted as making no provision for the possibility of waiving immunity from giving evidence, whereas that article had the same meaning as was given by the Special Rapporteur to article 32 of his draft.

51. The position was perfectly clear: a State could always waive immunity, including immunity from giving evidence. The latter point should therefore be mentioned only in the commentary.

52. Mr. KEARNEY said that in some legal systems the initiation of proceedings would itself constitute a waiver of immunity from having to testify, for example, in pre-trial examinations. In such cases, if a plaintiff refused to testify, the court would entertain a motion by the defence to quash the proceedings. Legal systems differed so widely in that respect, however, that he did not think the Commission could deal with the matter, either in the text of the article or in the commentary. Unless it was prepared to carry out a far-reaching study of the problem, the Commission should limit itself to a very general statement in the commentary.

53. Mr. ALBÓNICO noted that under paragraph 3 the initiation of proceedings by the permanent representative precluded him from invoking "immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim". He wondered whether that provision referred only to immunity from civil jurisdiction or also to immunity from criminal jurisdiction. If, for example, a counter-claim or counter-charge was advanced against a criminal action initiated by the permanent representative, would he be entitled to plead immunity from criminal jurisdiction?

54. Mr. EUSTATHIADES said that article 32 should be read together with article 31.

55. The points raised by Mr. Kearney and Mr. Albónico were extremely delicate. Even if they were elucidated in the course of the discussion, the Commission could go no further than embodying its conclusions in the commentary, since article 32 followed the analogous articles in the Vienna Conventions; the Chairman had pointed out the disadvantages of using different wording.

56. The question of giving evidence was simpler. The solution proposed by the Drafting Committee was the wisest one. It left aside the problem of possible differences in internal law regarding the sphere of immunity; but if immunity from giving evidence was regarded as an integral part of immunity from jurisdiction, the Drafting Committee's formulation solved the problem.

57. That solution had a further advantage. In some kinds of legal proceedings, the sending State might have something to say on the question whether a permanent representative or member of the diplomatic staff of a

⁷ For previous discussion, see 996th meeting, para. 10.

⁸ United Nations, *Treaty Series*, vol. 500, p. 112.

permanent mission could exercise his right to testify or to refuse to testify. Before giving evidence, the representative or member concerned might then wish to consult his government to find out whether it authorized him to do so or not. The solution proposed by the Drafting Committee covered all such contingencies.

58. Mr. ROSENNE said that article 32 stated the law concerning waiver of immunity as he understood it. The Commission should be extremely careful not to disturb an existing practice which had always worked satisfactorily in many different circumstances and in many different legal systems. In the commentary, in particular, the Commission should avoid creating possible theoretical difficulties involving what was sometimes called the "inter-temporal law". The Special Rapporteur's commentary was perfectly adequate and should be left as it was.

59. Mr. CASTRÉN said it would be better not to change a text which was in substance the same as that of the Vienna Convention on Diplomatic Relations. He agreed that caution should be exercised in the commentary.

60. The question of giving evidence should not arise, since article 31 was entitled "Immunity from jurisdiction". Even though the title was not decisive for the interpretation of the article, it could not fail to affect it.

61. The counter-claims mentioned in paragraph 3 undoubtedly related to civil cases. In any event, it would be better not to try to be more specific. The record of the discussion should suffice.

62. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee had not considered the question of counter-claims from the angle suggested by Mr. Albónico.

63. Speaking as a member of the Commission, he observed that article 32 reproduced the Vienna text. No categorical reply could be given to the question regarding immunity from criminal jurisdiction, for everything depended on the laws and regulations of each country. Counter-claims could be brought only in civil suits, but under some legal systems there could be a criminal element involved in a civil suit. That, however, was a special question which could not be regulated in a general text.

64. Mr. ELIAS, referring to Mr. Kearney's remarks, said it was often very difficult to induce members of a diplomatic mission to testify in the courts of the host State, even when it was in their own interest to do so. In his own country, for example, an embassy whose premises had been burgled had been unwilling to waive its immunity from jurisdiction to the extent of testifying against the criminals in the local court and it had been suggested that the court should send a commission to the embassy to take its evidence—a procedure which was not permitted by the local law in such matters.

65. With regard to the question raised by Mr. Albónico, it seemed to him that, in Anglo-Saxon legal systems at least, a counter-claim of the kind referred to in paragraph 3 could be brought only in civil cases, since it

was inconceivable that the defendant in a criminal case could file a counter-claim against the State.

66. Mr. USTOR said the Commission was in general agreement that it would not be desirable to change the wording of article 32, since it was based on the corresponding article of the Vienna Convention on Diplomatic Relations and any change in it might have repercussions on the interpretation of that Convention.

67. With regard to the commentary, he thought that the Special Rapporteur should be free to decide whether or not he wished to include any of the suggestions made in the Commission and in the Drafting Committee, some of which raised certain difficulties concerning the interpretation of the Vienna Convention.

68. As to the point raised by Mr. Elias, a waiver of immunity from jurisdiction, including immunity from having to testify in the courts of the host State, must always be express. A sending State might waive such immunity to the extent that it would permit evidence to be given in the house or office of the permanent mission, and the court would then have to decide whether it would accept such a waiver.

69. On the point made by Mr. Kearney, he agreed that the initiation of proceedings by the permanent representative amounted to submission to the jurisdiction of the courts of the host State. It would be for the sending State, therefore, to decide whether it wished to permit its permanent representative to initiate proceedings, in the full knowledge that such an action would automatically involve a waiver of immunity in respect of any counter-claim.

70. Mr. ALBÓNICO said it was clear that article 31 dealt with immunity from proceedings against the members of a permanent mission. But it was equally clear that as soon as a member himself initiated proceedings against a national of the host State, he was submitting himself to the jurisdiction of its courts and could not invoke immunity from any counter-claim.

71. Nevertheless, he still had some doubts about the exact scope of article 32, paragraph 3, for in the Latin-American legal system there were actions, such as those for slander and libel, against which the only possible defence was a counter-claim or counter-charge of a criminal nature. In such cases he was not sure to what extent a member of a permanent mission would enjoy immunity.

72. Immunity from having to give evidence was clearly established in article 31, paragraph 2, and any waiver of that immunity under article 32 would certainly have to be express.

73. Mr. RAMANGASOAVINA said he was not in favour of going into too much detail, since that might alter the meaning of the text or raise fresh problems.

74. On the question of giving evidence, when the sending State waived its representative's immunity, the waiver also applied to the obligation to give evidence. In any case, since the waiver was express, the sending State could always specify its scope.

75. Paragraph 3 raised a question of procedure. The French term "*demande reconventionnelle*", like the

English "counter-claim", could only apply to a civil suit; it was a claim similar to that of the original plaintiff and was in some sort its counterpart.

76. In criminal procedure, on the other hand, it was hard to see how a diplomat bringing a claim for assault and battery, for example, could avoid the issue if his opponent maintained that the assault had been mutual and offered to prove it. Diplomats should be cautious about initiating proceedings. Before waiving immunity from jurisdiction, a sending State should therefore consider whether the proceedings might not injure its reputation.

77. The CHAIRMAN, speaking as a member of the Commission, stressed that immunity from criminal jurisdiction was an absolute rule firmly established in international law by custom, by several centuries of practice and by a number of conventions in force, including the Vienna Convention on Diplomatic Relations. That rule was reproduced in article 31, paragraph 1 of the present draft. No other interpretation was possible, even in connexion with article 32, paragraph 3. To initiate proceedings meant to initiate civil proceedings, and a counter-claim, likewise, could only be a civil claim. The Commission should not depart from the principle that immunity from criminal jurisdiction was absolute.

78. Speaking as Chairman, he noted that no member of the Commission had proposed any amendment to the text of article 32. He therefore suggested that the Commission adopt the article, on the understanding that the Special Rapporteur would reconsider the commentary in the light of the discussion and that the Commission would revert to the commentary in due course.

Subject to that reservation, article 32 was adopted.

The meeting rose at 1.5 p.m.

1020th MEETING

Monday, 14 July 1969, at 3.20 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Ustor, Mr. Yasseen.

Other business

[Item 8 of the agenda]

1. The CHAIRMAN invited Mr. Rosenne to address the Commission on a matter coming under item 8 of the agenda.

2. Mr. ROSENNE said that, in paragraph 69 of the Commission's report for 1965, reference was made to an examination which the Commission had undertaken of certain suggestions regarding the presentation of its records in the *Yearbooks*.¹ He believed that all members would recognize the very marked improvements which had been made in the Commission's records since then and that it would be right that the Commission's appreciation of the skill and devotion shown by all those who collaborated in producing those records—the precis-writers, revisers, translators, editors and responsible editor-in-chief—should be appropriately noted. The Commission might also take the opportunity to commend the responsible services of the Secretariat for the excellence of the presentation of the official records of the first session of the United Nations Conference on the Law of Treaties² which, he noted, followed the same pattern as had been evolved for the Commission's *Yearbook*.

3. In paragraph 64 (a) of the Commission's report for 1965, it was implied that volume II of the *Yearbook* was no less important than volume I. He mentioned that because, although volume I was now being issued fairly promptly, there seemed to be excessive delays in the production of volume II, and he hoped that series would not be allowed to fall into arrears.

4. In view of the changes which were continually taking place in the presentation of United Nations documents and records, it was important to remember that the General Assembly, in its resolution 987 (X) of 3 December 1955, had placed on the Commission certain responsibilities regarding the editing of the *Yearbook*—responsibilities which the Commission had exercised from time to time, notably in 1956 and in 1965. It could therefore be assumed that the Secretariat would not introduce changes in the presentation of the material in either volume of the *Yearbook* without first bringing the matter before the Commission, as had been done in the past.

5. The CHAIRMAN said that the Commission was satisfied with the presentation of its *Yearbooks*; the editors should therefore make no changes.

Relations between States and international organizations

(A/CN.4/218)

[Item 1 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 33 (Settlement of civil claims)³

6. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 33.

¹ See *Yearbook of the International Law Commission*, 1965, vol. II, p. 195.

² *United Nations Conference on the Law of Treaties, First Session, Official Record*.

³ For previous discussion, see 996th meeting, para. 17.

7. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 33

Settlement of civil claims

The sending State shall waive the immunity of any of the persons mentioned in paragraph 1 of article 32 in respect of civil claims in the host State when this can be done without impeding the performance of the functions of the permanent mission. If the sending State does not waive immunity, it shall use its best endeavours to bring about a just settlement of such claims.

8. The only changes made by the Drafting Committee were drafting changes, but they were of some importance. The article stated two rules. The first was that the sending State should waive the immunity referred to in the article if it could do so without impeding the performance of the functions of the permanent mission. The second was that, if the sending State did not waive immunity, it should use its best endeavours to bring about a just settlement of claims. The Drafting Committee had thought that each of those rules should be stated in a separate sentence and had amended the text accordingly.

9. The Drafting Committee had also made certain alterations in the French version in order to bring it closer to the English and Spanish versions: in the first sentence, it had replaced the word "*renoncera*" by "*doit renoncer*" which rendered the real meaning of the sentence better, seeing that it was followed by a condition. In the second sentence, the Committee had replaced the word "*s'efforcera*" by the words "*doit faire tous ses efforts*", an expression which corresponded better to the English "shall use its best endeavours". The Committee had also slightly amended the title of the article.

10. Mr. NAGENDRA SINGH said he supported article 33 as proposed by the Drafting Committee. The article was based on article 42 of the draft on special missions,⁴ but the wording had been improved; the meaning had been made clearer by breaking up the text into two sentences.

11. Mr. CASTRÉN said he approved of the new wording of the text and of the title of the article.

12. The CHAIRMAN, speaking as a member of the Commission, said it would be better to keep to the wording of article 42 of the draft on special missions. The new text proposed by the Drafting Committee was perhaps an improvement, but it would be necessary to explain in the commentary why the wording of the corresponding article of the draft on special missions had not been adopted.

13. Mr. ELIAS said he supported the Drafting Committee's text, which did not depart in substance from article 42 of the draft on special missions and was

clearer in meaning. Since there had been no alteration of substance, there was no need to explain in the commentary the changes which had been made in the wording.

14. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that article 42 of the draft on special missions had not yet been considered and approved by the Sixth Committee, so it had not such authority that it must be taken as a model. The changes made by the Drafting Committee were improvements and the text could be adopted as proposed. Furthermore, the Sixth Committee might usefully take the improvements into account when it came to consider article 42 of the draft on special missions.

15. Mr. ROSENNE said he associated himself with the remarks made by Mr. Elias on the drafting of article 33 and by Mr. Castañeda on the status of article 42 of the draft on special missions.

16. The CHAIRMAN said that, if the Commission wished to adopt article 33 in its present text, it should perhaps, in the French version, replace the words "*doit renoncer*" in the first sentence by "*renonce*" and the words "*doit faire tous ses efforts*" in the second sentence by "*s'efforce*".

17. Mr. IGNACIO-PINTO said that the Drafting Committee had considered that the sending State, when it found that it could not waive the immunity, was normally bound to try to reach a just settlement of the dispute. The use of the expression "*doit faire*" in the French version strengthened that obligation.

18. Mr. YASSEEN observed that in French an obligation was usually expressed in the present tense. He saw no reason to strengthen the obligation.

19. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee had considered several possible formulations. The present indicative was the tense normally used in French to express an obligation and it was so used in many other provisions of the draft. In the present case, however, there was no unconditional obligation, but only an injunction which did not operate unless a certain condition was fulfilled. The Drafting Committee had been unanimous in that view.

20. The CHAIRMAN said he noted that the majority of the Commission favoured the text proposed by the Drafting Committee.

21. Mr. YASSEEN said he was not convinced by the explanations given by the Chairman of the Drafting Committee. It was natural that the sending State should be obliged to seek a just settlement only in the event of its not waiving the immunity. Moreover, the English "shall" had always been translated into French by the present tense.

22. The CHAIRMAN, speaking as a member of the Commission, supported Mr. Yasseen's remarks.

23. Speaking as Chairman, he suggested that the Commission adopt article 33.

Article 33 was adopted.

⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 365.

ARTICLE 34 (Exemption from social security legislation)⁵

24. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 34.

25. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 34

Exemption from social security legislation

1. Subject to the provisions of paragraph 3 of this article, the permanent representative and the members of the diplomatic staff of the permanent mission shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the host State.

2. The exemption provided for in paragraph 1 of this article shall also apply to persons who are in the sole private employ of the permanent representatives or of a member of the diplomatic staff of the permanent mission, on condition:

(a) That such employed persons are not nationals of or permanently resident in the host State; and

(b) That they are covered by the social security provisions which may be in force in the sending State or a third State.

3. The permanent representative and the members of the diplomatic staff of the permanent mission who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the host State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the host State provided that such participation is permitted by that State.

5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

26. Apart from stylistic changes such as the substitution of the definite for the indefinite article before "permanent representative", the Drafting Committee had made no changes in article 34 except in paragraphs 4 and 5 of the English version, which it had brought into line with the corresponding provisions of article 33 of the Vienna Convention on Diplomatic Relations;⁶ the French and Spanish versions already followed that article.

27. The CHAIRMAN suggested that the Commission adopt article 34.

Article 34 was adopted.

ARTICLE 35 (Exemption from dues and taxes)⁷

28. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 35.

29. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 35

Exemption from dues and taxes

The permanent representative and the members of the diplomatic staff of the permanent mission shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) Indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) Dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the permanent mission;

(c) Estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 41;

(d) Dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State;

(e) Charges levied for specific services rendered;

(f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 25.

30. As several members of the Commission had observed during the first reading of article 35, the proviso in sub-paragraph (f), "subject to the provisions of article 25", might lead to difficulties of interpretation. The proviso was an exception to the rule stated in sub-paragraph (f), a rule which was itself an exception to that stated in the opening sentence of the article. The proviso was also contained in article 34, sub-paragraph (f) of the Vienna Convention on Diplomatic Relations. The Committee had left sub-paragraph (f) unaltered, so that the Commission could ask Governments, in its commentary, whether they had found any practical difficulties in applying the rule as stated in the Vienna Convention.

31. In order to explain the nature of the dues and taxes referred to in sub-paragraph (f), the Committee had thought that the Commission might stress, in the commentary, the difference between that sub-paragraph and sub-paragraph (e), which related only to dues and taxes levied for specific services rendered.

32. Mr. ROSENNE said that article 25 itself had caused considerable difficulty to the Commission, which had invited the Drafting Committee to re-examine it. It might therefore be appropriate to reserve sub-paragraph (f) of article 35 until the Drafting Committee had prepared a revised text for article 25; the Commission could then examine the two texts together.

33. Mr. NAGENDRA SINGH said he supported that suggestion. It would help the Commission to formulate sub-paragraph (f) properly if it had the revised text of article 25 before it.

34. Mr. USTOR said that the Drafting Committee had interpreted the situation in the following manner: Under article 35, the permanent representative was not exempted from the dues and taxes mentioned in sub-paragraph (f); he therefore had to pay those dues and

⁵ For previous discussion, see 996th meeting, para. 23.

⁶ United Nations, *Treaty Series*, vol. 500, para. 112-114.

⁷ For previous discussion, see 996th meeting, para. 25.

taxes in the normal way. In the case mentioned in paragraph 1 of article 25, however, if any dues or taxes of the type there mentioned were sought in respect of the permanent mission's premises, they would not be payable. In the circumstances, the Drafting Committee had considered it appropriate to retain the text of subparagraph (f), which was based on the corresponding text of the 1961 Vienna Convention on Diplomatic Relations.

35. Mr. CASTAÑEDA (Chairman of the Drafting Committee) suggested that the Commission approve article 35 on the understanding that if the Drafting Committee made any changes in article 25 which affected article 35, it might be amended. Otherwise, the text would be adopted as approved.

36. Mr. RUDA said he agreed with the Chairman of the Drafting Committee. There would have to be a substantial change in the structure of article 25 to make any alteration necessary in subparagraph (f) of article 35.

37. As he recalled it, the main problem which had arisen in connexion with article 25 was whether the exemption of the premises of the mission was to be an exemption *in rem* or *in personam*. In all probability, the provisions of article 25 would take the form of an exemption *in rem*, and subparagraph (f) of article 35 could then remain as it stood.

38. The CHAIRMAN suggested that the Commission adopt subparagraphs (a) to (e) and provisionally approve subparagraph (f), to which it might revert when the Drafting Committee had made its final examination of article 25.⁸ He further suggested that the Special Rapporteur be requested to draw the attention of Governments to the matter in the commentary.

It was so agreed.

ARTICLE 36 (Exemption from personal services)⁹

39. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 36.

40. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 36

Exemption from personal services

The host State shall exempt the permanent representative and the members of the diplomatic staff of the permanent mission from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

41. The Committee had not made any changes in article 36. It suggested, however, that it be stressed in the commentary that the expression "military obliga-

tions" covered military obligations of all kinds, and that the enumeration which followed had been included only by way of example.

42. Mr. ROSENNE said he wished to raise a point of substance. He did not believe it was correct to say that only members of the diplomatic staff of the permanent mission were exempt from personal services. He believed that members of the administrative and technical staff and members of the service staff of the mission were also exempt, if they were nationals of the sending State.

43. Mr. USTOR said that the point raised by Mr. Rosenne would be met by the provisions of article 39 (A/CN.4/218).

44. Mr. BARTOŠ said he agreed with the Chairman of the Drafting Committee about the explanation of the expression "military obligations" to be included in the commentary. More particulars should be provided.

45. The commentary should also deal with the problem of civil obligations in greater detail and cite facts. One question that might be asked was whether the term "public services" included services of a humanitarian character. If, for instance, a diplomat failed to assist an injured person on the road, was he liable to be declared *persona non grata* for that reason?

46. Mr. ROSENNE, thanking Mr. Ustor for his explanation, said that the provisions of article 39 would probably cover the point, but the commentary on article 36 should refer to article 39 with regard to persons other than those mentioned in the text.

47. The CHAIRMAN, speaking as a member of the Commission, said that the question had already been considered by the Commission when it had examined the corresponding article of the draft which had served as a basis for the Vienna Convention on Consular Relations. The commentary on article 36 might therefore reproduce the commentary then adopted,¹⁰ or simply refer to it; if the Commission found that it was not sufficiently explicit, the Special Rapporteur could expand it.

48. Speaking as Chairman, he suggested that the Commission adopt article 36 and request the Special Rapporteur to expand the commentary in the light of the discussion.

It was so agreed.

Article 36 was adopted.

ARTICLE 37 (Exemption from customs duties and inspection)¹¹

49. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 37.

50. Mr. CASTAÑEDA (Chairman of the Drafting

⁸ See 1037th meeting, para. 41.

⁹ For previous discussion, see 996th meeting, para. 31.

¹⁰ See *Yearbook of the International Law Commission, 1961*, vol. II, p. 122, article 51.

¹¹ For previous discussion, see 996th meeting, para. 33.

Committee) said that the Drafting Committee proposed the following text:

Article 37

Exemption from customs duties and inspection

1. The host State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

(a) Articles for the official use of the permanent mission;

(b) Articles for the personal use of the permanent representative or a member of the diplomatic staff of the permanent mission or members of his family forming part of his household, including articles intended for his establishment.

2. The personal baggage of the permanent representative or a member of the diplomatic staff of the permanent mission shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. Such inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

51. The Drafting Committee had made only drafting changes in the text of article 37. In the English version of paragraph 1 (b), it had replaced the indefinite by the definite article before "permanent representative". In the French version of paragraph 2, it had replaced the expression "*sont exemptés*" by "*sont exempts*". The Committee had preferred the latter wording, which appeared in several other places in the draft and which indicated that the exemption was a matter of course; the expression "*sont exemptés*" might give the impression that some special action on the part of the host State was required to give effect to the exemption.

52. The CHAIRMAN suggested that the Commission adopt article 37.

Article 37 was adopted.

ARTICLE 38 (Laws of the host State and nationality)¹²

53. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 38.

54. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 38

Laws of the host State and nationality

Members of the permanent mission not being nationals of the host State, and members of their families forming part of their household, shall not, solely by the operation of the law of the host State, acquire the nationality of that State.

55. Only the title of the article had been changed. The Drafting Committee had thought that the Special Rapporteur's title, "Acquisition of nationality", did not

faithfully reflect the content of the article, which dealt rather with non-acquisition of nationality. After hesitating between several forms of words, the Drafting Committee had decided to propose the title "Laws of the host State and nationality".

56. The Drafting Committee had also considered that the article would be better placed between articles 40 and 41.

57. The Special Rapporteur had informed the Drafting Committee that, in view of its importance, he intended to expand the commentary on article 38. The Drafting Committee would like the Special Rapporteur to clarify, in the commentary, the meaning of the expression "solely by the operation of the law of the host State".

58. Mr. ROSENNE said he was not satisfied either with the title now proposed or with the original title. Neither clearly reflected the contents of the article. Perhaps, instead of referring to the laws of the host State, the title should refer to non-acquisition of the nationality of that State, but he was reluctant to propose a negative formula.

59. Mr. YASSEEN said that the title proposed by the Drafting Committee should be made more specific. It would be going too far to talk of non-acquisition, so he proposed "Laws of the host State and acquisition of nationality". It should be specified in the commentary that the word "laws" covered both laws in the strict sense, and regulations and constitutional provisions.

60. He was glad to see that an important principle, which had many practical consequences, had been maintained in the form of a draft article.

61. Mr. CASTRÉN said that the title proposed by the Drafting Committee was better than that chosen by the Special Rapporteur, although he had followed the example of the 1961 Optional Protocol concerning acquisition of nationality.¹³ The wording proposed by Mr. Yasseen was preferable, as it was more precise.

62. He agreed with the Drafting Committee's recommendation regarding the position of the article.

63. Mr. BARTOŠ said he was not in favour either of the title proposed by the Special Rapporteur or of any short title which *a priori* implied a negative approach. All that had to be precluded by the text was the forced attribution of nationality by the application of *jus soli* to persons who resided in the territory of the host State only because of their diplomatic functions, in particular, to the children of diplomats born in the territory. On the other hand, the laws of the host State might apply when, for example, the daughter of a diplomat married a national of the host State, even if she enjoyed privileges and immunities. The whole question needed further detailed consideration.

64. Mr. RUDA said he approved of the substance of article 38. He also considered that its provisions should be part of the draft articles themselves, instead of forming a separate optional protocol, like that to the 1961 Vienna Convention on Diplomatic Relations.

¹² For previous discussion, see 996th meeting, para. 36.

¹³ See United Nations, *Treaty Series*, vol. 500, p. 224.

65. He approved of the position proposed for the article by the Drafting Committee.

66. The commentary should be fuller and more explicit, since article 38 dealt with a problem of great political and practical importance.

67. He agreed that the title should be changed, but he did not favour a negative formula. Consideration might perhaps be given to some such wording as "Laws of the host State on the acquisition of nationality".

68. Mr. ALBÓNICO said he was not satisfied with the title. Article 38 was not an exhaustive study of the problem of nationality; it referred only to certain members of the permanent mission. Moreover, the article itself should be worded in affirmative rather than in negative terms, for it expressed a specific idea which was to be found in international doctrine and practice and could be generally accepted.

69. It might, perhaps, be useful to add a clause definitely excluding from the operation of the law of the host State such acts as marriage, adoption and legitimation. In any case, some express reference to those cases should be given in the commentary.

70. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said he understood the members' doubts about the title. It was only for want of something better that the Drafting Committee had decided on the wording it had proposed to the Commission. Personally, he believed that the core of article 38 was the non-acquisition of nationality, so that a negative formulation seemed inevitable.

71. Mr. RAMANGASOAVINA said that the question of the title was of secondary importance. It was the wording of the article that would have to be changed, in order to get rid of a negative form which seemed to preclude all possibility of acquiring the nationality of the host State, whereas, as had already been pointed out, that possibility subsisted.

72. He suggested that the article be reworded to read: "The laws of the host State cannot have the effect of imposing the nationality of the host State on members of the permanent mission through the mere fact of their presence in its territory". That would expressly preclude the attribution of nationality based on *jus soli*, which was the rule most often adopted when a territory became independent.

73. Mr. USTOR suggested that the title of article 38 be redrafted on the lines of the titles of articles 34, 35, 36 and 37 to read: "Exemption from nationality laws".

74. Mr. ALBÓNICO said that the nationality laws of many South American countries made an express exception in the case of foreign diplomats.

75. Mr. BARTOŠ said that the formerly very well-known French jurist André Weiss, who had been an authority on nationality, had considered nationality to be a contractual relationship between the individual and the State—an idea which had been contested even at that time—and had firmly rejected all compulsory attribution of a nationality.

76. It was recognized, however, that States had the right to make rules governing nationality within their territory, and the only persons protected against the compulsory attribution of nationality were diplomats and their families. He wondered whether the Commission could not adopt Mr. Ustor's proposal for the title of the article. Either the title should be very vague, in which case the content of the article had better be worded with great precision, or the title should bring out clearly that it was the compulsory attribution of nationality which was ruled out. The nationality of the host State could, of course, always be acquired by voluntary naturalization or marriage.

77. The negative formula and the positive formula both had their advantages and disadvantages, but he was nevertheless prepared to support Mr. Ustor's proposal.

78. Mr. ELIAS said he agreed with Mr. Ustor that a short, crisp title along the lines of those of the preceding articles might be the best solution.

79. With regard to the article itself, he thought that the present wording was not sufficient to cover cases where the daughter of a member of the permanent mission married a national of the host State and where, under the laws of that State, foreign women were obliged to take the nationality of their husbands. The text was not satisfactory.

80. Mr. YASSEEN said he agreed that the text of the article was not precise enough, considering what it was intended to express. It was very seldom that nationality was conferred solely by the operation of the law of the host State; that would require a text providing that a given person, designated by name, acquired the nationality of the host State by virtue of that text. Generally, the law provided that nationality was acquired as a result of some specific fact or act, which thus constituted a condition for operation of the law. Fulfilment of that condition might be wholly involuntary, as in the case of birth. In other cases, the person concerned might have wished to acquire the nationality of the State in question. His wish might either be express, in the form of an application for naturalization, or implied, as in the case of marriage. What the provision in article 38 was intended to preclude was the possibility of the host State imposing its nationality on members of a permanent mission or on members of their family without any wish for it on their part, express or implied.

81. In spite of his doubts about the wording, he was in favour of keeping the article, because the text was in conformity with that of the Vienna Protocol. The intention there had not been to state anything other than what was now intended in article 38. That might be explained in the commentary, with a reference to the Vienna Protocol.

82. Mr. CASTAÑEDA (Chairman of the Drafting Committee), speaking as a member of the Commission, said he found the wording proposed by Mr. Ustor felicitous, as it reflected the content of the article truly and concisely. It also had the advantage of being consistent with the preceding titles, particularly that of article 34. There could perhaps be more precise ways of

wording it, but that was hardly important in a title, which only had to suggest the content of the article.

83. With regard to the substance, he entirely agreed with Mr. Yasseen. Laws on nationality were always brought into operation by a fact or an act. It would be better, however, to keep to the wording of the Vienna Protocol and reproduce the gist of the discussion in the commentary. When Governments had sent in their comments, the Commission could see whether the wording need be changed.

84. Mr. ROSENNE said that Mr. Ustor's suggestion for the title was a good one, but perhaps a little too short; a better wording might be: "Exemption from the application of the nationality legislation of the host State".

85. With regard to the substance of the article, while appreciating the scruples of certain members, he considered that it was drafted with reasonable correctness; the word "solely", in particular, clearly indicated that it was meant to operate as a kind of reservation. Moreover, as to the possible marriage of a daughter of a member of the permanent mission to a national of the host State, it might be asked whether by virtue of that marriage she ceased to be a member of the household of the exempted person.

86. Mr. KEARNEY said there appeared to be a fundamental weakness in article 38, since in the hypothetical case of the marriage of a daughter of a member of the permanent mission to a national of the host State, Mr. Elias and Mr. Yasseen had interpreted it in entirely different ways. As Mr. Rosenne had pointed out, the interpretation of the article hinged on the one word "solely", since in the absence of that word, the legal situation would be quite different. Consequently, while appreciating the fact that the article was based on the corresponding provision of the Optional Protocol to the Vienna Convention on Diplomatic Relations, he wondered whether it was not susceptible of various interpretations and therefore in need of some correction.

87. Mr. ALBÓNICO proposed that article 38 be redrafted to read:

"The nationality of members of the permanent mission and of their families forming part of their household who are not nationals of the host State shall not undergo any change solely by the operation of the law of that State except by an express declaration to the contrary".

88. The CHAIRMAN, speaking as a member of the Commission, said that, when the situation was similar, he was in favour of keeping to the wording that had already been adopted. Article 38 was worded, *mutatis mutandis*, like article II of the 1961 Vienna Protocol. That article certainly had the meaning that the Special Rapporteur gave to article 38 of his draft. If the Commission wished to keep to that interpretation, therefore, it should not alter the wording. It should alter the text only if it had good reason to do so.

89. With regard to the title, he assumed that Mr. Ustor would have no objection to using the term "nationality

legislation" rather than "nationality laws" in the English version, since the word "legislation" had already been used in the title of article 34, which the Commission had just adopted. Moreover, it had not been thought necessary to add the words "of the host State" in the titles of previous articles; the title was clear enough without that detail.

90. Mr. YASSEEN said that article 38 raised a problem of law-making policy which concerned the Commission's work as a whole. The Commission should not depart from the Vienna text when dealing with similar situations. To use a different text might give the impression that the Commission had adopted a different solution. The wording of the Vienna Protocol might perhaps not be very felicitous, but it was agreed that it gave a clear idea of what was intended.

91. Mr. ROSENNE said he now thought that the Commission should retain the title adopted by the Special Rapporteur, which had been based on the Optional Protocol to the Vienna Convention on Diplomatic Relations. Moreover, it should be remembered that the words "the operation of the law of the host State" were not necessarily limited to the nationality laws of the host State. The Commission should not take a hasty decision, but should reflect further on the article until the next meeting.

92. The CHAIRMAN, speaking as a member of the Commission, pointed out that according to article 1, sub-paragraph (f),¹⁴ the expression "members of the permanent mission" meant "the permanent representative and the members of the staff of the permanent mission". According to the definition in sub-paragraph (g) of the same article, the "members of the staff of the permanent mission" comprised all the members of the staff except persons in the private service of members. Hence those were the persons to whom article 38 applied. There was no difference between it and the Vienna Protocol.

The meeting rose at 6.10 p.m.

¹⁴ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, Chapter II, section E.

1021st MEETING

Wednesday, 16 July 1969, at 10.10 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Albónico, Mr. Bartoš, Mr. Cartañeda, Mr. Castrén, Mr. Elias, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Ustor, Mr. Yasseen.

Co-operation with other bodies

[Item 5 of the agenda]

(resumed from the 1010th meeting)

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN welcomed Mr. Pirzada, observer for the Asian-African Legal Consultative Committee, and invited him to address the Commission.
2. Mr. PIRZADA (Observer for the Asian-African Legal Consultative Committee) said that his Committee wished to express its deep appreciation of the contributions made by the International Law Commission in various branches of international law. It was also grateful to the Commission for having sent one of its members, Mr. Tabibi, as an observer to the Committee's tenth session which had been held at Karachi at the beginning of the year.
3. The body known as "The Asian Legal Consultative Committee" had been constituted in November 1956, but in April 1958 its name had been changed to "The Asian-African Legal Consultative Committee" and countries of the African continent had begun to participate. The Committee served as an advisory body of legal experts from the two continents and provided a forum for the exchange of views and information on legal matters of common concern to member Governments. It had discussed and formulated principles on such topics as the privileges and immunities of diplomatic envoys, the extradition of offenders, free legal aid, reciprocal enforcement of foreign judgements, arbitral procedure and the legality of nuclear tests.
4. At its recent session at Karachi, the Committee had devoted a considerable amount of time to the Commission's draft on the law of treaties and had attempted to reach agreement on certain important articles in the interests of Asian-African solidarity. At the Vienna Conference, notwithstanding the difficulties encountered over the most controversial articles, namely, articles 5 *bis* and 62 *bis*,¹ the members of the Committee, and in particular Mr. Elias of Nigeria, had made an important contribution.
5. At the same session, the Committee had also considered the subject of the rights of refugees and had unanimously adopted a resolution stressing the need for alleviating the sufferings of Palestine Arab refugees and other displaced Arabs. Previously, at its session at Bangkok, the Committee had adopted a report on the rights of refugees and had agreed to reconsider, at its next session, the Bangkok principles concerning the treatment of refugees.
6. Another topic considered at Karachi had been the law of international rivers, with particular reference to the needs of the Asian-African countries. An inter-sessional sub-committee had been appointed to study and report on that topic at the Committee's next session.
7. The membership of the Committee was increasing: Jordan had now joined, while Kenya and Nigeria intended to submit their applications. The presence at the Karachi session of observers from Iran, Malaysia, Morocco, Philippines, Sierra Leone, Singapore and Turkey had provided further evidence of the growing interest in the work of the Committee.
8. The Committee had been gratified to note that the Asian-African viewpoint was adequately reflected in the Commission's formulation of the legal principles of the topics it was considering, and that its recommendations provided sound solutions when divergent views prevailed in different regions of the world. The Committee was taking a particular interest in such items on the Commission's present agenda, as relations between States and international organizations, succession of States and Governments, and State responsibility. He was confident that the deliberations and reports of the Commission would be of immense value to the Committee, which, as in the past, would look forward to welcoming an observer from the Commission at its next session, which was to be held in Ghana.
9. Mr. NAGENDRA SINGH, after thanking Mr. Pirzada for his interesting statement, said that he had presided with distinction over the Committee's session at Karachi, where his spirit of co-operation and understanding had won the admiration of all members.
10. He had already referred at an earlier meeting to the service Mr. Tabibi had rendered the Commission by attending the Committee's tenth session as an observer.² It was important to maintain the closest co-operation between the Commission and all institutions which were responsible, on a regional basis, for the codification and progressive development of international law. He suggested that the Commission should thank the Committee for the spirit of co-operation it had shown in sending its Chairman in person to the present session.
11. Mr. YASSEEN said he was glad to welcome Mr. Pirzada, the Chairman of the Asian-African Legal Consultative Committee, who was an eminent jurist and a former Minister for Foreign Affairs of Pakistan. There was a functional link between the Asian-African Legal Consultative Committee and the International Law Commission, for under its statute the Committee examined all the items on the Commission's agenda in order to collaborate with it in promoting the codification and progressive development of international law.
12. The Committee spared no effort to ensure that the new realities of international life and the legitimate needs of countries which had recently achieved independence were taken into consideration in the codification and progressive development of international law. It arranged to be represented at most meetings of bodies concerned with that work, and was to be congratulated on doing so.
13. Mr. RAMANGASOAVINA said he would like particularly to thank the Asian-African Legal Consultative Committee, through its Chairman, for its hospitality to the representative of his country at the

¹ See *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, document A/CONF.39/15.

² See 1010th meeting, para. 28.

Committee's last session. The Committee was performing a valuable service by bringing together jurists from an actively developing world in which age-old customary law confronted Roman and English law. Within the great juridical family that was growing up on all five continents, the Asian-African Legal Consultative Committee was playing an important part as the representative of the "third world". It had demonstrated that most effectively at the Vienna Conference on the Law of Treaties.

14. Mr. ELIAS said that although his country was not yet a member of the Asian-African Legal Consultative Committee, it had been represented at its meetings by an observer on two occasions. At the last session, his Government's representative had been authorized to inform the Committee that it intended to apply for membership. He was deeply appreciative of the contribution made by the Committee to the success of the recent Vienna Conference on the Law of Treaties.

15. Mr. ALBÓNICO said he could not exaggerate the importance of the contribution made by such regional legal institutions as the Asian-African Legal Consultative Committee and the Inter-American Council of Jurists towards meeting the needs of the countries of the third world. Those bodies were concerned with stating the basic principles of international law on such vital problems for the developing countries as the self-determination of nations, sovereignty over natural resources, non-intervention in the internal affairs of States, economic co-operation and world peace and security. Although representing different legal systems, they placed themselves above all political considerations and tended to complement each other. He wished the Committee every success in its future work.

16. Mr. RUDA said he wished to associate himself with the thanks expressed by previous speakers to Mr. Pirzada for his statement, and through him to the Asian-African Legal Consultative Committee for its excellent co-operation with the Commission in making the Vienna Conference on the Law of Treaties a success.

17. Mr. USTOR said he had heard with great interest that the membership of the Committee was steadily increasing. He hoped that in the not too distant future it would embrace nearly all the countries of the Asian and African continents and thus be in a position to make a still greater contribution to the work of the Commission.

18. The CHAIRMAN thanked Mr. Pirzada for his statement and said the Commission had had an opportunity to appreciate the value of the Committee's work when it had considered Mr. Tabibi's report on the Committee's tenth session.³ The Commission had been especially glad to note that it had been due to the Committee's efforts that the Vienna Conference on the Law of Treaties had managed to settle a number of important and delicate questions, thereby achieving success. The Commission welcomed its close and valuable links with the Committee, which were essential

to the successful codification and progressive development of contemporary international law. Those links should be maintained and become even closer.

19. Mr. TESLENKO (Deputy Secretary to the Commission) said he had received a letter from Mr. Tabibi regretting his inability to be present to welcome Mr. Pirzada. Mr. Tabibi went on to say that the tenth session of the Asian-African Legal Consultative Committee had been a most important one, because it had been devoted almost entirely to discussion of the draft convention on the law of treaties, with a view to ensuring the success of the second session of the Vienna Conference. It was as a result of that work that the Vienna Conference had finally surmounted its difficulties and that the world now had an important Convention before it.

Relations between States and international organizations

(A/CN.4/218 and Add.1)

[Item 1 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 38 (Laws of the host State and nationality) (continued)

20. The CHAIRMAN invited the Commission to continue consideration of article 38 as proposed by the Drafting Committee. At the previous meeting Mr. Rosenne had suggested that the Commission should reflect further on the problems raised by the article and its title. He had further suggested that, if the Commission meant to keep to the text of the 1961 Vienna Protocol,⁴ it would perhaps be preferable to use the title proposed by the Special Rapporteur, since it was copied from the title of the Protocol.

21. Mr. RAMANGASOAVINA said that at the previous meeting he had suggested a completely different wording which he thought would better express the idea underlying the article. However, after examining the texts of earlier conventions and draft conventions anew, he had decided it would be better to keep to the wording and title already adopted in the 1961 Vienna Protocol concerning acquisition of nationality. He therefore supported the text and title proposed by the Special Rapporteur (A/CN.4/218).

22. Mr. CASTAÑEDA said he appreciated the concern of those members who wished to follow the Vienna Protocol as closely as possible. The title raised a special problem, however. The Protocol was entitled: "Optional Protocol . . . concerning Acquisition of Nationality". To use only the final words, "Acquisition of Nationality", as the title of an article which in fact dealt with precisely the opposite of acquisition of nationality would

³ See 1010th meeting, paras. 24-42.

⁴ United Nations, *Treaty Series*, vol. 500, p. 224.

produce a very different result, at least so far as the spirit of the article was concerned.

23. Mr. ROSENNE and Mr. RAMANGASOAVINA might perhaps be willing to accept the wording "Exemption from the laws of the host State concerning acquisition of nationality". That kept the words "acquisition of nationality", but at the same time included the idea underlying the proposal made by Mr. USTOR at the previous meeting.⁵

24. Mr. KEARNEY said that the problem of the title of the article was not as important as that of its substance. There had been sufficient discussion at the previous meeting to show that the phrase "solely by the operation of the law of the host State", even though sanctified by article II of the Optional Protocol to the Vienna Convention on Diplomatic Relations was ambiguous and open to varying interpretations. He therefore suggested that it be amended to read something like "solely as a result of their presence in the host State".

25. In addition to the presence in the host State of members of the permanent mission and their families, there were other acts of a voluntary nature which might give rise to the acquisition of nationality. He did not see why the effect of those acts with respect to the members of permanent missions should not be clarified. In any case, the test should be a factual one rather than the abstract and difficult test of what would happen solely by the operation of the law of the host State.

26. Mr. NAGENDRA SINGH said there appeared to be general agreement in the Commission that the article as it stood was ambiguous and capable of improvement. If the Commission had a clean slate to write on, it could undoubtedly produce an article which would be more precise than article II of the Optional Protocol, but as it had not, any departure from the original Vienna text would confront the Commission with many dangers and difficulties. He therefore proposed that the Commission retain the present text and title of the article, but also prepare a detailed commentary in which the present ambiguity of both would be made fully evident. In particular, it should be made clear in the commentary that the mere residence of a member of a permanent mission in the host State did not affect his nationality.

27. Mr. USTOR said he agreed that the present text was not articulate and gave rise to difficulties of interpretation. However, he did not think that Mr. Kearney's proposal would improve it, since it might be asked whether the reference to the "presence" of the members of the permanent mission and their families in the host State would cover the case of the birth of children to those persons. He therefore thought, for the reasons given by Mr. Yasseen and Mr. Nagendra Singh, that the best solution was to retain the present text, but to append a detailed commentary explaining how nationality would be affected by the different cases of birth and marriage, for example, thus giving Governments an opportunity to express their views.

28. With respect to the title, he proposed that it read: "Exemption from laws concerning acquisition of nationality", without any reference to the host State.

29. Mr. YASSEEN said he favoured the retention of the text proposed by the Special Rapporteur, because any change might raise a number of difficulties.

30. The title proposed by Mr. Castañeda would have the advantage of clarifying the meaning of the article, by showing not only that there was no question of excluding the operation of all laws on nationality, but above all that it remained possible to acquire nationality voluntarily. An exemption could apply only to what was imposed on a person, not to the rights he enjoyed, and as far as the substance was concerned, it was fully agreed by all that the sole purpose of the provision was to protect those concerned against the imposition of nationality.

31. Mr. ALBÓNICO said he agreed with Mr. Kearney that the article was obscure. It did not, however, purport to solve all the problems which could arise in connexion with the members of permanent missions and their families, such as those connected with birth and marriage, since legislation on those matters naturally varied from State to State. The essential point was that the persons in question should not undergo any change of nationality merely as a result of their residence in the host State. He proposed, therefore, that the final clause be amended to read: "shall not, merely by their residence in the territory of the host State, acquire the nationality of that State". The title proposed by the Special Rapporteur should be retained.

32. Mr. ELIAS said it must be admitted that article 38 was unsatisfactory. The Commission might decide to retain it merely for the sake of conformity with the Optional Protocol, but article II of the Protocol was certainly very ambiguous, as was often the case with articles hastily prepared at an international conference. As a lawyer, he had the utmost respect for legal precedent, but if the Commission found the present text unsatisfactory, it ought to say so. Mr. Rosenne had given an interpretation of the article which made sense, but in his opinion that interpretation was not immediately apparent from the text. In any case, if the Commission did decide to retain the present text, he agreed with Mr. Yasseen that it should add a copious commentary pointing out just where it was in need of revision.

33. Mr. ROSENNE said that all members agreed that the present text was inadequate and ambiguous; attention had also been rightly called to the danger of overcharging individual words in order to arrive at some sensible meaning.

34. He did not recall all the circumstances in which the Commission had dealt with the subject when preparing its draft articles on diplomatic relations some ten years before. However, the mere fact that the 1961 Vienna Conference had not included the relevant article in the text of the Convention itself, but had relegated the subject to an Optional Protocol, seemed to indicate that it had had some difficulty with it.

⁵ See 1020th meeting, para. 73.

35. He thought that the Commission should clarify the relations, if any, between article 38 and article 44, on the obligation to respect the laws and regulations of the host State.

36. He agreed with Mr. Elias that the Commission should not be bound by the precedents of a conference held ten years ago, even if the subject-matter was substantially the same, if it could improve the text in the direction desired by Governments. What that direction might be, however, was not yet known. At the present juncture, the Commission was still engaged in a first reading of the article and was not in a position to put forward any alternatives. Once the matter had been discussed in the Sixth Committee in the light of the records of the Commission's present session, the comments of Governments should be forthcoming and the Commission should be able, at the second reading, to propose an improved text.

37. With regard to the title, in some legal systems the title of a treaty was excluded for purposes of interpretation while in other systems the reverse was true. The Commission should be careful, however, not to include any new elements in the title which might affect the interpretation of the article. He was prepared, therefore, to support Mr. Ustor's proposal.

38. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Kearney's and Mr. Albónico's proposals differed in form but were very similar in substance. He did not think the changes they proposed were felicitous.

39. It was not just presence in the territory of the host State which attracted the attribution of nationality; that arose by the operation of the law. Whereas the presence of the person concerned in the territory of the host State was always necessary for the law of the host State to produce its effect, that effect might consist in the attribution of the nationality of the host State on legal grounds unconnected with presence in the territory. For instance, if a woman national of a host State in which nationality was based on *jus sanguinis* married a diplomat and gave birth to a child outside the territory of that State, once the child set foot on that State's territory, it would automatically become a national of that State by the operation of its law; but that would be because its mother was a national of the host State and not solely by the operation of the law of the host State. The wording of the Vienna Protocol was therefore more satisfactory and he, at any rate, found it perfectly clear.

40. With regard to the title, at the previous meeting he had expressed his support for the formula proposed by Mr. Ustor, but on second thoughts had concluded that the idea of exemption was not the essence of the article. To say that the persons covered by the article did not acquire nationality solely by the operation of the law of the host State implied that they could acquire the nationality of that State other than solely by the operation of its law, for example, as a result of certain legal acts such as marriage, divorce and affiliation. So it was really more a matter of acquisition, and the Special Rapporteur's title was more suitable than the

new title proposed. It would be better to keep to the formula used in the Vienna Protocol.

41. Mr. BARTOŠ said that in some Latin American countries mere presence in the territory was a sufficient legal ground for the attribution of nationality if the presence was for a certain time. That was an argument in favour of Mr. Kearney's view. However, presence in the territory was only one legal ground among many, which was why he now supported the position taken by the Chairman.

42. The CHAIRMAN, speaking as a member of the Commission, said that he approved of the text proposed by the Drafting Committee, but preferred the title proposed by the Special Rapporteur.

43. Mr. KEARNEY said it might help the discussion if he were to go over the history of the Optional Protocol concerning Acquisition of Nationality adopted by the 1961 Vienna Conference.

44. The Commission's 1958 "Draft articles on diplomatic intercourse and immunities", which had served as the basis for the work of that Conference, had contained an article 35 entitled "Acquisition of nationality",⁶ which ultimately became article II—the operative article—of the 1961 Optional Protocol. That article 35 had of course been proposed as part of the draft Convention, but it had led to considerable controversy at the 1961 Conference. The Committee of the Whole of the Conference had referred it to a working group, which had proposed an alternative text that concentrated on the problem of the birth in the receiving State of a child of a diplomatic agent. The alternative text, however, had been rejected by the Committee of the Whole, which had adopted article 35 as it appeared in the Commission's 1958 draft.

45. The article had then come before the plenary Conference, but had failed to obtain the required two-thirds majority and had consequently not been adopted. The representative of Spain had then proposed that the contents of article 35 "should form the subject of a separate optional protocol" and his proposal had been adopted by 54 votes to 4, with 11 abstentions.⁷ The Drafting Committee of the Conference had thereupon prepared the text of the Optional Protocol which the Conference had adopted at its twelfth plenary meeting without objection.⁸

46. The proceedings of the 1961 Vienna Conference thus showed that there had been a sharp division of opinion among States on the issues involved. Once it had been decided to make article 35 the subject of an Optional Protocol, it seemed that the question of the adequacy of its language had been forgotten, since those States which had objected to its wording had no intention of signing the Protocol.

47. In the circumstances, he would not press his proposed amendment to article 38, since he realized

⁶ See *Yearbook of the International Law Commission*, 1958, vol. II, p. 101.

⁷ See *United Nations Conference on Diplomatic Intercourse and Immunities*, Official Records, vol. I, p. 31.

⁸ *Ibid.*, p. 51.

that the formula he had envisaged might not adequately cover all the problems involved. In view of the difficulties to which the article had given rise, he suggested that the text be placed in square brackets so as to underline the need for Governments to comment on it and to indicate the Commission's concern as to whether it adequately disposed of the various problems involved. A very full explanation should be given in the commentary.

48. Mr. CASTRÉN said that article 35 of the draft on diplomatic intercourse and immunities had been discussed at length at Vienna, but although a majority of States had been in favour of the text proposed by the Commission, it had not gained the necessary two-thirds majority and so had had to be relegated to an Optional Protocol.

49. The commentary to the article, which was to be found in the Commission's report on the work of its tenth session,⁹ indicated the scope of the provision. He was in favour of retaining the wording used in the Vienna Optional Protocol; any additional explanation could be given in the commentary.

50. With regard to the title, he supported Mr. Ustor's last proposal.

51. Mr. CASTAÑEDA said that the text proposed by the Drafting Committee was supported by nearly all the members of the Commission and no concrete proposal had been made for its amendment. There was, however, a proposal to amend the title of the article and it had secured the support of several members.

52. Mr. ALBÓNICO said he wished to withdraw his earlier suggestion and to support Mr. Kearney's proposal that the text of article 38 be placed in square brackets; the Commission could review the article at the second reading in the light of the comments of Governments.

53. The discussion had shown that the issues of substance involved in article 38 were much more complex than he had at first believed. They were connected not only with the problems arising from the imposition of a nationality, but also with the conflict between the *jus soli* and the *jus sanguinis* principles.

54. Mr. ROSENNE, after thanking Mr. Kearney and Mr. Castrén for their explanations regarding the history of article 38, said he did not favour placing the text of the article in square brackets. Since the draft was only going to be approved at first reading, all of its articles were necessarily of a tentative character, and there was no reason to place any one article in brackets to indicate that it had been approved only tentatively. The position was quite different when the Commission placed a few words of a text in square brackets because it had doubts about those particular words.

55. He agreed that it was important to include an appropriate paragraph in the commentary to draw the attention of governments to the difficulties involved.

56. The CHAIRMAN suggested that the Commission adopt the text of article 38.

The text of article 38 was adopted.

57. The CHAIRMAN asked Mr. Rosenne whether he wished to maintain his suggestion regarding the title of article 38¹⁰ or whether he accepted Mr. Ustor's proposal.

58. Mr. ROSENNE said that he found Mr. Ustor's proposed title adequate.

59. The CHAIRMAN suggested that the Commission therefore adopt for article 38 the title "Exemption from laws concerning acquisition of nationality".

The title of article 38 was adopted.

60. The CHAIRMAN suggested that the Special Rapporteur be requested to expand the commentary to article 38 by including a reference to the Commission's commentary to article 35 of the draft on Diplomatic intercourse and immunities.

It was so agreed.

61. Mr. USTOR said that at least the Commission was unanimous on the subject of the commentary. The Special Rapporteur would have a difficult task in drafting it because of the diversity of nationality laws and the variety of factors which affected nationality. Without suggesting that the list was in any way exhaustive, he would suggest for the consideration of the Special Rapporteur that the factors which affected nationality included, first, mere presence in a territory; secondly, for both legitimate children and children born out of wedlock, birth in a territory; thirdly, voluntary acknowledgment of paternity; fourthly, recognition of paternity by a court judgment; fifthly, child adoption; sixthly, dissolution of adoption; seventhly, marriage and divorce, with the different types of divorce.

62. The CHAIRMAN said that Mr. Ustor's suggestions would be transmitted to the Special Rapporteur.

63. Mr. BARTOŠ said that some States deprived their nationals of their nationality if they entered the service of a foreign State without the permission of the government of their own country. The former Yugoslav law on nationality had contained a provision to that effect. He suggested that the question be intentionally left undecided but mentioned in the summary record.

REQUEST BY THE SWISS GOVERNMENT

64. The CHAIRMAN said that the Permanent Observer for Switzerland had informed the Legal Counsel that the Swiss Government wished to submit comments on the draft articles on representatives of States to international organizations.

65. The twenty-one articles the Commission had approved in 1968¹¹ had already been communicated to the Governments of States Members of the United

¹⁰ See previous meeting, para. 84.

¹¹ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

⁹ See *Yearbook of the International Law Commission, 1958*, vol. II, p. 101.

Nations for their comments. But in view of the special position of Switzerland, which was host to several international organizations, the Commission might wish to ask the Secretary-General to communicate the draft articles to the Swiss Government and invite it to present its comments. On previous occasions, the Commission had agreed to communicate draft articles to the Swiss Government at the latter's request.

66. Mr. BARTOŠ said he supported the Chairman's suggestion that the Commission should accede to the Swiss Government's request. Switzerland was interested in the draft articles in three capacities: as host to international organizations, as a member of many international organizations open to States which were not Members of the United Nations, and as a State represented by an observer in international organizations. He would remind the Commission that the provisions of the draft articles dealing with observers to international organizations had not yet been considered.

67. Mr. CASTRÉN said he thought the Commission should comply with the Swiss Government's request. Switzerland had participated in the discussions on special missions in the Sixth Committee without the right to vote, and could be expected to take part in further discussions.

68. Mr. YASSEEN said he endorsed the comments of Mr. Bartoš and Mr. Castrén.

69. Mr. ROSENNE said he welcomed the initiative of the Swiss authorities and the Commission's response to it. The decision about to be taken by the Commission would repair a serious omission in the general technique of codification adopted by the United Nations. It would be particularly timely, since the report submitted in June 1969 by the Swiss Federal Government to the Swiss Parliament on the relations between Switzerland and the United Nations contained a specific reference to the fact that Switzerland was not normally able to submit comments to the International Law Commission.

70. He wished to take that opportunity of pointing out that, by virtue of articles 25 and 26 of its Statute, the Commission could consult with any United Nations organ or specialized agency if it believed that such a procedure might assist it in dealing with a topic on its agenda. Experience with the draft articles on the law of treaties had shown that some of the comments submitted by the specialized agencies would have been much more useful to the Commission if they had been available before the second reading of those articles, and he therefore hoped that the specialized agencies would be consulted before the Commission began its second reading of the present articles.

71. Mr. BARTOŠ said that the specialized agencies had been invited on several occasions to attend the Commission's discussions and speak as advisers. He suggested that the Secretariat repeat the invitation when it sent them the Commission's report.

72. The CHAIRMAN said that the Commission seemed to be in favour of requesting the Secretary-General to transmit to the Swiss Government for comment the twenty-one articles on representatives of

States to international organizations already adopted, and the articles on that subject adopted subsequently. The Commission could take a decision later on the chapter on the legal status of permanent observers to international organizations. When the draft articles on representatives of States to international organizations were completed, the Commission might decide to send them to the specialized agencies too. He suggested that the Commission comply with the Swiss Government's request and defer its decision on the other matters.

It was so agreed.

The meeting rose at 1 p.m.

1022nd MEETING

Thursday, 17 July 1969, at 10 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 39 (Privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff)¹

1. The CHAIRMAN, in the temporary absence of the Chairman of the Drafting Committee, invited Mr. Ustor, to introduce the Drafting Committee's text for article 39.

2. Mr. USTOR said that the Drafting Committee proposed the following text:

Article 39

Privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff

1. The members of the family of the permanent representative forming part of his household and the members of the family of a member of the diplomatic staff of the permanent mission forming part of his household shall, if they are not

¹ For previous discussion, see 996th meeting, para. 52.

nationals of the host State, enjoy the privileges and immunities specified in articles 29 to 37.

2. Members of the administrative and technical staff of the permanent mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 29 to 36, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in article 37, paragraph 1, in respect of articles imported at the time of first installation.

3. Members of the service staff of the permanent mission who are not nationals of or permanently resident in the host State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in article 34.

4. Private staff of members of the permanent mission shall, if they are not nationals of or permanently resident in the host State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the permanent mission.

3. The Drafting Committee had altered the title of the article. The Special Rapporteur's original title "Persons entitled to privileges and immunities" could give the impression that article 39 covered all the persons entitled to privileges and immunities. In fact, the article did not deal with the permanent representative and the members of the diplomatic staff of the permanent mission, whose privileges were dealt with in article 29 and the following articles. The Committee had therefore considered it appropriate to propose a new title which, though much longer, expressed more correctly the contents of the article.

4. Paragraph 1 had been redrafted on the lines of the corresponding provision, article 36, of the Commission's 1958 draft on diplomatic intercourse and immunities.² The alteration in the wording did not affect the substance.

5. The Drafting Committee wished to draw attention to a matter of substance arising out of article 39. Paragraph 1 conferred on members of the family "the privileges and immunities specified in articles 29 to 37", an enumeration that did not include article 27, which dealt with freedom of movement. It could of course be argued that freedom of movement was necessary for the purposes of the functions of the members of the permanent mission and should therefore be confined to them. It could, however, also be argued that the officials concerned had a human right to move and travel freely with their families in the host State. The Committee therefore suggested, for the consideration of the Commission, the following modification of the concluding words of article 27: "... the host State shall ensure freedom of movement and travel in its territory

to all members of the permanent mission and to the persons referred to in paragraph 1 of article 39".³

6. Mr. ROSENNE asked whether it would not be appropriate to include article 38, which dealt with the question of nationality, in the enumerations contained in paragraphs 1 and 2 of article 39.

7. Mr. USTOR said that the terms of article 38 were not restricted to the permanent representative and the members of the diplomatic staff, as were those of the articles mentioned in paragraphs 1 and 2 of article 39. Moreover, article 38 would eventually be placed after article 39.

8. Mr. KEARNEY said he had no objection in principle to the extension of freedom of movement to members of the family of members of the permanent mission. It should be noted, however, that the 1961 Vienna Convention on Diplomatic Relations contained no provision to that effect. The question had not given rise to any difficulty and States appeared to allow freedom of movement to members of the family in the case of diplomats. Nevertheless, the Commission ought to consider whether the amendment of article 27 in the manner now proposed might not have an effect on the future interpretation of the corresponding article 26 of the 1961 Vienna Convention.⁴

9. Mr. USTOR said that freedom of movement of members of the family probably went without saying, but he thought it was better to express it clearly in article 27.

10. The CHAIRMAN, speaking as a member of the Commission, said that the Drafting Committee's proposal to include a reference to article 39 in article 27 was possibly judicious. On the other hand, the wording of article 26 of the Vienna Convention on Diplomatic Relations was identical with that already approved by the Commission for article 27 of the draft, so that the Drafting Committee's proposal might lead to the Vienna Convention's being interpreted as not providing for freedom of movement and travel for the families of members of a diplomatic mission.

11. In those circumstances it would, perhaps, be better not to amend article 27, but to mention in the commentary to that article that freedom of movement and travel extended to members of the family of the persons concerned and that the same applied to article 26 of the Vienna Convention. He was in favour of the Drafting Committee's broad interpretation, but dubious about its proposed modification of article 27.

12. Mr. CASTRÉN said he considered that the members of the family of a person who enjoyed freedom of movement and travel should also enjoy that freedom. It was not possible, however, to interpret the Vienna Convention so broadly.

13. He proposed, therefore, that before article 27 was amended as proposed by the Drafting Committee, Governments should be asked how they had applied article 26 of the Vienna Convention. If State practice had been liberal, the Commission might consider increa-

² See *Yearbook of the International Law Commission, 1958*, vol. II, p. 101.

³ For text of article 27, see 1017th meeting, para. 17.

⁴ United Nations, *Treaty Series*, vol. 500, p. 108.

sing the number of persons benefiting from the right to freedom of movement and travel.

14. Mr. NAGENDRA SINGH said he was in favour of freedom of movement for the families of the members of permanent missions. Nevertheless, he saw some difficulty in amending article 27 in the manner proposed. The 1961 Vienna Convention on Diplomatic Relations did not expressly extend freedom of movement to the families of diplomatic agents. The need for freedom of movement for their families appeared to be greater for diplomats than for members of permanent missions, who were only concerned with the international organization to which they were accredited.

15. He suggested that the matter be dealt with in the commentary on lines favourable to freedom of movement.

16. Mr. BARTOŠ said that while the Commission should take the provisions of the Vienna Convention on Diplomatic Relations into account, it should not regard them as sacrosanct. The purpose of those provisions was to enable members of diplomatic missions to perform their functions in the receiving State freely and efficiently. The Headquarters Agreement between the United Nations and the United States of America⁵ did not expressly accord members of permanent missions to the United Nations freedom to travel throughout United States territory. Though the United States authorities were tolerant in practice, in principle they might require the persons concerned to apply for permission for their travel. The United Nations General Assembly had approved that interpretation of the Agreement.

17. It would be going too far to place members of permanent diplomatic missions and representatives of States to international organizations on an equal footing in every case and in every respect. While they might generally be more or less assimilated in fact, in law there was no justification for any rule of strict equality.

18. Mr. USTOR said that, as a general rule, he agreed that care should be taken to avoid any action which might affect the interpretation of the 1961 and 1963 Vienna Conventions. In the present instance, however, he favoured the inclusion of an express provision on the right of members of the family to move freely in the host State.

19. It would of course be necessary to explain the matter in the commentary. There were two possible approaches to the problem. One was to consider the present liberal practice with regard to the members of the family of diplomatic agents as a broad interpretation of the provisions of the 1961 Vienna Convention on Diplomatic Relations. The other was to consider that practice as expressing a customary rule of international law which was applicable by virtue of the concluding paragraph of the preamble to the 1961 Vienna Convention. That Convention did not restrict the freedom of movement of members of the family of diplomatic agents; it simply did not regulate that freedom and, in the absence of any such regulation, the rules of customary international law applied.

20. He did not believe that the inclusion of such an express provision in article 27 could have any detrimental effect on the situation regarding members of the family of diplomatic agents. In bilateral diplomacy, reciprocity was the rule and there was no danger of a State going back on the present liberal practices in the matter, because it would immediately face the prospect of reciprocal action by other States. In the present instance, however, there could be no question of reciprocity, and it would not be unduly bold for the Commission to amend article 27 in the manner suggested by the Drafting Committee.

21. He did not favour the alternative of including a reference to article 27 in the enumeration in article 39. That enumeration was intended to cover provisions dealing with privileges and immunities, and it would perhaps not be altogether appropriate to regard freedom of movement, which was provided for in article 27, as a privilege or an immunity. For that reason, he preferred the approach adopted by the Drafting Committee.

22. The CHAIRMAN, speaking as a member of the Commission, said he accepted Mr. Ustor's arguments. He suggested that the Commission add to article 27 the phrase proposed by the Drafting Committee and explain in the commentary that it had been added in the light of established State practice, although it was not to be found in article 26 of the Vienna Convention.

23. Mr. KEARNEY said that, if the amendment to article 27 proposed by the Drafting Committee were adopted, the effect would be to extend the right to freedom of movement to the families of permanent representatives and members of the diplomatic staff, who were "the persons referred to in paragraph 1 of article 39". But the same right would apparently not be accorded to members of the families of members of the administrative and technical staff, who were covered by paragraph 2 of article 39.

24. In order to overcome that difficulty, the result sought by the Drafting Committee might be obtained by amending the concluding words of article 27 to read "... shall ensure freedom of movement and travel in its territory to all members of the permanent mission and to the members of their families forming part of their respective households".

25. Mr. ROSENNE suggested that, in examining article 39, the Commission should refrain from reconsidering article 27. The point to which the Drafting Committee had drawn attention should be dealt with in the commentary to article 39. It should be remembered that the Special Rapporteur had been invited to furnish more material in connexion with article 27.⁶

26. Sir Humphrey WALDOCK said that if it were desired to alter article 27, it should be done in the manner suggested by Mr. Kearney. At the same time, he would urge caution in departing from the language of the 1961 Vienna Convention, which drew rather precise distinctions between the various categories of persons it covered.

⁵ United Nations, *Treaty Series*, vol. 11, p. 12.

⁶ See 1017th meeting, paras. 43-46.

27. Mr. ROSENNE said he had come prepared to discuss the texts of articles 39 and 40, on which the Drafting Committee had reported to the Commission. If it were now suggested that the Commission reconsider article 27, it would be better for the Drafting Committee to submit a proposal in writing so that members could give it careful consideration.

28. The CHAIRMAN said that, as articles 27 and 39 were connected, the Commission could take a decision on the reconsideration of article 27 and, if necessary, instruct the Drafting Committee to prepare a new text for it.

29. Mr. USTOR said that, purely as a matter of formal procedure, Mr. Rosenne was entitled to request that the proposal to amend article 27 be made in writing. The Commission, however, had made it a practice always to adopt a more flexible approach and to treat such cases on their merits.

30. Sir Humphrey WALDOCK said it was important that the Commission should retain a considerable flexibility in its procedures. When the Commission discussed an article of a draft, it must frequently happen that it would have repercussions on other articles.

31. Mr. ROSENNE said it was not a question of the Drafting Committee or the Commission not reverting to another article which had already been adopted, since both retained full freedom of action. But the Drafting Committee was now recommending changes in article 27 which, in his opinion, were far-reaching and might lead to interpretations and re-interpretations of other instruments. Since the Commission had so far been careful not to adopt formulas which would imply a need for some re-interpretation of the Vienna Convention on Diplomatic Relations in analogous circumstances, he was a little surprised at the Drafting Committee's rather complicated proposal.

32. Mr. ELIAS said that, in discussing article 38, many members had held that amendments to that article would give rise to difficulties, because it would no longer be in line with the Protocol to the Vienna Convention. He himself had thought that the Commission should be free to improve the text of the article, but in dealing with articles 24 to 38, the Commission had so far scrupulously refrained from making any changes which departed from the Vienna Convention. He suggested, therefore that the Commission refer article 39 back to the Drafting Committee, together with Mr. Kearney's amendment, for further consideration.

33. Mr. CASTRÉN said he withdrew his proposal and would agree to an immediate vote on article 27; alternatively, the Drafting Committee could submit its proposal in writing, as had been requested.

34. The CHAIRMAN said that the Commission had offered no comments on the Drafting Committee's text for article 39. On the other hand, certain proposals had been made for the amendment of article 27. As the Commission had already adopted that article, a two-thirds majority would be needed for its amendment.

35. He suggested that the Commission first adopt

article 39 as proposed by the Drafting Committee, with its new title, and then turn to article 27.

Article 39 was adopted.

ARTICLE 27 (Freedom of movement)⁷

36. The CHAIRMAN said that with the amendment proposed by the Drafting Committee, as further amended by Mr. Kearney, article 27 would read:

"Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure freedom of movement and travel in its territory to all members of the permanent mission and to the members of their families forming part of their respective households."

37. Mr. CASTRÉN asked whether the expression "members of their families" included members of the families of the service staff. Article 39, paragraph 3, did not provide for privileges or immunities for that category of persons.

38. Mr. KEARNEY said that in his opinion a person who performed domestic service for a family should be allowed to travel with that family to the same extent as anybody else.

39. M. CASTRÉN said he was glad to have Mr. Kearney's opinion. He was not against amending article 27, but if the text now proposed were adopted, the Commission would be departing appreciably from the corresponding provisions of the Vienna Convention.

40. Mr. ROSENNE said he would have no objection to the new text, provided that a sentence on the lines suggested by the Chairman was included in the commentary.

41. The CHAIRMAN invited the Commission to vote on the Drafting Committee's amendment to article 27, as further amended by Mr. Kearney. The Special Rapporteur would be requested to draw attention to the novelty of the provision in the commentary.

The amendment to article 27 was adopted by 10 votes to none, with 4 abstentions.

42. Sir Humphrey WALDOCK said that he had abstained from voting on the amendment to article 27, not because he was opposed to it, but because he did not think that an adequate case had been made out for departing from the text of the Vienna Convention.

43. Mr. BARTOŠ said he had abstained from voting for two reasons. First, the amendment was inconsistent with the preambles to the Vienna Conventions on Diplomatic Relations and Consular Relations, which stated that the purpose of privileges and immunities was not to benefit individuals, but to ensure the efficient performance of their functions; for whereas the functions of diplomatic agents and consuls required that they should be able to move freely throughout the territory of the host State, the functions of members of permanent mis-

⁷ For previous discussion, see 1017th meeting, para. 16.

sions did not require that privilege. Secondly, the amendment was contrary to United Nations practice under the Headquarters Agreement with the United States, which did not guarantee freedom of travel throughout United States territory, even though it might tolerate it.

44. Mr. CASTRÉN said he had abstained from voting because he doubted the advisability of extending freedom of movement and travel to members of the families of service staff.

ARTICLE 40 (Nationals of the host State and persons permanently resident in the host State)⁸

45. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 40.

46. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 40

Nationals of the host State and persons permanently resident in the host State

1. Except in so far as additional privileges and immunities may be granted by the host State, the permanent representative and any member of the diplomatic staff of the permanent mission who are nationals of or permanently resident in that State shall enjoy immunity from jurisdiction, and inviolability, only in respect of official acts performed in the exercise of their functions.

2. Other members of the staff of the permanent mission and private staff who are nationals of or permanently resident in the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

47. In paragraph 1 of the French version, the Committee had replaced the words "*les membres*" by the words "*tout membre*" after the words "*le représentant permanent*", so as to make it clear that the words "*qui sont ressortissants*" related both to "*le représentant permanent*" and to "*tout membre du personnel diplomatique*". Similar changes had been made in the English and Spanish versions.

48. In the same paragraph, the Special Rapporteur had provided for three cases in which immunity from jurisdiction and inviolability was enjoyed only in respect of official acts performed in the exercise of the functions of the persons concerned. The Drafting Committee had deleted the words "or is, or has been, its representative," because it considered that they referred to such exceptional situations that there was no need for them. Moreover, if a person represented, or had represented, the host State, he was very likely to be one of its nationals and therefore subject to the limitation imposed by the paragraph.

49. The Drafting Committee had also discussed the case of persons permanently resident in the host State. Some members of the Committee had advocated the deletion of the reference to them as well, taking the

view that a national of another State already permanently resident in the host State was often appointed as the permanent representative of the State of which he was a national, and that there was no justification for giving him a lesser status. On the other hand, it had been pointed out that that deletion would leave the host State in a difficult position, because it would mean granting some permanent residents a more favourable status than others. The Drafting Committee regarded that as a question of substance which the Commission should decide. It had therefore left the reference to permanent residence, though in the English version it had replaced the words "a permanent resident of" by the words "permanently resident in", since that was the expression used in the Vienna Conventions and in the draft on special missions.

50. In paragraph 2 of the French version, the Committee had deleted the words "*de la mission*" after the words "*les personnes au service privé*" because, as stated in article 1 (k) of the draft,⁹ the persons in question were in the service of the members of the mission and not of the mission itself.

51. Also in paragraph 2 of the French version only, the Committee had added the words "*ces membres et*" before the words "*ces personnes*", so as to make it clear that the rule stated in the second sentence of the paragraph applied to the members of the staff of the mission and to the private staff mentioned in the first sentence. That change was necessitated by the fact that the French version of article 1 (k) used the term "*personnes au service privé*", whereas in the English version the wording was "*private staff*". There was now no doubt that the words "those persons" in the second sentence of article 40, paragraph 2, referred to all the persons mentioned in the first sentence, whereas the original French version might have suggested that the words "*ces personnes*" referred only to the private staff. That difficulty had not arisen in the Vienna Conventions, because private staff were referred to by the terms "private servant" in the 1961 Convention and "member of the private staff" in the 1963 Convention.

52. Mr. TAMMES said that, in the note on nationality of members of a permanent mission in the Special Rapporteur's third report,¹⁰ reference was made to a number of conventions on privileges and immunities which contained wording similar to the words "or is, or has been, its representative" which the Drafting Committee now proposed to delete from paragraph 1. Although the Chairman of the Drafting Committee had rightly pointed out that that case would rarely occur in practice, he wondered whether, since provision was made for it in so many important conventions, it would be altogether wise to drop it from article 40.

53. Mr. ROSENNE said that there was a minor discrepancy between the French and English versions of the second sentence of paragraph 2. The French version read: "*Toutefois, l'Etat hôte doit exercer sa juri-*

⁹ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

¹⁰ *Ibid.*, document A/CN.4/203/Add.1.

⁸ For previous discussion, see 996th meeting, para. 61.

diction sur ces membres et ces personnes . . .”, while the English version read: “However, the host State must exercise its jurisdiction over those persons . . .”. In drafting multilingual texts, it was surely unsound to adopt a phrase which in one language version had two objects and in another had only one.

54. Sir Humphrey WALDOCK suggested that the English version of the first sentence of paragraph 2 be amended to read: “Other members of the staff of the permanent mission and persons on the private staff . . .”; the second sentence of that paragraph could then be amended to read: “However, the host State must exercise its jurisdiction over those members and persons . . .”.

55. Mr. BARTOŠ said that in any case there could be no question of reverting to the term “servant”, which had been rejected in the new ILO terminology. Furthermore, the expression “private staff” was wider and could include a tutor, private chaplain, and so on.

56. The CHAIRMAN suggested that the Commission accept the amendment to the English version proposed by Sir Humphrey Waldock in order to bring it into line with the French.

It was so agreed.

57. Mr. CASTRÉN said he was a little concerned at the deletion of the words “or is, or has been, its representative”. He did not particularly like that form of words, which he did not find very clear because he did not see how the fact of a person having been a representative of the host State could affect his legal status when he was no longer a representative of that State. But Mr. Tammes had pointed out that the words appeared in several treaties or conventions, so it might be better to hear the Special Rapporteur’s opinion before deleting them.

58. Mr. ALBÓNICO said that the text of article 40 proposed by the Drafting Committee reflected present practice and was in conformity with the corresponding article 38 of the Vienna Convention on Diplomatic Relations.¹¹ He was therefore prepared to accept the Drafting Committee’s proposal to delete the words “or is, or has been, its representative”.

59. Mr. BARTOŠ said that the situation contemplated in the phrase deleted by the Drafting Committee might occur in consequence of a change of régime or a territorial change entailing a change in nationality, but such cases were relatively rare and it seemed unnecessary to complicate the article by alluding to them, particularly since they were always governed by special provisions.

60. The CHAIRMAN said that Mr. Castrén had suggested that the Special Rapporteur be asked for his opinion, but no member had formally proposed that the deleted phrase be restored. The Commission might therefore adopt the article in the Drafting Committee’s version, the more so since the 1961 Vienna Convention did not contain the phrase, and at the same time ask the Special Rapporteur for his opinion.

61. Mr. CASTAÑEDA said that the Commission also had to decide whether the reference to permanent residence should be kept or deleted.

62. Mr. YASSEEN said he had stated his opposition to the reference to permanent residence as long ago as 1961, at the Vienna Conference on Diplomatic Intercourse and Immunities. Though status as a national of the host State might be a reason for restricting privileges and immunities, permanent residence in that State was not, especially if the person concerned had the nationality of the sending State. He was therefore against mentioning permanent residence in article 40, paragraph 1.

63. Mr. ALBÓNICO said that he supported the Drafting Committee’s proposal to retain the words “or permanently resident in that State” in paragraph 1, since it was only logical that representatives who had their permanent residence in the host State should not enjoy the same privileges and immunities as those coming from the sending State.

64. Mr. CASTAÑEDA said that the situation contemplated in the phrase “or permanently resident in that State” often arose, especially in New York. There was no reason whatever to give such persons a lower status, since that would mean creating a separate of permanent representatives different from the others. Permanent residence did not create any special link with the host State that justified discriminatory treatment of permanent representatives who were also permanent residents.

65. If the host State considered that the person concerned ought not to enjoy the privileges and immunities of a permanent representative at the same time as the status of permanent resident, it should change its internal laws or regulations governing the status of permanent residents. He was in favour of deleting the phrase “or permanently resident in that State”.

66. Mr. KEARNEY said he did not think that the host State should be placed under the burden of changing its legislation for the benefit of representatives who had their permanent residence in its territory. By electing to live permanently in the host State, the individual in question had already acquired certain privileges and immunities which were denied to temporary visitors, such as tourists, students, trainees and the like. If he subsequently became the permanent representative of a foreign State, it would be unreasonable for him to expect that he might thereby acquire an additional set of privileges and immunities, such as exemption from taxation and police jurisdiction and the right to import duty-free goods. He therefore favoured the retention of the words “or permanently resident in that State”.

The meeting rose at 1 p.m.

1023rd MEETING

Friday, 18 July 1969, at 10.20 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Ignacio-

¹¹ United Nations, *Treaty Series*, vol. 500, p. 118.

Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ranganasavina, Mr. Rosenne, Mr. Ruda, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 40 (Nationals of the host State and persons permanently resident in the host State) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of the text proposed by the Drafting Committee for article 40. The Commission had been asked by the Drafting Committee to decide whether or not it intended to retain the reference in paragraph 1 to permanent residence.

2. Mr. BARTOŠ observed that it was in the Vienna Convention on Diplomatic Relations that permanent residence had been treated for the first time as a case for exclusion from privileges and immunities.¹ The exclusion did not, of course, relate to functional privileges and immunities, but it did lead, even in the present draft, to discrimination between permanent representatives who enjoyed full privileges and immunities and those who enjoyed them only for official acts performed in the exercise of their functions.

3. In the case of permanent residents, host States complained more about the privileges and immunities granted to members of their families than about those enjoyed by the permanent representatives themselves.

4. With regard to such permanent representatives themselves, various objections had been raised. The host State regarded them as something of a danger, because of their special knowledge of the customs of the country and because it was easier for them than for other diplomats to gain access to government officials. Most permanent residents engaged in some commercial or professional activity in the host country, like nationals. If it were agreed that, in their capacity as permanent representatives, they were entitled to the same privileges and immunities as other permanent representatives, it would also have to be agreed that they must refrain from any commercial or professional activity. Mr. Kearney had made a discreet but plain enough allusion to persons who tried to take advantage of their position to obtain diplomatic privileges and immunities in order to evade taxes, dues or customs duties.² The matter must therefore be regulated very clearly.

5. It was in the case of members of the family that the

problem was most delicate. If permanent representatives who were also permanent residents were granted full privileges and immunities, those privileges and immunities would also extend to their wives and children. He had been told that the sons of permanent representatives had often caused the local authorities of the host country far more trouble than their fathers. But since children, too, were generally covered by privileges and immunities, the host countries had had to request that adult sons, at least, should not enjoy them. In New York the question had been raised even in connexion with the adult daughters of persons enjoying privileges and immunities, but no exception had been made in that case.

6. Personally, he had no hard and fast views on the matter, but he did think that, before deleting the reference to residence from paragraph 1, the Commission should consider the consequences and decide whether it served any purpose. In most of the countries where there were headquarters of international organizations, there were numbers of aliens who enjoyed the status of permanent resident, which allowed them advantages not available to other aliens, including the right to engage in professional or commercial activity.

7. Presumably the Special Rapporteur had included that exception in the text of his draft not just in order to follow the precedents of the Vienna Conventions, but also for realistic reasons, which should at least be brought to the Commission's notice.

8. If the Commission decided to delete that exception, it should state the reason plainly in the commentary and explain that it had examined the possibility of restricting privileges and immunities in the case under consideration, but had concluded that to do so might impede the performance of the functions of permanent missions and permanent representatives.

9. Mr. YASSEEN said that the status of permanent representative or member of a permanent mission was an international status which must take precedence over that of permanent resident. The exception in respect of nationality of the host State was justified because of the bond of allegiance between the national and his State. The status of national thereby acquired an international scope.

10. The proviso in paragraph 1 was not based on the functional theory. It was more restrictive than that, for performance of the function was not limited to official acts. If the Commission decided in favour of such a limitation, it would be restricting the freedom of action and latitude of a permanent representative who was also a permanent resident and be placing him in an inferior position in relation to other permanent representatives.

11. The possibility of combining the advantages of the two kinds of status was another matter. He was not urging the desirability of any such plurality. The host State might take steps to prevent it. The Commission might provide that the status of permanent resident was suspended for such time as the person concerned enjoyed the status of permanent representative: he would then not be able to engage in any professional or commercial activity, for instance. But the privileges

¹ United Nations, *Treaty Series*, vol. 500, p. 118, article 38.

² See previous meeting, para. 66.

and immunities of a permanent representative should not be restricted solely by reason of his permanent residence in the host State.

12. Mr. RAMANGASOAVINA said he was not in favour of deleting the restriction relating to permanent residence. It had been argued that it would entail discrimination as between permanent representatives, but the attempt to avoid such discrimination involved the risk of creating another and even more serious form of discrimination. There could be two classes of permanent resident in a country: residents who were nationals of the country and residents who were aliens. As a general rule, an effort was made to accord them complete equality both in civil life and in employment. Without the restriction in paragraph 1, a permanently resident alien, who was also a permanent representative, would enjoy unfair advantages in relation to a resident who was a national.

13. Article 40 as it stood gave adequate protection to the persons covered by it. First, they enjoyed privileges and immunities for official acts; secondly, the host State might grant them additional privileges and immunities; and thirdly, in the exercise of its jurisdiction the host State must not interfere unduly with the performance of the functions of the mission. Thus it was the functions of the permanent representative that were protected. So far as his private acts were concerned, a permanent representative who was also a permanent resident should be placed on an equal footing with nationals of the host State.

14. A comparison of the provisions of articles 39 and 40 seemed to disclose an anomaly. Article 39, paragraph 1, did not mention permanent residence in connexion with members of the family. It was, however, possible that a member of the family, an adult son, for example, might have become a permanent resident, in which case he would apparently be entitled to full privileges and immunities, whereas the permanent representative who was in the same position would be subject to the restriction in article 40.

15. With regard to the wording, the expression "*d'une manière excessive*" in the French version of article 40, paragraph 2, and in article 39, paragraph 4, was a bad translation of the English adverb "unduly". It would be better to say "*d'une manière abusive*". The expression "*d'une manière excessive*" could give the impression that the host State might interfere with the functions of the mission, provided that it did not do so excessively.

16. Sir Humphrey WALDOCK said he felt compelled to start from the premise that article 40 was based on a text which had already been carefully considered by governments in connexion with the 1961 Vienna Convention.

17. Moreover, it was impossible to overlook the fact that an individual's permanent residence in the host State prior to his appointment as a representative did distinguish him from an individual who had resided in the sending State prior to his appointment. To take only one example, he was in an exceptionally favourable position vis-à-vis his business creditors. His posi-

tion was entirely different from what it would be in normal diplomatic relations, when the receiving State would not be obliged to accept his appointment and could refuse its *agrément*. That measure of protection was lacking in the case of a host State, whose position was therefore much less strong. Consequently, if the words "or permanently resident in that State" had been considered necessary in the Vienna Convention, they would, *a fortiori*, seem to be even more necessary in the present article.

18. For the same reasons as had already been given by Mr. Kearney, Mr. Bartoš and Mr. Ramanasoavina, therefore, he did not think that a case had been made out for departing from the Vienna text.

19. Mr. ELIAS said that, although powerful arguments had been advanced for the deletion of the phrase "or permanently resident in that State", it would be difficult to produce a new text which would cover the problems mentioned by Mr. Kearney and other members. In order not to disrupt the delicate formula adopted in article 38 of the 1961 Vienna Convention, the best solution would be to retain paragraph 1 in its present form.

20. The argument for deleting the phrase in question, however, should be fully stated in the commentary, in order to give governments an opportunity of suggesting alternative formulations if they wished.

21. Mr. ALBÓNICO said he was inclined to support the idea that permanent residence in the host State placed certain limitations on the privileges and immunities of a permanent representative. Under the law of many States, permanent residence created a new domicile, which extinguished any former domicile and in itself conferred a sort of second nationality. Permanent residence tended to forge a juridical and political link of great strength, and if that link gave rise to certain rights and privileges, it was only logical that it should also give rise to certain obligations towards the host State.

22. It was inconceivable that, by voluntarily taking a diplomatic appointment, a person already enjoying the rights and privileges of permanent residence should be able to place himself in a more favoured position than those who were, in that respect, his equals. To accept that interpretation would create serious problems of jurisdiction, for by virtue of his permanent residence in the host State such a person would enjoy immunity, in civil suits, from the jurisdiction of his home State, while by taking the post of permanent representative in the host State he would be immune from the jurisdiction of that State as well. Hence the present text of paragraph 1 should be retained.

23. He was beginning to be seriously concerned at the fact that the Commission in some cases seemed to regard the text of the Vienna Convention as something sacrosanct, from which no departure could be permitted, while in other cases it took precisely the opposite view.

24. Mr. IGNACIO-PINTO said he would be inclined to advocate the deletion of the reference to permanent residence in paragraph 1.

25. It had been convincingly argued that a permanent representative, or a member of a permanent mission, who was at the same time a permanent resident of the host State, was in a position of unjustified inferiority incompatible with his functions with an international organization. Combining the advantages of the status of permanent resident with those of the status of permanent representative would, however, mean placing a permanent representative who enjoyed that dual status in a more favourable position than other permanent representatives. Might not the best solution be that in such a case the permanent representative would waive his status as permanent resident, at least for the period during which he enjoyed privileges and immunities?

26. In view of the strength of the arguments advanced by those in favour of retaining the restriction, however, he would be prepared to approve its retention for the time being, provided that it was fully explained in the commentary that the question should be considered very closely since there was a danger of its undermining the very basis of the privileges and immunities of permanent representatives to international organizations. The Commission could take a final decision later, in the light of comments by Governments.

27. Mr. NAGENDRA SINGH said that, after listening to the views of his colleagues, he did not think that there was a sufficiently strong case for departing from the text of the Vienna Convention.

28. He agreed with Mr. Elias that a reference to the difference of opinion over paragraph 1 should be included in the commentary in order to attract comments by Governments.

29. The CHAIRMAN, speaking as a member of the Commission, said that there were three reasons for deleting the phrase. First, the interests of medium-sized and small countries needed to be protected, for they were the countries which appointed permanent residents as permanent representatives to an international organization or as members of the staff of their mission, because they did not have enough qualified civil servants available.

30. Secondly, article 39, paragraph 1, like article 37, paragraph 1 of the Vienna Convention on Diplomatic Relations, contained no exception relating to permanent residence. Mr. Ramangasoavina had pointed out that that would entail different treatment for a permanent representative and the members of his family, whereby the latter would have the advantage.

31. Thirdly, article 40, paragraph 1 referred to the functions of the permanent representative and the members of the diplomatic staff of a permanent mission to an international organization. While in relations between a sending State and a receiving State it was easy to decide whether an act fell within the diplomatic function or not, in relations between States and international organizations it was not for the host State to determine whether something did or did not fall within the functions of a permanent mission.

32. There were, however, also arguments for retaining the proviso. It was a rather delicate question for the Commission to decide.

33. Speaking as Chairman, he said that the Commission might consider replacing the word "*excessive*" by the word "*abusive*" in the French version of article 40, paragraph 2, as suggested by Mr. Ramangasoavina, on the understanding that it would be specified in the commentary that the intention was merely to provide a more accurate equivalent of the English term, not to change the meaning of the provision.

34. Mr. ROSENNE said that, since article 40 had been copied from a text which was already authentic in five languages, he doubted whether the Commission should try to improve one particular version at the present stage. Such an action would lay the text open to misinterpretations; it would be better only to refer to the matter in the commentary.

35. Sir Humphrey WALDOCK said he thought that the French word "*abusive*" went much further than the English word "*unduly*", which in his opinion was almost exactly right and offered greater protection to the sending State.

36. Mr. ALBÓNICO said that the French word "*abusive*" had an entirely different connotation from the Spanish word "*indebidamente*".

37. Mr. RAMANGASOAVINA said he thought it was the French word "*excessive*" which implied more than was meant. The verb "*entraver*" was in itself very strong. The expression "*de manière excessive*" meant exceeding certain limits. It would therefore imply that the host State was permitted to interfere with the performance of the functions of the mission within certain limits. The use of the word "*abusive*" would stress that what was to be prevented was misuse of authority by agents of the host State.

38. The CHAIRMAN, supported by Mr. USTOR, suggested that the Commission should decide not to amend the last sentence of paragraph 2, but instead, to explain the difficulty in the commentary.

It was so agreed.

39. The CHAIRMAN suggested that, in response to the Drafting Committee's request, the Commission take a decision on the question whether the words "or permanently resident in", in paragraph 1, should be deleted or not.

40. Mr. ALBÓNICO said he thought that the attention of Governments should be drawn to the general problem involved rather than to the desirability of deleting a particular phrase.

41. The CHAIRMAN put to the vote the amendment deleting the words "or permanently resident in", in paragraph 1.

The amendment was rejected by 10 votes to 5, with 1 abstention.

42. Mr. ROSENNE said that he had voted against the amendment because he did not think that a sufficiently strong case had been made out for the deletion of the phrase in question.

43. Mr. RUDA said that he had voted against the amendment because he thought that it was better, for

the time being, to adhere to the language of article 38 of the 1961 Vienna Convention.

44. Mr. YASSEEN said he had voted for the amendment, despite his anxiety that the Commission should follow the text of the Vienna Conventions, because he believed that the retention of the exception might impair the free exercise of an international function, namely, that of permanent representative.

45. Mr. BARTOŠ said he had already explained his position on the amendment. He had abstained from voting because he believed that deletion of the limitation would require further changes in the text, which the Commission was not in a position to make at that stage.

46. The CHAIRMAN, speaking as a member of the Commission, said he had voted for the amendment with the interests of medium-sized and small countries particularly in mind.

47. Mr. RUDA said he agreed with the Chairman of the Drafting Committee that there were two distinct trends in the Commission concerning article 40 and that the arguments on both sides should be clearly reflected in the commentary and brought to the attention of Governments.

48. Mr. KEARNEY proposed that the commentary should also include a suggestion that an attempt be made to obtain some factual information about the practical aspects of the matter at issue: in other words, to ascertain to what extent, at the present time, permanent representatives to international organizations were, in fact, permanent residents of the host State.

49. Mr. ELIAS said he supported Mr. Kearney's proposal. The situation had arisen in his own country, and the Commission should make a direct request to Governments for the necessary information.

50. Mr. ROSENNE said that the Commission should not only request the views of Governments, but should also ask the Secretariat to what extent the problem existed in the main cities of the world where there were international organizations.

51. Mr. NAGENDRA SINGH said he supported Mr. Rosenne's suggestion.

52. The CHAIRMAN suggested that the Commission adopt the text proposed by the Drafting Committee for article 40, with the amendments to the English version of paragraph 2 made at the previous meeting, on the understanding that the commentary would be drafted on the basis of the discussion concerning the question of permanent residents.

Article 40, as amended, was adopted.

ARTICLE 41 (Duration of privileges and immunities)³

53. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 41.

54. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 41

Duration of privileges and immunities

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the host State by the Organization or by the sending State.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the permanent mission, immunity shall continue to subsist.

3. In case of the death of a member of the permanent mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the permanent mission not a national of or permanently resident in the host State or of a member of his family forming part of his household, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the host State was due solely to the presence there of the deceased as a member of the permanent mission or as a member of the family of a member of the permanent mission.

55. The Drafting Committee had made only one change of importance in the text. The final part of paragraph 1 dealt with the position of a person who was appointed a member of a permanent mission when he was already in the territory of the host State. The Committee had noted that article 17, paragraph 3⁴ provided that the organization should transmit to the host State certain notifications received from the sending State, in particular notifications concerning the engagement of persons resident in the host State as members of a permanent mission. Article 17, paragraph 4, provided in addition that the sending State might also transmit the notifications in question direct to the host State. In order to take those provisions into account the Committee had added at the end of article 41, paragraph 1, after the words "when his appointment is notified to the host State", the words "by the Organization or by the sending State".

56. The Committee had replaced the expression "permanent resident of" in the English version of paragraph 4 by the expression "permanently resident in", and in the Spanish version the phrase "*ni residente permanente en él*" by the phrase "*o tenga en él resi-*

³ For previous discussion, see 996th meeting, para. 64.

⁴ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

dencia permanente". The same changes had been made in article 40, paragraph 1.

57. Mr. RUDA said he favoured the text proposed by the Drafting Committee; the additional words at the end of paragraph 1 were appropriate. He also fully supported the changes made in the Spanish version.

58. The CHAIRMAN suggested that the Commission adopt the text proposed by the Drafting Committee for article 41.

*Article 41 was adopted.*⁵

ARTICLE 42 (Transit through the territory of a third State)⁶

59. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 42.

60. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 42

Transit through the territory of a third State

1. If the permanent representative or a member of the diplomatic staff of the permanent mission passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of the members of his family enjoying privileges or immunities who are accompanying the permanent representative or member of the diplomatic staff of the permanent mission or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the passage of members of the administrative and technical or service staff of the permanent mission, and of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the host State. They shall accord to the couriers of the permanent mission who have been granted a passport visa if such visa was necessary, and to the bags of the permanent mission in transit the same inviolability and protection as the host State is bound to accord.

4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to the official communications and bags of the permanent mission, whose presence in the territory of the third State is due to *force majeure*.

61. The Special Rapporteur had entitled article 42 "Duties of third States"; for the sake of uniformity the Drafting Committee had substituted the title of article 43 of the draft on special missions, namely, "Transit through the territory of a third State".

⁵ For resumption of the discussion of paragraph 2, see 1036th meeting, para. 1.

⁶ For previous discussion, see 997th meeting, para. 1.

62. All the other changes were purely drafting amendments. In the French version, in the first sentence of paragraph 1 the Committee had put the verb "*accorder*", which had been in the future in the Special Rapporteur's text and in article 40 of the 1961 Vienna Convention, into the present tense. It had also considered that the phrase "*Il fera de même pour les membres de sa famille*", at the beginning of the second sentence of paragraph 1, needed amending. The words "*Il*" and "*sa*" seemed to refer to the same person, whereas in fact "*Il*" referred to the third State and "*sa*" to the permanent representative or member of the diplomatic staff mentioned a little earlier in the text. The Committee had therefore amended the phrase to read "*L'Etat tiers fait de même pour les membres de la famille*". The English version was not affected by that change. In the Spanish version, the words "*su familia*" had been replaced by the words "*la familia*".

63. In paragraphs 3 and 4, in order to bring the wording into line with that of article 28,⁷ the Committee had replaced the expression "diplomatic couriers" by "couriers of the permanent mission" and "diplomatic bags" by "bags of the permanent mission".

64. At the first reading, the Commission had discussed at length the question whether third States were obliged to allow members of permanent missions free passage. The discussion had turned mainly on the phrase "which has granted him a passport visa if such visa was necessary". The Committee had not changed that phrase at all, but had expressed the hope that the Special Rapporteur would record the Commission's discussion in the commentary in order to elicit comments from Governments.

65. The CHAIRMAN, speaking as a member of the Commission, referring to the change in language made by the Drafting Committee in the second sentence of paragraph 3, said that a diplomatic courier and a courier of a permanent mission were sometimes the same person. If a distinction had to be made, either the wording proposed by the Drafting Committee should be retained and the requisite explanation given in the commentary, or the Commission should go back to the Special Rapporteur's wording.

66. Mr. ROSENNE said he associated himself with the Chairman's comments.

67. There was also another question he wished to raise with regard to paragraphs 1 and 3. Those paragraphs were couched in terms drawn from the 1961 Vienna Convention which suggested that recognition of the status of the permanent representative or other person concerned was dependent on the fact that the third State had "granted him a passport visa if such visa was necessary". Thus they did not cover the case in which no visa was required; no obligation was specified for the third State in that case. Since 1961, the abolition of the visa requirement had become much more widespread, especially for diplomatic passports. It was therefore necessary to specify that the third State should also accord the necessary immunities, where no visa was required.

⁷ See 1017th meeting, paras. 52 and 70.

68. Mr. ALBÓNICO said that paragraph 1 dealt only with the case of a permanent representative or a member of the diplomatic staff of the permanent mission, and members of their families, proceeding to take up or to return to their posts or returning to their own country. Paragraph 4 dealt with the case in which the presence of such persons in the territory of the third State was "due to *force majeure*". No provision was made, however, for other journeys by such persons to third States. The 1928 Havana Convention regarding Diplomatic Officers specified that the third State should grant privileges and immunities in such cases.⁸

69. Mr. CASTAÑEDA (Chairman of the Drafting Committee), replying to Mr. Rosenne, said that paragraph 1 dealt with the case in which a visa was required and was granted by a third State. In such a case, the third State must grant inviolability and any other necessary immunities, but it was obvious that the same applied when no visa was required.

70. With regard to the question raised by Mr. Albónico, the first three paragraphs of article 42 dealt only with the transit of persons proceeding to take up or to return to their post or returning to their own country. Paragraph 4 dealt with the exceptional case of *force majeure*. There was *force majeure*, for example, when an aircraft had to make a forced landing in the territory of a State outside its normal route. The case of a permanent representative who already lived in the host State and was travelling to another country, no matter what was the object of the journey, was not covered by article 42.

71. Sir Humphrey WALDOCK said he associated himself with the interpretation placed on paragraph 1 by the Chairman of the Drafting Committee. Admittedly the form of words used in that paragraph, which had been taken from the corresponding provision of the 1961 Vienna Convention on Diplomatic Relations,⁹ was not very felicitous. Nevertheless, the intention could only have been to indicate that, whether a passport visa was necessary or not, the privileges and immunities should be accorded to the person to whom the necessary visa had been granted or who was dispensed from the visa requirement. Any other interpretation would deprive paragraph 1 of all useful effect and would be contrary to the normal rules of interpretation.

72. Mr. ROSENNE said that the interpretation placed on paragraph 1 by the Chairman of the Drafting Committee and by Sir Humphrey Waldock was eminently desirable. But unfortunately, it was possible for a State to adopt a different interpretation in good faith, especially as privileges and immunities were always construed restrictively.

73. If it were desired to ensure that privileges and immunities would be accorded by the third State even where a visa was not required, the language of paragraph 1 would have to be altered. The question was of practical importance because there had, in fact, been

serious abuses of the privileges and immunities of permanent representatives in transit.

74. The CHAIRMAN, speaking as a member of the Commission, said that it was stipulated in article 43, paragraph 3, of the draft on special missions¹⁰ that third States "shall accord to the couriers and bags of the special mission in transit the same inviolability and protection as the receiving State is bound to accord". He noted that the Drafting Committee had taken that provision as a model in amending paragraph 3 of article 42. Consequently, he would not press the point he had made earlier about the distinction between a diplomatic courier and the courier of a permanent mission.

75. The phrase "which had granted him a passport visa if such visa was necessary", which was in the two Vienna Conventions and had now been reproduced in article 42, had been omitted from article 43, paragraph 1, of the draft on special missions. The reason why it had been omitted was that a paragraph 4 had been added to the article, stipulating that a third State was bound to permit the persons referred to in the article to pass through its territory only if it had been informed in advance, either in the visa application or by notification, of the transit of those persons.

76. Mr. ROSENNE said he was grateful to the Chairman for having drawn attention to the different structure of the corresponding article 43 of the draft on special missions. It was true that paragraph 1 of that article did not contain the words "which has granted him a passport visa if such visa was necessary", but paragraph 4 made a clear distinction between cases in which a visa was necessary and other cases, and specified that the third State was bound to comply with its obligations "only if it has been informed in advance, either in the visa application or by notification, of the transit of those persons . . . and has raised no objection to it". A similar paragraph was not included in the article under discussion.

77. It was clear that paragraph 4 of article 43 of the draft on special missions provided a much better model for article 42 with regard to the point he had raised.

78. Mr. BARTOŠ observed that article 9 of the Vienna Convention on Diplomatic Relations provided that the receiving State might, without having to explain its decision, declare a person *non grata*, or not acceptable, even before that person arrived in its territory. Hence a third State had no obligation to grant a visa.

79. Sir Humphrey WALDOCK said that the use of the word "If" in the present article made it impossible for a third State acting in good faith to interpret the provision restrictively. The object of paragraph 1 was to leave the third State free to refuse passage to the persons concerned; the privileges and immunities were specified for the case in which it accorded passage, whether by granting a visa or by not requiring one.

80. Mr. CASTRÉN said he agreed with Mr. Castañeda's and Sir Humphrey Waldock's interpretation of

⁸ League of Nations, *Treaty Series*, vol. CLV, p. 271, article 23.

⁹ United Nations, *Treaty Series*, vol. 500, pp. 118-120, article 40.

¹⁰ See *Yearbook of the International Law Commission*, 1967, vol. II, p. 365.

paragraph 1. In his opinion, Mr. Rosenne's restrictive construction was not logical. In practice, until a third State had received a visa application or advance notification, it would not know whether a journey was the official travel in transit covered by article 42.

81. Mr. KEARNEY said that the legislative history of the corresponding article of the 1961 Vienna Convention supported the construction placed on paragraph 1 by the Chairman of the Drafting Committee. The Commission's 1958 draft of article 39¹¹ had not contained the words "which has granted him a passport visa if such visa was necessary"; they had been introduced at the 1961 Vienna Conference as an amendment.

82. The CHAIRMAN, speaking as a member of the Commission, said he concurred in the interpretation of paragraph 1 given by Mr. Castañeda and other members.

83. Mr. ROSENNE said he was opposed to article 42 as it stood. He could have supported the article if it had been drafted in the same form as article 43 of the draft on special missions.

84. The CHAIRMAN suggested that the Commission adopt article 42 in the form proposed by the Drafting Committee.

Article 42 was adopted.

ARTICLE 43 (Non-discrimination)¹²

85. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 43.

86. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 43

Non-discrimination

In the application of the provisions of the present articles, no discrimination shall be made as between States.

87. In order to bring the Spanish version of the article closer to the other language versions, the Committee had deleted the word "*ninguna*", although it appeared in the text of the Vienna Convention.

88. Mr. NAGENDRA SINGH suggested that the Commission adopt article 43 as proposed by the Drafting Committee.

Article 43 was adopted.

The meeting rose at 1 p.m.

1024th MEETING

Tuesday, 22 July 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218/Add.1)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES

PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 44 (Obligation to respect the laws and regulations of the host State)¹

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 44.

2. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 44

Obligation to respect the laws and regulations of the host State

1. 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 host State. They also have a duty not to interfere in the internal affairs of that State.

2. The premises of the permanent mission must not be used in any manner **incompatible with the functions** of the permanent mission [as laid down in the present articles or by other rules of general international law].

3. The Committee had unanimously decided that the words "or by special agreements in force between the sending and the host State", at the end of paragraph 2 (A/CN.4/218/Add.1), were unnecessary, because article 4 stated that "The provisions of the present articles are without prejudice to other international agreements in force between States or between States and international organizations". The Committee had therefore deleted those words.

4. Several members of the Committee had also considered the words "as laid down in the present articles or by other rules of general international law" to be unnecessary. As not all the members had been in favour

¹¹ *Op. cit.*, 195, vol. II, p. 103.

¹² For previous discussion, see 997th meeting, para. 22.

¹ For previous discussion, see 997th meeting, paras. 67-75, and 998th meeting.

of deleting those words, however, the Committee had placed them in brackets.

5. A few slight changes had been made to the Spanish version of the article.

6. Mr. Kearney, it would be remembered, had submitted an amendment adding a paragraph 3 to article 44.² Later, he had submitted a revised version to the Drafting Committee, but had finally withdrawn it, as most of the members of the Committee had not favoured it. Mr. Kearney had now submitted a new version of his amendment. It was designed solely to state a substantive rule, omitting any reference to procedure, and read:

“3. The sending State shall remove from the permanent mission any person enjoying immunity from the criminal jurisdiction of the host State under this Convention who has seriously violated the criminal laws or regulations of the host State.”

7. Mr. KEARNEY, introducing his amendment, said that in two previous proposals he had tried to combine certain procedural steps with the general principle that a member of a permanent mission who violated the criminal laws of the host State should not be allowed to remain in its territory and enjoy immunity from its criminal jurisdiction. In view of the difficulty of reaching agreement about the procedural problems, however, he was now proposing merely a statement of the general principle, which would place an obligation on the sending State to remove the offending member. The question of what might or might not happen if the sending State violated that general principle could be left for consideration in connexion with the final clause of the draft articles, concerning the settlement of disputes.

8. In view of the objections of other members, he had omitted any reference in his present proposal to the case of repeated violations of the criminal laws of the host State.

9. Mr. Bartoš had been somewhat concerned at the inclusion of a reference to the “regulations” of the host State.³ In the case of his own country, such a reference would be immaterial because criminal regulations in the United States were always based on legislation, but since there were a number of States which recognized criminal regulations or orders in their legislation, he thought that the reference to regulations should remain. He would, however, have no serious objections to its deletion.

10. The CHAIRMAN, speaking as a member of the Commission, said that in the cases covered by the amendment the organization was usually informed of the violation by the host State and itself approached the permanent mission with a request that the person concerned leave the territory of the host State.

11. Despite that practice, it might be as well to add the proposed paragraph 3, but with the following changes: the words “or regulations” should be deleted, since the reference was in fact to criminal laws; the

words “these articles” should be substituted for the words “this Convention”, since the Commission was still only considering a draft of articles; and in the French version the words “*doit retirer*” should be replaced by the word “*retirera*”, which would be closer to the English.

12. Mr. ROSENNE said he supported Mr. Kearney’s amendment.

13. It would be better, however, not to introduce the concept of “regulations”, which was subject to various interpretations. As a minor drafting point, he would suggest that the plural expression “criminal laws” be replaced by “criminal law”.

14. Mr. ELIAS said he questioned the use of the adverb “seriously” in the expression “who has seriously violated the criminal laws or regulations of the host State”. It was not so much the manner in which the criminal laws were violated as the fact of the violation itself that was decisive. If the provision was to be restricted to “serious violations”, it should state that clearly.

15. Mr. RAMANGASOAVINA said he was in favour of adding the new paragraph 3.

16. He was afraid that, if the words “or regulations” were deleted, as the Chairman urged, that might unduly restrict the scope of the provision. Some regulations, such as local police regulations, appeared in decrees or orders. Although a breach of such regulations did not constitute a criminal offence, it might be dangerous or cause an accident, depending on how serious it was or how frequent. To take an example, there was the case of a member of a permanent mission who had deliberately and repeatedly driven the wrong way down a one-way street. Everything depended on whether the paragraph was intended to cover only persons who committed crimes, or whether it was intended to cover also persons who committed breaches of regulations. Under the French system, the notion of “criminal jurisdiction” could cover mere infringements of police regulations.

17. Mr. USTOR said he doubted whether the word “remove”, in the English version of the amendment, had the same meaning as the word “*retirer*” in the French version. He suggested that the paragraph be redrafted on the lines of the second sentence of article 9, paragraph 1, of the Vienna Convention on Diplomatic Relations,⁴ which read: “In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission”.

18. Mr. ALBÓNICO said that he supported Mr. Kearney’s amendment, though he understood it to mean that the sending State would not be obliged to take the action in question until the remedies provided for in article 49, entitled “Consultations between the sending State, the host State and the Organization” (A/CN.4/218/Add.1), had been exhausted.

19. He took the term “seriously violated” to imply a

² See 997th meeting, para. 71.

³ See 998th meeting, para. 41.

⁴ United Nations, *Treaty Series*, vol. 500, p. 102.

repetition of violations; in other words, a violation became serious when it was constantly repeated.

20. Like Mr. Ramangasoavina, he favoured the retention of the word "regulations", since it covered all the minor police rules governing motor vehicle traffic, hunting, fishing and the like, the violation of which might be a mere misdemeanour, but which were nevertheless a part of criminal law.

21. Sir Humphrey WALDOCK said that, in his opinion, Mr. Kearney's amendment was a useful addition to the text of article 44.

22. He assumed that Mr. Kearney had deliberately used the non-legal word "remove" in order not to be too precise and to cover the various kinds of action which the sending State might take, depending on the gravity of the offence. In the case of an ordinary crime, for example, the sending State might merely recall its permanent representative, while in the case of a more serious crime which gave rise to public indignation in the host State, it might expel the representative from the permanent mission, without recalling him, in order to leave him open to the criminal jurisdiction of the host State.

23. He had no strong feelings for or against the use of the word "regulations", but since that word was also used in the title of the article, it would seem logical to retain it.

24. Mr. KEARNEY said that Sir Humphrey Waldock had been correct in assuming that he used the word "remove" in order to avoid some more technical term.

25. It was for the same reason that he had used the expression "seriously violated". Legal systems differed dramatically throughout the world; the "misdemeanours" and "felonies" of the common law system meant nothing in countries with a code system, and even the latter differed widely among themselves. A sending State should not be required to remove its representative for a mere parking offence, for example, although it might have to do so if the offence was repeated too often. It should also be borne in mind that what was considered a relatively minor offence in one country might be regarded as a serious crime in another. What was needed, therefore, was some term which would cover all possible geographical variations.

26. Mr. EUSTATHIADES said that he had already expressed a definite opinion on the principal of including a paragraph 3.⁵

27. He was in favour of retaining the words "or regulations". The diversity of national laws and regulations was an argument in favour of providing the same penalties for the same acts, no matter how they might be described or whether they were covered by a law or a regulation.

28. As he understood it, paragraph 3 was intended to prescribe a penalty for non-compliance with the provisions of paragraph 1. Paragraph 1 laid down that the laws and regulations of the host State must be respected. If paragraph 3 dealt only with the violation of laws, it would be a very lame provision.

29. Perhaps it would be better to use the expression "criminal legislation". In that case, if the notion of "serious violation" were retained, the clause would cover not only the criminal law, but also serious violations of regulations.

30. Assuming that paragraph 3 was essentially a sanction for violation of the provisions of paragraph 1, the obligation it contained did not apply to the violation of one obligation laid down in paragraph 1, namely, that of non-interference in the internal affairs of the host State. Since the notion of interference was somewhat vague, instead of amending paragraph 3, it might be better to expand the title of the article to read: "Respect for the laws and regulations, and non-interference in the internal affairs, of the host State."

31. With regard to the word "remove", the important point was to convey the general obligation of the sending State not to keep the person concerned in its mission, because of the unfortunate effect that might have on public opinion and on relations between the sending State and the host State and, above all, in the interests of the organization itself.

32. The Commission should therefore accept the amendment as it stood.

33. Mr. RUDA said that he could agree to the changes in article 44 recommended by the Drafting Committee, but he favoured the deletion of the words in square brackets in paragraph 2.

34. With regard to the amendment proposed by Mr. Kearney, he agreed with the basic idea that the host State required some such protection, though he had doubts about the drafting. The expression "shall remove from the permanent mission", for example, could only mean that the sending State would recall the offender at the request of the host State, since to remove him from the permanent mission without recalling him would leave him exposed to the local criminal jurisdiction, and that was entirely contrary to the idea of immunity from such jurisdiction, as well as to the idea that the sending State's waiver of immunity was purely optional.

35. With regard to the expression "seriously violated", he did not think it should be left to the discretion of the host State to determine whether its laws or regulations had been "seriously" violated; hence it would be better to delete the word "seriously".

36. He had no objection to retaining the word "regulations", although in the Latin-American legal system a law could include regulations.

37. Mr. CASTRÉN said he was in favour of the first two paragraphs of article 44, provided that the phrase in brackets was deleted.

38. The earlier version of Mr. Kearney's proposal had given rise to a long discussion, whereas the present version seemed to be accepted by almost all the members of the Commission. In view of what the Chairman had said about the practice of international organizations, he concurred in the general view, but would suggest that the Commission take no final decision until it knew the reaction of Governments.

⁵ See 998th meeting, paras. 33-36.

39. The reference to "regulations" seemed useful, in view of the variety of legal systems. In any event, the amendment dealt with serious violations; it was the serious element that was important, not the repetition, which had also been mentioned in the previous version.

40. As to the remaining questions of form, he suggested that the Drafting Committee be asked to submit a new text.

41. Mr. JIMÉNEZ de ARÉCHAGA said that paragraph 2 of the Drafting Committee's text, including the words within square brackets, was based on the corresponding articles in the Vienna diplomatic and consular Conventions and in the draft on special missions. For example, article 48, paragraph 2, of the latter read: "The premises of the special mission must not be used in any manner incompatible with the functions of the special mission, as envisaged in the present articles or in other rules of general international law or in any special agreements in force between the sending and the receiving States." In paragraph (3) of its commentary to that article, the Commission had stated that: "The question of asylum in the premises of the special mission is not dealt with in the draft. In order to avoid any misunderstanding, the Commission wishes to point out that among the special agreements referred to in article 48, paragraph 2, there are certain treaties governing the right to grant asylum in mission premises, which are valid as between the parties that concluded them".⁶

42. In general, he supported Mr. Kearney's amendment although, as Mr. Eustathiades had pointed out, it might have connotations which would exclude the duty of removal in connexion with other than "serious" violations. There was also the question, mentioned by Mr. Ruda, of the waiver of immunity from criminal jurisdiction by the sending State. He proposed, therefore, that article 44 be referred back to the Drafting Committee for further study.

43. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Kearney's proposal was based on the same idea as article 9 of the 1961 Vienna Convention on Diplomatic Relations. Taking the wording of that article as a starting point, therefore, he proposed that paragraph 3 be redrafted to read:

"The sending State shall recall any person enjoying immunity from criminal jurisdiction under the present articles who has seriously violated the criminal law of the host State or shall terminate his functions with the permanent mission, as appropriate."

44. The phrase "or by special agreements in force between the sending and the host State", which the Drafting Committee had deleted from the end of paragraph 2, had been added at Vienna⁷ at the request of certain Latin American countries. He was in favour of its deletion.

⁶ See *Yearbook of the International Law Commission*, 1967, vol. II, p. 367.

⁷ United Nations, *Treaty Series*, vol. 500, p. 120, article 41, para. 3.

45. Mr. BARTOŠ said it would certainly be wrong to impose on members of permanent missions, in the same way as on diplomatic agents, who were members of regular diplomatic missions, the duty not to interfere in the internal affairs of the host State. Members of permanent missions were occasionally obliged by their functions as members of a mission to criticize the host State, and that had sometimes been regarded by the host State as a breach of hospitality. He therefore considered that that clause should be deleted from paragraph 1 or formulated differently.

46. With regard to paragraph 2, he was in favour of retaining the words in brackets, because the premises of a permanent mission were often combined with those of an embassy or consular post, and that justified the mention of other rules of international law.

47. He was against Mr. Kearney's amendment in principle. The Drafting Committee had sought to protect the host State and, with that aim in mind, had tried to find a compromise between the interests of the sending State and those of the host State. But the obligation to remove a member of a permanent mission merely at the request of the host State, on the pretext that he was guilty of a serious offence, would amount to interference by the host State with the selection of the members of the mission. Everyone knew that in the past, at United Nations Headquarters, the United States Government had on more than one occasion considered some members of missions from eastern countries to be dangerous. He was not in favour, therefore, of basing paragraph 3 simply on article 9 of the 1961 Vienna Convention on Diplomatic Relations. The principle of the sending State's freedom of choice in the selection of the members of its missions ought to be respected, and provided with better safeguards.

48. Mr. YASSEEN said he found paragraph 1 of the text proposed by the Drafting Committee acceptable, provided that the meaning of the second sentence was fully explained in the commentary. It should be clearly understood that the duty not to interfere in the internal affairs of the host State applied only to matters unconnected with the performance of the functions of the permanent mission. For although the host State's foreign policy might be considered, in a sense, as an internal affair coming exclusively under its sovereignty, a permanent representative had the right to criticize that policy within an international organization if it affected the international community.

49. The phrase in brackets in paragraph 2 might be omitted for the sake of brevity, since it could be regarded as expressing a self-evident truth. In any event, he doubted whether, even in Latin America, the granting of diplomatic asylum could be considered as being within the functions of a permanent mission, which concerned relations between the sending State and the international organization, not between the sending State and the host State.

50. The addition of a paragraph 3 to the article had been proposed in order to ensure some protection for the host State's interests. He was entirely in favour of a balance between the interests of the three parties,

namely, the sending State, the host State and the international organization. It was not possible, however, simply to apply the institution of recall in such cases.

51. In bilateral diplomacy, the fact that the attitude of a certain person was not conducive to good relations between two States was sufficient ground for the receiving State's declaring him *persona non grata*. That was why the 1961 Vienna Convention did not require a host State to explain its decision. In relations with international organizations the problem was different, but that did not mean that the amendment was not justified. The possibility of abuse could not be invoked against it, since that argument could be advanced against any legal rule whatever. From the point of view of good faith, it was obvious that the host State could not be required to allow a person who had seriously violated its criminal law to remain in its territory. The whole institution of diplomatic immunities would be undermined if the sending State persisted in keeping a criminal as a member of its permanent mission.

52. Caution was required, however, and that was why he preferred the Chairman's wording. It had the merit of using the verb "recall", which was the standard term, and of omitting the reference to "regulations", the violation of which was not usually serious enough to warrant recall. He would, however, prefer the expression "criminal law" to be replaced by "criminal laws".

53. Mr. USTOR said he supported paragraph 1 as formulated by the Drafting Committee, including the second sentence, which expressed the duty of members of the permanent mission not to interfere in the internal affairs of the host State. There could be no doubt about the existence of such a duty.

54. In paragraph 2, he suggested that the clause in square brackets be dropped. Paragraph 2 would then become a brief and precise provision, on the lines of article 55, paragraph 2, of the 1963 Vienna Convention on Consular Relations,⁸ which provided a better model in the present instance.

55. With regard to paragraph 3, he supported the rewording suggested by the Chairman for Mr. Kearney's proposal.

56. Mr. JIMÉNEZ de ARÉCHAGA said he still favoured not only the retention of the words in brackets in paragraph 2, but also the reintroduction of the words "or by special agreements in force between the sending and the host State". That phrase corresponded to the concluding proviso of article 41, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, which had been inserted in that Convention to safeguard existing Latin American agreements on diplomatic asylum. A similar formula had been included in the corresponding article 48 of the draft on special missions. The purpose of the formula was not to grant diplomatic asylum, but merely to ensure that such asylum was not precluded where an agreement on the subject already existed between the two States concerned, namely, the sending State and the receiving or host State. Such agreements existed between certain Latin

American countries and had always been interpreted broadly; they would therefore cover the case of diplomatic asylum in the permanent mission to an international organization. The phrase in question would merely express the fact that those Latin American agreements were not contrary to any rule of *jus cogens*.

57. Mr. ROSENNE said he accepted the Drafting Committee's text for paragraph 1.

58. In paragraph 2, he supported the suggestion that the words in brackets be dropped, as they were unnecessary.

59. He agreed with Mr. Ustor that article 55, paragraph 2, of the 1963 Vienna Convention provided a better model for the present paragraph 2 and he therefore proposed that the paragraph be reworded to read: "The premises of the permanent mission shall not be used in any manner incompatible with the exercise of the functions of the permanent mission".

60. That wording was an improvement in two respects. First, the use of "shall" instead of "must", was more appropriate, apart from the fact that it corresponded better to the French text. Secondly, the introduction of a reference to "the exercise" of the functions of the permanent mission was also appropriate, bearing in mind the broad scope of those functions.

61. The Drafting Committee should re-examine the question of the position of paragraph 2. Its provisions did not belong in article 44 and should either be incorporated in article 22 or article 23, or be placed in a separate article altogether.

62. Regardless of the ultimate placing of paragraph 2, paragraph 3 should in any case follow immediately after paragraph 1. With regard to its text, he suggested that the Drafting Committee be asked to examine the three language versions.

63. Mr. RUDA said that, in the Spanish version of paragraph 2, the appropriate wording was: "*no serán utilizados*".

64. Mr. BARTOŠ said that his first impression of the Chairman's text for the new paragraph 3 was favourable. It was well-balanced, more appropriately worded and, he thought met Mr. Kearney's point. It brought out, not a right of the host State, but rather a duty of the sending State either to recall a person who had seriously violated the criminal law of the host State or to terminate his functions, according to the circumstances. In that form the paragraph would fulfil its purpose. He could not see any need to refer the text to the Drafting Committee a second time, but if the Commission so decided, he would not object.

65. The question had been raised whether paragraph 2 of the text proposed by the Drafting Committee should be retained in article 44. He was not in favour of making it into a separate article. If the paragraph was to be kept in article 44, however, it would be better to adopt the Chairman's proposal as paragraph 2, and the Drafting Committee's text of paragraph 2 as paragraph 3. It would be more logical first to state the obligation of the staff of a permanent mission, then to deal with a violation of that obligation and the sending State's

⁸ United Nations, *Treaty Series*, vol. 596, p. 308.

duty, to make reparation of it, as it were and finally to turn to the question of the use of the premises, in connexion with which the sending State had an objective duty.

66. The CHAIRMAN said he was opposed to referring the text to the Drafting Committee, since the Commission would have some difficulty in finding time to discuss it again. In any event, the proposal he had made for paragraph 3, as a member of the Commission, was merely a rewording of Mr. Kearney's amendment. As Mr. Kearney was the original author of the proposal, he would like to know whether the new wording was acceptable to him.

67. Mr. KEARNEY said that he was prepared to accept the revised text suggested by the Chairman, since it adequately reflected the idea in his own proposal.

68. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that when the Drafting Committee had discussed the deletion of the words "or by special agreements in force between the sending and the host State", he had been under the impression that such agreements were already covered by the reference in article 4 of the draft⁹ to "other international agreements in force between States", which meant that it was still possible for a permanent mission to grant the right of asylum.

69. Mr. USTOR suggested that the title of the article be shortened to read "Respect for the laws and regulations of the host State", like that of the corresponding article 55 of the 1963 Vienna Convention.

70. Mr. RUDA said he had doubts about the concluding words of the Chairman's proposal for paragraph 3, "or shall terminate his functions with the permanent mission, as appropriate". As he saw it, the choice for the sending State was not between recalling the offending person and terminating his functions, but between recalling him and waiving his immunity.

71. The CHAIRMAN said that those alternatives already existed in article 9 of the Convention on Diplomatic Relations. There were two cases to be considered. If the person concerned was a national of the sending State, that State must recall him. If he was not, the sending State obviously could not recall him; all it could do was to terminate his functions.

72. Mr. RUDA said he was grateful to the Chairman for his interpretation, which clarified the provisions of the proposed paragraph 3. But if that paragraph were retained in article 44, an explanation should be included in the commentary so as to avoid any misinterpretation.

73. Sir HUMPHREY WALDOCK said that he agreed with the Chairman regarding the meaning of article 9 of the 1961 Vienna Convention on Diplomatic Relations. The words "as appropriate" were used in the second sentence of paragraph 1 of that article in order to distinguish between a national of the sending State who would be recalled and a national of the receiving State,

whose employment with the mission would be terminated. That article, however, was intended to deal with the general case of a declaration of *persona non grata*.

74. The provisions of the present paragraph 3 were intended to deal not with the *persona non grata* rule but with the special case of a serious offence committed by a person enjoying immunity. In the case of such an offence, the sending State had the choice between recalling the offending person and waiving immunity so as to allow the law of the host State to take its course. It would be for the sending State to weigh the respective merits of the two possible solutions, bearing in mind the feelings aroused by the offence which had been committed.

75. The CHAIRMAN said there was a separate article in the draft, namely, article 32,¹⁰ which enabled a sending State to waive immunity from jurisdiction. The sending State was always at liberty to do so in cases of violation of the criminal law. It was therefore unnecessary to repeat that in article 44.

76. Sir Humphrey WALDOCK said that the point should be covered in the commentary, where it should be explained that the provisions of paragraph 3 did not derogate from those of article 32, on waiver of immunity, and did not preclude any action that might be taken under that article.

77. Mr. RUDA said he fully agreed with Sir Humphrey Waldo. There were only two alternatives for the sending State: recall of the offender or waiver of immunity. There could be no question of leaving a person in the territory of the host State without allowing the justice of that State to take its course.

78. Mr. CASTAÑEDA said that the confusion arose in part from the retention of the words "as appropriate". Those words had a specific meaning in article 9 of the Convention on Diplomatic Relations, as Sir Humphrey Waldo had explained. In article 44, he thought the intention had been to allow the sending State to choose one or the other alternative rather than make its choice solely in accordance with the legal situation of the member of the mission concerned.

79. Mr. ROSENNE said that the questions which had arisen were essentially of a drafting character, but were quite delicate. He therefore proposed that paragraph 3 be referred to the Drafting Committee.

80. The CHAIRMAN, speaking as a member of the Commission, said that the phrase "as appropriate" seemed clear enough both in the corresponding article of the 1961 Vienna Convention and in the new paragraph 3. To delete it would be tantamount to leaving the sending State at liberty to choose between the two alternatives. If it was included, it was clear that the sending State must take the alternative consonant with the legal position of the person concerned. It would, however, perhaps be better to refer the new paragraph 3 to the Drafting Committee. It was only for practical reasons connected with the organization of the Commission's work that he had suggested otherwise in his capacity as Chairman.

⁹ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

¹⁰ See 1019th meeting, para. 46.

81. Mr. ALBÓNICO said he could accept paragraph 1 as formulated by the Drafting Committee.

82. With regard to paragraph 2, he supported the suggestions made by Mr. Jiménez de Aréchaga, which would safeguard existing regional treaty provisions on the right of diplomatic asylum.

83. With regard to the new paragraph 3, he agreed that the sending State whose diplomatic agent had committed a serious offence could, instead of recalling him, waive his immunity and allow the local courts to deal with him. The Government of Chile had on one occasion discharged from its diplomatic service a diplomatic agent who had committed an offence in a foreign country where he was not accredited, and had allowed justice to take its course in that country.

84. He supported the proposal to refer paragraph 3 to the Drafting Committee, which should endeavour to find a formulation that would adequately cover the various situations.

85. The CHAIRMAN asked whether there were any objections to Mr. Ustor's proposed amendment to the title of article 44. ✓

86. Mr. BARTOŠ said he was opposed to it because the title proposed was incomplete.

87. The CHAIRMAN said that the majority of the Commission seemed to be in favour of the change and he therefore suggested that the Commission adopt the title as amended.

The title of article 44, as amended, was adopted.

88. The CHAIRMAN said that no proposal had been made to amend paragraph 1 of the text prepared by the Drafting Committee. He therefore suggested that the Commission adopt that paragraph.

Paragraph 1 was adopted.

89. Mr. JIMÉNEZ de ARÉCHAGA said that he withdrew his suggestion for the amendment of paragraph 2, on the understanding that Mr. Castañeda's explanation would be included in the commentary to the article.

90. The CHAIRMAN said that Mr. Ustor and Mr. Rosenne had proposed the deletion of the phrase in brackets in paragraph 2 and that no member had formally proposed its retention. Mr. Rosenne had also proposed two drafting amendments.¹ He suggested that the Commission adopt paragraph 2 thus amended and without the phrase in brackets.

Paragraph 2, as amended, was adopted.

91. The CHAIRMAN suggested that the Commission approve the new paragraph 3 of article 44 in principle and refer it to the Drafting Committee for consideration of the wording. Article 44 as a whole would be adopted after the Drafting Committee had sent the text of paragraph 3 back to the Commission.

*It was so agreed.*¹²

The meeting rose at 1.10 p.m.

¹¹ See para. 59 above.

¹² For resumption of the discussion, see 1029th meeting, para. 16.

1025th MEETING

Wednesday, 23 July 1969, at 10.10 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218/Add.1)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 45 (Professional activity)¹

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 45.

2. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 45

Professional activity

The permanent representative and the members of the diplomatic staff of the permanent mission shall not practice for personal profit any professional or commercial activity in the host State.

3. The Drafting Committee had made no change in the text of the article and the Commission had made no comment on it at the first reading.

Article 45 was adopted.

SECTION IV (End of the functions of the permanent mission or of its members)

ARTICLE 46 (Modes of termination)²

4. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 46.

5. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

¹ For previous discussion, see 999th meeting, para. 1.

² For previous discussion, see 999th meeting, para. 3.

Article 46

Modes of termination

The functions of a member of the permanent mission come to an end, *inter alia*:

(a) On notification by the sending State to the Organization or to the host State that the functions of the member of the permanent mission have come to an end;

(b) If the membership of the sending State in the Organization is terminated or suspended.

6. In the Special Rapporteur's draft (A/CN.4/218/Add.1), article 46 had dealt only with the permanent representative and the members of the diplomatic staff. The Special Rapporteur had modelled his draft on article 43 of the 1961 Vienna Convention,³ which only mentioned diplomatic agents. The Committee had considered, however, that it would be more logical to deal in the article with the end of the functions of all members of a permanent mission. It had therefore replaced the words "of a permanent representative or a member of the diplomatic staff of the permanent mission" by the words "of a member of the permanent mission", and had given section IV the title: "End of the functions of the permanent mission or of its members". The section dealt not only with the end of the functions of a member of a permanent mission, but also with the end of the functions of the mission itself, as was clear from article 48.

7. In view of the provisions of article 17,⁴ the Committee had inserted the words "to the Organization or to the host State" in sub-paragraph (a) of article 46, after the words "on notification by the sending State".

8. The Committee had made one purely drafting change in sub-paragraph (b), consisting in the use of the term "the Organization" with a capital "O", instead of "the international organization concerned", with a small "o". Article 1 (c)⁵ stated that "the 'Organization' means the international organization in question".

9. The Committee had also deleted the last phrase in sub-paragraph (b), namely, "or if the activities of the sending State in that organization are suspended". It had considered that the suspension of the activities of a State in an organization did not necessarily entail the end of the functions of its permanent mission. That would depend on the circumstances of each particular case.

10. It was not necessary to mention the suspension of activities expressly in article 46, even if in some cases there really was termination of the functions of a permanent mission, for such termination might be the result of the withdrawal from the organization already referred to in the first part of sub-paragraph (b). The use of the phrase "*inter alia*" at the end of the introductory sentence of the article showed clearly that the article did not list all the reasons for which the functions of

a member of a permanent mission might come to an end.

11. The Drafting Committee had asked that the reasons for deleting the last phrase in sub-paragraph (b) should be explained in the commentary.

12. Mr. JIMÉNEZ de ARÉCHAGA said he had serious doubts about the provision in sub-paragraph (a) for notification to the host State, as an alternative to notification to the organization, where such an important matter as termination of functions was concerned. That provision constituted a departure from the system already adopted by the Commission in article 17, the basic article on notifications. The rule formulated in paragraphs 1 and 3 of article 17 was that notifications were to be made by the sending State to the organization and that those notifications were transmitted to the host State by the organization.

13. In paragraph (7) of the commentary to article 17,⁶ it was explained that the rule in article 17 was "based on considerations of principle", and that the option of addressing notifications directly to the host State, set forth in paragraph 4 of article 17, provided "a supplement to and not an alternative or a substitute for the basic pattern prescribed in paragraphs 1 and 3 of the article".

14. Mr. CASTRÉN said he approved of the Drafting Committee's changes in the text of article 46.

15. He had no fixed views on the point about notification raised by Mr. Jiménez de Aréchaga.

16. Perhaps the words "*ou temporairement*" in the French version of subparagraph (b) should be deleted. If a State temporarily ceased to be a member, it might be argued that the functions of the permanent representative were merely suspended.

17. Mr. ROSENNE said he shared all the doubts expressed by the two previous speakers.

18. The text proposed by the Drafting Committee did not deal with the case in which for any reason, the sending State withdrew its permanent mission. That case had occurred in practice. For example, in 1965, Indonesia, regardless of its precise status as a member of the United Nations, had in fact withdrawn its permanent mission. It had even requested the United Nations Secretariat to make arrangements to enable the members of its permanent mission to remain in New York for the period of time necessary to wind up their affairs.

19. Since the establishment of the United Nations and its various specialized agencies, there had been more than one case of a State suspending its participation in the work of an organization. In all cases, every effort had been made in the organization concerned to avoid any formal cessation of membership. The purpose of that approach was clearly to avoid difficulties when the State concerned wanted to resume participation in the work of the organization.

20. The Commission should not endorse the concept of temporary cessation of membership in an organization. In his view it was not legally possible for a State

³ United Nations, *Treaty Series*, vol. 500, p. 122.

⁴ See *Yearbook of the International Law Commission*, 1968, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

⁵ *Ibid.*

⁶ *Ibid.*

to cease to be a member of an organization temporarily, as was suggested by the French version of sub-paragraph (b), which read "*cesse définitivement ou temporairement d'être membre*".

21. He would be prepared to accept the English version of sub-paragraph (b), which referred to membership in the organization being "terminated or suspended", if a suitable French translation could be found. The term "suspension" clearly implied that the State did not cease to be a member of the organization.

22. He would support any attempt to reword sub-paragraph (b) so as to cover the case in which, for any reason, a member State of an organization withdrew its permanent mission. A formulation of that type would be consistent with the terms of article 6, which stated that "Member States may establish permanent missions . . .",⁷ that provision implied the right of the State concerned to terminate its mission. In fact, the possibility of termination of the functions of the permanent mission itself was clearly envisaged in paragraph 1 of the proposed article 48,⁸ which opened with the words "When the functions of the permanent mission come to an end".

23. Mr. RUDA said he supported the new title of section IV, which was in keeping with the contents of article 48.

24. He also supported the idea of broadening the scope of article 46 so as to cover all the members of the permanent mission.

25. With regard to sub-paragraph (b), he fully agreed with Mr. Rosenne. He could not accept the idea that it was legally possible for a State to cease temporarily to be a member of an organization. He could accept the English version of sub-paragraph (b), because suspension did not imply cessation of membership but he could not accept either the French or the Spanish versions, which referred to temporary cessation. The language services of the Secretariat should be requested to bring the French and Spanish versions into line with the English.

26. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the change in sub-paragraph (a) proposed by the Drafting Committee was consequential on the change in article 41, which the Commission had adopted without objection.⁹ That article provided that a person who was already in the territory of the host State should enjoy privileges and immunities "from the moment when his appointment is notified to the host State by the Organization or by the sending State". It had seemed logical, therefore, to provide similar alternatives in connexion with the end of his functions. There might, however, be some difference from the procedures set out in article 17, paragraph 4, where the notification was a supplement to, and not a substitute for, the notification which the sending State must transmit to the organization under article 17, paragraph 1.

27. With regard to sub-paragraph (b), it was first necessary to eliminate, as a possible justification for the

phrase used in the Special Rapporteur's version, "or if the activities of the sending State in that organization are suspended", the case of suspension from the exercise of the rights and privileges of membership mentioned in Article 5 of the Charter, because a State remained a Member in the situation there contemplated. The Charter made no provision for suspension from membership of the Organization. The Drafting Committee had not wished to take into account the special case mentioned in Article 5, since, in the first place, it was exceptional and, in the second place, the General Assembly would specify the rights and privileges whose exercise was suspended in the resolution by which it took the decision.

28. The phrase could not apply either to a case such as that of Indonesia, since Indonesia had in fact ceased to be a member of the United Nations and had notified the Organization of its withdrawal. The legal consequence of the failure to apply strictly the procedure laid down in Article 4 of the Charter, in readmitting that State, had not been to convert its termination of membership in the Organization into suspension.

29. It might even be argued that when a State ceased to be a member of an organization, the fact that it resumed its membership after an interval, which might be long or short, had no legal implications *per se*. The words "*ou temporairement*", which were indeed an allusion to the Indonesian case, might therefore be omitted.

30. In any event, the explanation did not lie in a bad translation of the English phrase "if the membership . . . is . . . suspended". On the contrary, the English phrase had been used for want of a better rendering of the French. If it were decided to keep the words "*ou temporairement*", some other English translation would have to be found. If, on the other hand, they were deleted, the problem would solve itself.

31. Mr. REUTER said that one thing was certain: the English and French versions of sub-paragraph (b) did not have the same meaning. The Commission must therefore decide which should be taken as the basis for establishing the final text.

32. The question was whether the Commission wanted a text which was juridically correct or whether it wanted a text of practical utility, and that was not necessarily the same thing. It would be understandable if the Commission tried to find a text which was juridically rather vague, in order to avoid raising legal questions which in practice the organizations had no wish to decide.

33. The word "membership" had a precise meaning and was hard to translate into French. He wondered whether it might not be better to speak of participation in an international organization. Obviously, the term was imprecise. The Indonesian case apart, other cases of non-participation had occurred in the past and no one knew, or even wanted to know, what had been the effects of non-participation on the legal status of the States in question.

34. Mr. BARTOŠ said that, in trying to find out whether or not membership of an organization was

⁷ *Ibid.*

⁸ See next meeting, para. 2.

⁹ See 1023rd meeting, paras. 53-58.

suspended, the Charter of the United Nations was not the only instrument to be taken into consideration, since express provision for suspension was made in the constituent instruments of other organizations too. The draft did not concern the United Nations alone.

35. Though he had no strong views about the retention or deletion of the words "*ou temporairement*" in the French version and the words "or suspended" in the English, he could not agree with the interpretation of the Indonesian case put forward by the Chairman of the Drafting Committee. It would be remembered that, when Indonesia had returned to the United Nations, a legal interpretation of the position had been given and generally accepted, to the effect that it was not possible to leave the United Nations. Indonesia, therefore, had not withdrawn; it had merely abstained from participating in the Organization's activities. In the telegram addressed to the Secretary-General on 19 September 1966 by the Ambassador of Indonesia at Washington, the Indonesian Government had stated that it had decided "to resume full co-operation with the United Nations and to resume participation in its activities starting with the twenty-first session of the General Assembly".¹⁰ Indonesia had not, therefore, lost its status as a Member during its absence.

36. To delete the words "or suspended" would be to leave each situation to be interpreted on the facts, as it occurred. Obviously that could cause difficulties. On the other hand, if provision were made for suspension of membership in an organization, there could be all sorts of confusion. In the first place, the exercise of the rights of a member State might be suspended, but it might be only a partial suspension—suspension of the right to vote, for instance. During the period of suspension, the legal position of the mission of the State to the international organization concerned might be disputable. Secondly, if the suspension was total, would there be any reason for a permanent mission at all?

37. Personally, he was not sure that the State in question ought to be deprived of the possibility of retaining a permanent mission to the organization, which would enable it to maintain contact with the organization and the other members with a view to remedying the situation. Would it be possible to say that the functions of the permanent representative terminated in such a case and to keep the words "or suspended" in sub-paragraph (b), but without going so far as to say that the State could no longer have a permanent mission? He would, however vote for the Drafting Committee's text, whether those words were omitted or not.

38. Mr. CASTRÉN said he still thought it would be better to delete the words "or suspended" in sub-paragraph (b). The Chairman of the Drafting Committee had said that those words were an allusion to an exceptional situation. But, since article 46 was not limitative, as was shown by the use of the expression "*inter alia*", only the main cases need be mentioned in it.

39. The case of Indonesia had aroused a great deal of

controversy. The Charter made no provision for withdrawal from the United Nations, but the preparatory work showed that there were two or three grounds at least on which withdrawal was possible. The ground on which Indonesia had relied was not one of them. Nevertheless, and despite the position taken by the United Nations, he was rather inclined to accept the argument advanced by the Chairman of the Drafting Committee. But the solution was far from obvious, and other members might hold other opinions, as Mr. Bartoš did. It would be better, therefore, not to mention the situation at all.

40. Mr. USTOR, referring to the point about notification raised by Mr. Jiménez de Aréchaga, said that the Drafting Committee had not intended to depart from article 17, which was the basic article on the subject. The purpose of the reference to notification to the host State in sub-paragraph (a) was to cover the case in which the sending State omitted to notify the organization, but did notify the host State that the functions of a member of its permanent mission had come to an end. It had been thought that, in that case, the notification could not be left without any legal significance.

41. In sub-paragraph (b), the Drafting Committee had deleted the concluding words of the original text, "or if the activities of the sending State in that organization are suspended"; but it had not wished to go so far as also to delete the previous two words, "or suspended", because it had envisaged the possibility of a temporary cessation of membership.

42. Article 5 of the Charter did not seem to him to be relevant. It did not refer to suspension of membership itself; it referred to the case in which a Member State was "suspended from the exercise of the rights and privileges of membership". In such a case, the State concerned would still have its duties as a Member; it was only the exercise of its rights and privileges that was suspended.

43. The relevant article of the Charter was Article 6, which made provision for the possibility that a State might be expelled from the United Nations for having persistently violated the Principles of the Charter. The Drafting Committee had considered that since the General Assembly was empowered by the Charter to expel a Member on the recommendation of the Security Council, it was also empowered to take the less drastic action of conditional expulsion. The State to which such a measure was applied would cease temporarily to be a Member of the United Nations, but would resume its membership on fulfilling the conditions laid down by the organs of the United Nations.

44. Sub-paragraph (b) had been drafted in French for the purpose of covering that case, which was theoretically possible. The term "suspended", which was used in the English version, did not perhaps reflect that idea sufficiently. In any case, he saw no difficulty in dropping the words "or suspended" at the end of sub-paragraph (b) and the corresponding words in the French and Spanish versions.

45. Article 46 was intended to give only two examples of modes of termination, on the pattern of the

¹⁰ See General Assembly document A/6419, also issued as Security Council document S/7498.

corresponding provisions of the 1961 Convention on Diplomatic Relations; the use of the words "*inter alia*" in the opening sentence of the article made it clear that sub-paragraphs (a) and (b) did not contain an exhaustive enumeration of the modes of termination. They did not deal, for example, with the case of the death of a member of the permanent mission.

46. For the same reason, he did not consider it necessary to cover specifically the case mentioned by Mr. Rosenne of the withdrawal of the permanent mission itself, which clearly constituted a case of termination of the functions of its members.

47. He would suggest that the title of the article be amended to read "Termination of the functions of a member of the permanent mission", on the pattern of article 25 of the 1963 Vienna Convention on Consular Relations.¹¹ That title was preferable to the more general "Modes of termination", bearing in mind that article 48 dealt with termination of the permanent mission itself; for article 46 dealt only with termination of the functions of members of the mission.

48. The CHAIRMAN, speaking as a member of the Commission, said he was completely opposed to the Drafting Committee's text, since it no longer had the same meaning as the Special Rapporteur's article.

49. The Special Rapporteur had drafted an article which corresponded to article 43 of the Vienna Convention on Diplomatic Relations. The expressions "function" and "*inter alia*" made the meaning perfectly clear. The article was about function, not about privileges and immunities, and the expression "*inter alia*" meant that the case for which provision was made in sub-paragraph (a) was one of those in which the function of a permanent representative came to an end. It was the case in which a permanent representative claimed still to represent the sending State, against its wishes. It was then that the sending State notified the organization that the function of the permanent representative had come to an end.

50. The duration of privileges and immunities was a separate question and was dealt with in article 39 of the Vienna Convention on Diplomatic Relations. There was no reason for a sending State to notify the ending of the functions of a member of the private staff or of the service staff. Article 46 should deal only with the permanent representative and the members of the diplomatic staff, since they alone represented the sending State and it was in their case alone that the sending State must notify the organization, and only the organization, when it put an end to their functions. Notifications to the host State concerned privileges and immunities only.

51. Section IV of the Special Rapporteur's draft (A/CN.4/218/Add.1) was entitled "End of the function of the permanent representative". The phrase "and of the members of the diplomatic staff of the permanent mission" might perhaps have been added, but the Drafting Committee had proposed that the section be entitled "End of the functions of the permanent mis-

sion or of its members". He could see no merit in that change. The end of the functions of the permanent mission entailed the termination of the permanent mission itself, and there was no need for any article on that situation. Besides, article 46, despite the section's new title, did not deal with the end of the functions of a permanent mission. It dealt with the end of the functions of the permanent representative and of the members of the diplomatic staff, not the end of the functions of the mission.

52. Obviously, in the cases contemplated in sub-paragraph (b) there might be a cessation of the functions of the permanent mission, but not necessarily from the legal point of view. When a State declared that it no longer considered itself a member of an organization, it might be arguable whether the functions of its permanent mission did or did not come to an end. In any event, there was no reason to make provision for the case in which the permanent mission had ceased to exist, since obviously there would then be no more permanent representative, members of the diplomatic staff or functions. It was the fact that the permanent mission no longer existed, not the legal fact that the sending State had ceased to be a member of the organization, which entailed the termination of the functions of the permanent representative and of the members of the diplomatic staff. But if a sending State could establish its mission to an international organization at its discretion, it was that State, and that State alone, which could decide to withdraw its mission at its discretion. He wondered why that situation had not been taken into account.

53. Article 46 should deal solely with the functions of a permanent representative and of members of the diplomatic staff, and the expression "*inter alia*" should relate only to cases in which the sending State put an end to the functions of a permanent representative or of a member of the diplomatic staff by notifying the organization that the person in question no longer represented it. He therefore proposed that the Commission go back to the text in the Special Rapporteur's draft, but with the deletion of sub-paragraph (b). It would then remain consistent with the meaning and wording of article 43 of the Vienna Convention on Diplomatic Relations.

54. Mr. KEARNEY said that if there was any difference between the French and English versions of the original text of article 46, which appeared in the Special Rapporteur's fourth report (A/CN.4/218/Add.1), the meaning of the English version, especially with regard to the word "suspended", conveyed the Special Rapporteur's original idea. He assumed, therefore, that the Special Rapporteur was not referring solely to suspension as a result of the operation of the constitutional provisions of the organization, but also to a suspension of its membership by the sending State itself. In his opinion, it was impossible for the Commission to consider the question whether the suspension was constitutionally justified or not; consequently, if that question did arise in connexion with the French version, he would suggest that the French version be amended to bring it into conformity with the English.

¹¹ United Nations, *Treaty Series*, vol. 596, p. 282.

55. One of the problems which had been raised in connexion with article 46 was the difference between it and article 43 of the Vienna Convention on Diplomatic Relations. He himself assumed that that difference was due merely to the different nature of a permanent mission to an international organization. Article 17, paragraph 1 (a) of the present draft provided that the sending State should notify the organization of: "The appointment of the members of the permanent mission . . . their arrival and final departure or the termination of their functions with the permanent mission". Sub-paragraph (a) of article 46 did not refer to the "final departure" of members of the permanent mission, but only to the notification that their functions had come to an end. The reference in article 17 to both their final departure and the termination of their functions was obviously intended to cover the difference between members who were nationals of the host State and those who were not. Some mention of "final departure", therefore, might also be included in sub-paragraph (a) of article 46, although in view of its inclusion in article 17, it could be deemed superfluous.

56. With regard to sub-paragraph (b), he saw certain advantages in retaining the words "or suspended", in order to take unusual situations into account. On the other hand, as the Chairman had pointed out, what was said there was self-evident.

57. On balance, he would favour deleting article 46 altogether, though if the Commission believed that it served some useful purpose, he could agree to its retention, provided that the French version of sub-paragraph (b) was brought into line with the English.

58. Mr. YASSEEN said that article 46 had the disadvantage of dealing with two different things: the direct ending of the functions of a member of the mission and the indirect ending of his functions as a result of the *de facto* or *de jure* cessation of the permanent mission's existence. All the difficulties caused by the article were due to the fact that it departed from the Vienna Convention on Diplomatic Relations, article 43 of which contemplated only the case in which the sending State notified the receiving State that the function of a diplomatic agent had come to an end. It referred neither to the closing of a mission nor to the termination of a mission as a result, for instance, of the breaking off of diplomatic relations.

59. As it now stood, article 46 provided that the functions of a member of a permanent mission came to an end not only because of the position of the person concerned, but also for reasons connected with the sending State's participation in the organization. In the latter case, there might be termination or suspension of the State's membership, or there might be suspension of activities and closure of the mission. In view of those distinctions, article 46 might be divided into two.

60. Like the Chairman, he doubted whether it was advisable to extend the application of article 46 to members of the mission other than the permanent representative and the members of the diplomatic staff.

61. Sir Humphrey WALDOCK said that to some

extent he agreed with Mr. Yasseen that article 46 appeared to cover two different things, although in that respect it was in conformity with the title of Section IV, which Mr. Ustor, incidentally, had said was incorrect.

62. What, after all, was the purpose of article 46? Essentially it was to establish the exact time for the commencement of the "reasonable period" referred to in article 41, within which the individual concerned could still enjoy his privileges and immunities before leaving the country. The analogous provision in the Vienna Convention on Diplomatic Relations was article 43, though that article did not deal with certain cases which might arise in connexion with permanent missions to international organizations. The Vienna Convention, however, also contained article 45, which covered the case of the breaking off of diplomatic relations—a situation which in some respects was analogous to that of the suspension of membership referred to in article 46, sub-paragraph (b). In article 45 of the Vienna Convention, of course, there was a clear understanding that the members of the mission were going to leave the country, since provision was made for entrusting the custody of the premises and property of the mission to a third State.

63. Article 46 of the present draft was mainly concerned with the question of privileges and immunities, and the Commission should avoid becoming too involved with the question of membership. As Mr. Yasseen had suggested in connexion with sub-paragraph (b), it should perhaps think in terms of the "cessation" of the mission, which might be due to a variety of causes, such as the expense of maintaining it or the belief that it was not justifying its existence.

64. Mr. JIMÉNEZ de ARÉCHAGA said he supported the Chairman's suggestion that the Commission should go back to the Special Rapporteur's original draft of article 46, subject to the deletion of sub-paragraph (b).

65. The first need was to ask what purpose the article was intended to serve. In his view, its purpose was not to cover the privileges and immunities of the members of the permanent mission, which were already dealt with in articles 17 and 41, but, as the Chairman had said, to give the sending State the right to put an end to the functions of members of the mission.

66. He agreed with Mr. Yasseen that the scope of sub-paragraph (a) should be restricted to members of the permanent mission, since it was only in respect of them that notification was necessary. That would be in conformity with article 43 of the Vienna Convention on Diplomatic Relations, which referred only to "the diplomatic agent", and not to the administrative and service staff.

67. He also agreed with Mr. Yasseen that sub-paragraph (b) dealt with an entirely different subject; it should, therefore, either become a separate article or be deleted. Personally, he favoured deleting it and retaining only sub-paragraph (a) of the Special Rapporteur's original text.

68. Mr. CASTRÉN said he supported the Chairman's

proposal to go back to the text proposed by the Special Rapporteur, excluding sub-paragraph (b), which could either be made into a separate article or be omitted altogether, since the proposition it contained was self-evident.

69. Mr. KEARNEY, referring to the proposal to restrict the scope of sub-paragraph (a) to the diplomatic staff of the permanent mission, pointed out that article 17 required that notification be given of the final departure not only of members of the permanent mission, but also of persons belonging to their family and of persons employed on their private staff. It would seem strange if article 46 had a different scope from article 17.

70. The CHAIRMAN, speaking as a member of the Commission, said that under article 17, paragraph 1 (a) of the draft, the sending State notified the organization of the arrival and departure of members of the mission and of the termination of their functions. The sending State could notify the arrival and the departure only of its own nationals; in the case of nationals of the host State it would notify the termination of their functions.

71. There was a distinction between a notification of that kind and a communication stating that the function of a permanent representative or a member of the diplomatic staff of a permanent mission had come to an end. If a person claimed still to represent a sending State as a member of its permanent mission or as a diplomatic agent, the termination of his functions would have to be notified. That was the meaning of article 43 of the Vienna Convention and that should be the meaning of the present article.

72. Article 43, sub-paragraph (b) of the Vienna Convention on Diplomatic Relations dealt with the case in which the receiving State refused to recognize a diplomatic agent as a member of the mission. There was a similar provision in article 25 of the Vienna Convention on Consular Relations. But there was no need to make provision for that situation in the article under consideration, for the host State could not make such a notification to the sending State. The most closely related case was that dealt with in Mr. Kearney's amendment to article 44, which the Commission had considered at the previous meeting.¹²

73. He therefore maintained his proposal to go back to the version of article 46 proposed by the Special Rapporteur, with the omission of sub-paragraph (b). The most he could accept would be the insertion of the words "to the Organization" after the words "on notification by the sending State", at the beginning of sub-paragraph (a).

74. Mr. USTOR said that the Drafting Committee had considered that the purpose of article 46 was to specify the date on which the functions of a member of the permanent mission came to an end. Sir Humphrey Waldock had pointed out the connexion between that article and article 41, paragraph 2,¹³ which stated that "When the functions of a person enjoying privileges

and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict".

75. Article 53, paragraph 3, of the Vienna Convention on Consular Relations¹⁴ went even further, however, since it referred not only to the privileges and immunities of a member of the consular post, but also to those of a member of his family forming part of his household or a member of his private staff. The Commission should therefore consider whether it would not be desirable to amend article 41, paragraph 2, to bring it into conformity with that provision. An additional sentence would also be required to provide for the case of members of the permanent mission who were nationals of the host State or permanent residents in its territory and who ceased to be members of the permanent mission.

76. In drafting the new text of article 46 the Drafting Committee had, in fact, relied heavily on the Vienna Convention on Consular Relations and had thought that the scope of the article should be extended to all members of the permanent mission, including diplomatic, technical, administrative and service staff.

77. Mr. ROSENNE said he had the gravest doubts whether the Commission should include article 46 in any manner, shape or form in the draft articles and whether it did, indeed, serve any useful purpose. The Commission should not slavishly follow the Vienna diplomatic and consular Conventions, since there was a fundamental difference between the legal status of diplomatic and consular agents and that of members of a permanent mission to an international organization.

78. He was also suspicious of the words "*inter alia*", which might open the door to what the Commission was most anxious to avoid, namely, that the host State should have any say in choosing the members of the permanent mission. Article 17 covered all the most important contingencies that might arise, including the cases of home-based members, locally recruited staff and members who were permanent residents in the host State. He therefore questioned whether the Chairman's proposal was really necessary and whether it would not be better to drop article 46 altogether.

79. Mr. ALBÓNICO said that he had understood the Special Rapporteur's original draft of article 46, but was completely at a loss to understand the new draft submitted by the Drafting Committee. That might be due to the fact that the new draft had been influenced by the Vienna diplomatic and consular Conventions, which were totally inapplicable to draft articles dealing with multilateral rather than bilateral relations. He therefore proposed that the Commission retain the original text of article 46 as submitted by the Special Rapporteur.

80. Sir Humphrey WALDOCK said he would like to state once again that the purpose of article 46 was to define the moment at which the functions of a member of the permanent mission came to an end,

¹² See para. 6.

¹³ See 1023rd meeting, para. 54.

¹⁴ United Nations, *Treaty Series*, vol. 596, p. 306.

in order to answer any questions which might arise in connexion with the articles concerning privileges and immunities. He did not agree with Mr. Rosenne that it was unnecessary to specify the exact time, since otherwise notification might take effect when given or when the person in question left the country.

81. The expression "*inter alia*" was merely a precautionary phrase designed to cover cases of death and the like, and thus to avoid the impression that other obvious cases had been overlooked.

82. Mr. ROSENNE said that, in his opinion, an article which stated only that the functions of a member of the permanent mission terminated when the sending State said they did was entirely useless.

83. The CHAIRMAN, speaking as a member of the Commission, said that article 46 ought to be retained in the wording he had proposed. Article 17 did not expressly provide that the sending State must notify the termination of the functions of a permanent representative or of a member of the diplomatic staff if the person concerned claimed still to represent the sending State. There were probably other situations also which were not covered by article 17.

84. Speaking as Chairman, he suggested that the Commission refer article 46 back to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁵

The meeting rose at 1 p.m.

¹⁵ For resumption of the discussion, see 1034th meeting, para. 1.

1026th MEETING

Thursday, 24 July 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Ustor, Sir Humphrey Waldo, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218/Add.1)

[Item 1 of the agenda]
(continued)

DRAFT ARTICLES

PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 47 (Facilities for departure) and

ARTICLE 48 (Protection of premises and archives)¹

1. The CHAIRMAN invited the Chairman of the

Drafting Committee to introduce the Drafting Committee's texts for articles 47 and 48 together.

2. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following texts:

Article 47

Facilities for departure

The host State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Article 48

Protection of premises and archives

1. When the functions of the permanent mission come to an end, the host State must, even in case of armed conflict, respect and protect the premises as well as the property and archives of the permanent mission. The sending State must withdraw that property and those archives within a reasonable time.

2. The host State is required to grant the sending State, even in case of armed conflict, facilities for removing the archives of the permanent mission from the territory of the host State.

3. No comment had been made on those articles at the first reading and only minor changes in them had been made by the Drafting Committee. In the English version the Committee had deleted the word "the" before "case of armed conflict", as it was unnecessary and did not appear in the corresponding provisions, articles 44 and 45, of the 1961 Vienna Convention on Diplomatic Relations.² In article 48, the Committee had substituted the definite for the indefinite article in the English and French versions, before the words "permanent mission" and "*mission permanente*" respectively.

4. Mr. ROSENNE proposed, in order to bring the English text of article 47 into line with the French text, that the words "its territory" be inserted after the words "to leave".

5. The CHAIRMAN, speaking as a member of the Commission, said that articles 47 and 48 were barely intelligible.

6. What was wrong with the opening phrase of article 48, "When the functions of the permanent mission come to an end", was that it placed the stress on the functions of the permanent mission, not on the mission itself. The real intention in article 48 was to deal with the situation where a mission was permanently or temporarily recalled. Article 45 of the 1961 Vienna Convention on Diplomatic Relations covered the breaking off of diplomatic relations between the two States as well, but that was not relevant to permanent missions to international organizations.

¹ For previous discussion, see 999th meeting, para. 21.

² United Nations, *Treaty Series*, vol. 500, p. 122.

7. The 1961 Vienna Convention placed certain obligations on the receiving State "even in case of armed conflict". He was not at all sure that that exception should be retained in the draft articles.

8. As the permanent or temporary recall of a permanent mission was the only situation contemplated in article 48, the consequences should be those stated in article 45 of the 1961 Vienna Convention. Article 45, sub-paragraphs (a) and (b) which provided first for the obligation to respect and protect the premises, property and archives of the mission and, secondly, for the possibility of entrusting the custody of those premises, property and archives to a third State, should have their counterpart in article 48; there was no need to reproduce the provisions of sub-paragraph (c).

9. The drafting of articles 47 and 48 should be improved in the light of the wording of articles 44 and 45 of the 1961 Vienna Convention and, if necessary, the articles should be combined.

10. Mr. ALBÓNICO said that the phrase "other than nationals of the host State", in article 47, required some clarification; it seemed to mean that nationals of the host State would not be entitled to the same facilities for departure.

11. He was prepared to accept the text of article 48 proposed by the Drafting Committee.

12. Mr. JIMÉNEZ de ARÉCHAGA said that the Chairman's suggestion that the expression "even in case of armed conflict" be deleted from both article 47 and article 48 had some merit.

13. He could agree to the addition in article 47 of the words "its territory", proposed by Mr. Rosenne.

14. With respect to the point raised by Mr. Albónico, he would prefer to leave the text as it was, since the right of nationals of the host State to leave its territory was a matter of internal law.

15. With regard to article 48, he agreed with the Chairman that the opening phrase of paragraph 1 should be replaced by some such wording as "When the permanent mission is permanently or temporarily recalled". He could not agree, however, that the practice in bilateral diplomacy of placing the premises and archives of the permanent mission in the custody of a third State should apply in multilateral diplomacy.

16. Mr. RAMANGASOAVINA said he agreed with Mr. Rosenne that the words "its territory" should be added in the English version of article 47.

17. The distinction drawn in article 47 between nationals of the host State and members of the families of persons enjoying privileges and immunities was correct. It was quite normal that nationals of the host State should not be able, merely by virtue of their functions, to leave the territory of the host State together with nationals of the sending State, particularly in case of armed conflict. To leave the host State then would look like desertion, since the presumption was that they would be going to the sending State. On the other hand, it was normal that facilities should be granted for members of the family to leave, irrespective of their nationality. That distinction did not mean that nationals

of the host State would be prevented from leaving the territory of that State; they would simply be treated in the same way as any other citizens of the host State. Articles 47 and 48, like articles 44 and 45 of the Vienna Convention, dealt primarily with the situation of armed conflict, though in the drafting it was presented merely as an incidental situation.

18. He agreed with the Chairman that it would be desirable to include in the draft a provision modelled on sub-paragraph (b) of article 45 of the 1961 Vienna Convention. As article 48 now stood, the sending State must withdraw its property and archives within a reasonable time, but was not offered the alternative of transferring them to the diplomatic mission of a friendly country.

19. Mr. CASTRÉN said he was in favour of retaining the words "even in case of armed conflict", which were also to be found in the 1961 Vienna Convention. To omit them might give the impression that the host State was not obliged to grant facilities in such cases for the persons in question to leave.

20. He was also in favour of retaining the present wording of article 47 concerning nationals of the host State, since it was similar to that used in article 44 of the Vienna Convention.

21. He supported the Chairman's view that the opening phrase of article 48 should be amended.

22. He agreed with Mr. Jiménez de Aréchaga that it was not necessary to mention the question of the custody of the mission's archives by a third State in article 48, though there was a similar provision in article 45 of the Vienna Convention.

23. Mr. BARTOŠ said that the situations contemplated in the draft articles were very different from those for which provision was made in the Vienna Convention on Diplomatic Relations. That Convention applied to bilateral diplomacy, and it would be wrong to follow it slavishly in every detail of relations between the host State and the sending State with regard to permanent missions to international organizations; even in the Vienna Convention on Consular Relations it had been found necessary to adopt a different provision. For instance, the host State must tolerate the consequences of the presence of the permanent mission of a State which was a member of an international organization, even though it might be in armed conflict with that State.

24. It was not a question of permitting members of a permanent mission who were nationals of the host State to leave the territory of that State freely; on the other hand, it was the normal and usual practice to grant facilities for the departure of the members of the family of persons enjoying privileges and immunities, even if the members of the family were nationals of the host State. Unless it was absolutely necessary, however, it would be wrong to go further than the Vienna Conventions in the substance of the articles, though the possibility should always be reserved of making changes, *mutatis mutandis*, in view of the difference in character between permanent missions and diplomatic missions.

25. With regard to the premises, property and archives

of the permanent mission, the sending State should be given full guarantees and be permitted to entrust their custody to the mission of another State or to the organization itself, if the latter agreed. That practice, which was unknown in bilateral diplomacy, lent force to the idea that it would be wise not to follow the Vienna Conventions too often and too closely.

26. Mr. ALBÓNICO said that there was a certain ambiguity about the phrase in article 47, "in order to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality". It would seem that either the facilities for departure did not apply to nationals of the host State, or that such persons were not obliged to leave its territory. In the case of families, however, it would seem that members of them would have to leave, even if they were nationals of the host State. He would welcome an explanation of that phrase.

27. Mr. YASSEEN said that the notion of "family" was very hard to define, as the Commission itself and several conferences had realized. The application of article 47 was likely to lead to difficulties. To give one illustration, in Switzerland non-discrimination with regard to women had led to some discrimination against men. The husband of a woman diplomat did not enjoy any privileges or immunities and even had to pay residence tax. It was of course possible to place some limits on the notion of family, but it should at least cover the spouse. Nevertheless, under the instructions of the Swiss Federal Government, the husband of a woman diplomat enjoyed no privileges or immunities, even those most essential for the performance of family duties.

28. Mr. EUSTATHIADES said that articles 47 and 48 carried the analogy with diplomatic relations too far. Also, the commentaries to those articles needed to be much fuller; they failed to mention whether there was any practice of international organizations, which could offer some guidance.

29. The results of too close an adherence to the Vienna Convention were apparent in the inferences drawn from the case of armed conflict. The principle there should be that of the continuity of the organization's existence and even of the belligerent State's participation, in principle, in its activities. Articles 47 and 48 should not give the impression that armed conflict was the normal reason for the ending of the participation of States in an organization.

30. Article 48 as now worded gave the impression that a sending State must withdraw its property and archives within a given time. It should be stated clearly that it would no longer receive protection from the host State after that time had expired. The Special Rapporteur should ponder all those questions and mention them in the commentary.

31. Mr. REUTER said he agreed in principal with the Chairman and he also agreed with Mr. Bartoš that the Commission must be careful to recast any rules transferred from bilateral to multilateral diplomacy.

32. It was quite understandable that it should be thought desirable to keep the expression "in case of armed conflict", in order not to fall short of the Vienna Convention. But it should be remembered that, for the Vienna Convention, armed conflict was the worst situation conceivable.

33. In multilateral relations, on the other hand, armed conflict might seem almost innocuous in comparison with two other situations, namely, the breaking off of diplomatic relations and the non-recognition of a government. The second situation occurred when the host State of an organization, for example, recognized government A of a member State of the organization as the legitimate government. The host State might, however, change its policy and cease to recognize government A in favour of government B, while the organization still recognized government A. It was obvious that it was government A which should continue to enjoy the privileges to which the articles referred. Those two other situations should be borne in mind, at least for mention in the commentary, if not for amendment of the text of the articles.

34. The CHAIRMAN said that a form of words which might meet the points raised by some members of the Commission was "The host State must in all circumstances, even in case of armed conflict, grant facilities...".

35. Mr. KEARNEY said that, in his opinion, the phrase "even in case of armed conflict" did serve a protective purpose with respect to action which might be taken by the host State, but he fully understood the problems referred to by other members. In order, therefore, to avoid any implication of bilateral relations which that phrase might have, he suggested that it be amended to read "even if it is engaged in an armed conflict"; that would emphasize the unilateral duty of the host State.

36. He thought that the phrase "other than nationals of the host State", in article 47, should be retained.

37. With respect to the duty of the sending State, referred to in article 48, paragraph 1, to withdraw the property and archives of the permanent mission, he agreed that the host State could not be placed under an unlimited burden of preserving that property and those archives. A reference should be included to the possibility of placing them in the custody of a third State. He agreed with Mr. Bartoš that custody could be assumed by the organization as well as by a third State, since in many cases the organization was the entity best equipped to undertake that responsibility.

38. On the question of the definition of the word "family", in article 47, he noted that it was not defined in article 1, the definitions article, but that article 39 referred to "the members of the family of the permanent representative forming part of his household". He assumed that the phrase "forming part of his household" would also apply in the case of article 47, but the Commission should consider the desirability of including a corresponding definition of the word "family" in article 1.

39. Mr. RUDA said that article 47 should refer primarily to the normal case of a person enjoying privileges and immunities who was recalled to his country of origin

either permanently or temporarily. As drafted at present, however, article 47 seemed to place the chief emphasis not on the normal case, but on cases arising in connexion with such contingencies as armed conflict. That was logical enough in bilateral diplomacy, and such cases were covered by article 44 of the Vienna Convention on Diplomatic Relations.

40. In the case of permanent missions to an international organization, however, he largely agreed with Mr. Eustathiades that the armed conflict would be between the host State and a member State. In such an event it was not clear to him whether the normal practice would be for the members of the permanent mission of a belligerent State to remain in the host State with a view to reaching some solution or presenting their case to the organization. Consequently, he was in favour of deleting the phrase "even in case of armed conflict", although the Commission should give careful consideration to the Chairman's suggestions to use the words "in all circumstances".

41. With regard to article 48, paragraph 1, he found no difficulty over the duty of the host State to protect the property and archives of the permanent mission and the corresponding duty of the latter to withdraw them within a reasonable time.

42. Mr. BARTOŠ said that the question of finding a definition of the term "family" which would be valid in international law had been discussed during the consideration of the draft convention on diplomatic intercourse and immunities at Vienna, but it had not been settled because delegations had failed to agree even in principle on the concepts involved. Foreign Ministries construed the notion of "members of the family" fairly strictly, in accordance with their own particular view. Thus, the Swiss authorities considered that the husband of a female diplomat was not a member of the family entitled to privileges and immunities, whereas the wife of a male diplomat was. The matter had also arisen in connexion with the Yugoslav Consul at Geneva, who at the time had been a woman.

43. It might perhaps be as well at least to mention in the commentary the principal of the equality of the sexes in international law, since it was recognized by the United Nations, even if it were not thought desirable to go so far as to offer a solution to the problem in the text of the articles themselves.

44. It was quite clear, so far as the substance was concerned, that the phrase "irrespective of their nationality" applied only to the members of the family of persons not having the nationality of the host State who enjoyed privileges and immunities. It was a general rule that persons in the service of the sending State but having the nationality of the host State could not, any more than the members of their family, ask to leave its territory under the protection of diplomatic privilege and immunity. Consequently, the only nationals of the host State who might have that possibility open to them, if need be, were those who were members of the family of a person enjoying privileges and immunities who was not himself a national of the host State. To ask for anything further would be going too far. It was for those

members of the Commission whose mother tongue was one of the languages in which the articles were being drafted to say whether that principle was expressed clearly in the text proposed.

45. The wording suggested by the Chairman was quite satisfactory and he supported it.

46. Mr. USTOR said he wished, first of all, to make it clear that the Drafting Committee had not gone into the merits of articles 47 and 48, since they had been referred to it by the Commission without comment. The text was, therefore, the one originally submitted by the Special Rapporteur, based on articles 44 and 45 of the Vienna Convention on Diplomatic Relations.

47. It was regrettable that, even in the Vienna Convention, it had been necessary to maintain the reference to armed conflict, since had States complied with their obligations under the Charter to settle their disputes by peaceful means, such a reference could have been avoided. The type of conflict which the Drafting Committee had had in mind was armed conflict between the sending State and the host State. He agreed that to refer to armed conflict three times in articles 47 and 48 was perhaps excessive and he would have no objection to the formula "in any circumstances", which had been suggested, and which would cover the case of armed conflict.

48. He supported the Chairman's suggestion that a provision similar to that in sub-paragraph (b) of article 45 of the Vienna Convention on Diplomatic Relations be included in the text, and Mr. Bartoš' idea that the property and archives of the permanent mission might be entrusted either to a third State or to the organization itself.

49. He was not against attempting to define the concept of "the family", but in the light of the experience of the Vienna Conference, he doubted very much whether such an attempt would be successful.

50. Mr. ROSENNE said he fully supported Mr. Ustor's remarks concerning the nature of the present debate: the summary record of the Commission's 999th meeting showed that no member had wished to comment on articles 47 and 48. It had perhaps been unavoidable, but in his view extremely undesirable, that at the present session the debate on substance had in most cases taken place in connexion with the text proposed by the Drafting Committee and not during the initial discussion. The debate should not, therefore, be taken as either overt or implicit criticism of the Drafting Committee.

51. With regard to articles 47 and 48, if the term "armed conflict" had to be used at all, it should be used in a very precise manner. The armed conflict might be between the host State and the sending State, or possibly between one or other of those two States and a third State, but conflict between two third States would not usually be relevant. To refer, therefore, only to "armed conflict" was far too general. A general article on the effects and implications of the severance of diplomatic relations between the host State and the sending State, or the complete non-existence of such relations, along the lines suggested by Mr. Reuter and

Mr. Ruda, would perhaps make it possible to reduce, or remove entirely, the references to armed conflict in articles 47 and 48.

52. The question of the severance of diplomatic relations was partly dealt with in article 2, paragraph 3 of the Vienna Convention on Consular Relations, and although that paragraph was not relevant to the articles now under consideration, the fundamental idea was a valid one. The position should be referred to the Special Rapporteur for his consideration and should be mentioned in the Commission's report, since it would also apply to the articles to be submitted on permanent observer missions and delegations to conferences.

53. It would clearly be necessary to change the wording of article 47, perhaps along the lines suggested by the Chairman.

54. The Chairman's suggestion for the inclusion of the provision contained in sub-paragraph (b) of article 45 of the Vienna Convention on Diplomatic Relations was also a useful one, but it should be remembered that the present draft was concerned with multilateral, not with bilateral, relations and that there could therefore be no question of the third State having to be acceptable to the host State. He did not, however, support the suggestion by Mr. Bartoš that the property and archives of the mission might be entrusted to the organization as well as to a third State.

55. On the question of the concept of family, he agreed with Mr. Ustor that the Commission should refrain from trying to produce an international legal definition of such a controversial term.

56. The CHAIRMAN, speaking as a member of the Commission, said he noted that several members of the Commission had expressed their approval of the wording: "The host State must, in all circumstances, and even if it is engaged in armed conflict, grant facilities".

57. The most important question, however, was article 48. In drafting that article, the Special Rapporteur had in fact drawn on article 47 of the draft on special missions.³ But special missions were temporary, so that when the functions of a special mission came to an end, the receiving State might request the sending State to withdraw the special mission's property and archives. The problem of premises, property and archives arose with permanent missions to international organizations in the case of temporary or final recall, just as it did with permanent diplomatic missions. Therefore, no matter whether the recall was temporary or final, a permanent mission was not bound to sell its premises or to withdraw its archives and property within a reasonable time. As the situation was similar to that of permanent diplomatic missions, the provision in article 45 of the Vienna Convention on Diplomatic Relations was the provision that ought to be adopted instead of paragraph 1 of the proposed article, except that the sending State would not have to concern itself with the question whether the third State referred to in sub-paragraph (b)

of article 45 of the Vienna Convention, was acceptable to the host State

58. There was no good reason for retaining paragraph 2 of article 48 either. The requirement to grant facilities for removing the archives was merely the corollary of the requirement that a State sending a special mission must withdraw its property and archives within a reasonable time, a requirement which ought not to be imposed upon a State sending a permanent mission. The provisions of article 45 of the Vienna Convention should therefore be followed, *mutatis mutandis*.

59. He would like to make it clear that his comments were not directed to the Drafting Committee's work, but to the text originally submitted to the Commission (A/CN.4/218/Add.1).

60. Mr. YASSEEN said that the problems raised by article 47 showed once again that resemblances between multilateral and bilateral diplomacy might be deceptive. The basic idea was acceptable; a host State must certainly grant facilities for the departure of a permanent mission. The wording, however, prejudged the reply to questions of importance.

61. It might be inferred from the phrase "in case of armed conflict" that the sending State must recall its permanent mission if that case occurred. But neither the breaking off of diplomatic relations nor the withdrawal of recognition, nor even armed conflict with the host State could oblige the sending State to withdraw its permanent mission from the host State's territory. Such an obligation was conceivable only in bilateral diplomacy. The sending State might wish to bring its dispute with the host State before the international organization concerned. Some neutral wording must therefore be found—a form of words which dealt with the departure of a permanent mission without prejudging other matters.

62. Mr. ELIAS said he agreed that, while the subject matter of articles 47 and 48 was important, their formulation left something to be desired. The very titles of those articles indicated that the emphasis should be on the facilities to be granted to permanent missions rather than on the question of armed conflict, and he supported the suggestion by the Chairman that the general principle be stated first and that it then be stated that the obligations also applied in the case of armed conflict, the severance of diplomatic relations and other exceptional circumstances.

63. He was opposed to any attempt to define the concept of "family", less because it was extremely unlikely that any acceptable definition could be found than because the mere formulation of a definition would not solve the important issues raised by Mr. Yasseen. Even if the convention defined the family as including the spouse, whether husband or wife, that was no guarantee that governments would comply.

64. He supported the Chairman's suggestion that the provision in sub-paragraph (b) of article 45 of the Vienna Convention on Diplomatic Relations be included in article 48, since it was not always easy for permanent missions to make the necessary arrangements in time.

65. He agreed that the last sentence of paragraph 1

³ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 366.

of article 48 was inappropriate; it did not necessarily follow that property and archives had to be withdrawn.

66. Sir Humphrey WALDOCK said that, although article 44 of the Vienna Convention on Diplomatic Relations might be regarded as somewhat misleading, it was not correct to interpret it as implying that the sending State was obliged to remove its mission. The emphasis on armed conflict in that Convention was very understandable, because in the case of bilateral relations armed conflict was the one situation in which difficulties really arose in practice. In the past, when war had broken out, diplomats had sometimes been held by receiving States for the purpose of applying pressure on sending States, and it was that kind of experience which the Vienna Conference had had in mind when drafting article 44.

67. At the same time, it was an element which could not be entirely neglected in the present draft, and the reference to armed conflict should not be omitted altogether. A host State was just as likely to cause difficulties for a permanent mission as it was for diplomats. Nevertheless, the point raised by Mr. Yasseen regarding the need for the permanent mission to protect the interests of the sending State in the organization itself would have to be taken into account, although it was unlikely that those problems could be entirely solved at the present time.

68. He supported the suggestion by Mr. Elias that the reference to armed conflict be deleted from the first sentence of article 47 and that a new final sentence be added; that would remove the misunderstanding regarding the primary objective of article 47. The inclusion of the phrase "to leave at the earliest possible moment" was quite understandable in the Vienna Convention on Diplomatic Relations, but the same considerations did not apply in an ordinary case of departure and the phrase was therefore inappropriate.

69. He agreed with the Chairman's approach to article 48. The article should cover two cases parallel to those contemplated in the Vienna Convention on Diplomatic Relations: the permanent and the temporary recall of the permanent mission; sub-paragraphs (a) and (b) of article 45 of the Vienna Convention would then be appropriate to article 48.

70. He was not, however, convinced that paragraph 2 could be dispensed with altogether. The question of the fate of the archives might be of some importance, since they might well contain material of great political significance, as well as material which related only to the organization. He agreed with the suggestion by Mr. Bartoš that the organization might be added to the possible custodians in the provision corresponding to sub-paragraph (b) of article 45 of the Vienna Convention on Diplomatic Relations.

71. Lastly, he agreed that the Commission should not attempt to define the concept of family.

72. Mr. RAMANGASOAVINA said that he too found the wording of articles 47 and 48 unsatisfactory. Although the expression "even in case of armed conflict" was presented as an incidental situation and as

one case among others, the impression was given that that was the main object of concern.

73. It would be a mistake to follow the text of the Vienna Convention blindly when the situation was very different. In the case of article 47 the formulation suggested by the Chairman would not suffice, since there would still be the references to leaving "at the earliest possible moment" and to placing at their disposal "the necessary means of transport", and the requirement to withdraw the property, all of which seemed to relate to the extreme situation of armed conflict. Some other wording must therefore be found which would show that the article applied simply to the temporary or final closure of a permanent mission. In particular, provision must be made for the sending State to entrust the custody of its permanent mission's property and archives to another permanent mission, or even to place them under the protection of the international organization.

74. The Commission should not shirk the difficulties of defining the term "family". A rough definition had already been attempted by a reference to the persons forming part of the household, but even that approximation was debatable; it had not made possible any satisfactory regulation of the position of the husband of a female diplomat. It was for the Commission to seek a minimum definition, as it were, of the family, based on the modern western concept, that was to say, comprising the husband and wife, the children and perhaps even orphaned grandchildren for whom their grandparents were responsible. A definition which even covered certain exceptional cases would be preferable to compelling diplomats to resort to subterfuges such as engaging their grown-up daughter as a children's nurse in order to enable her to enjoy privileges and immunities.

75. Mr. USTOR suggested that the Commission consider the possibility of a separate article which would state that, in case of armed conflict, all the privileges and immunities accorded under the convention must be granted. If armed conflict was to be referred to at all, it was not enough to mention it only in connexion with the departure of the permanent mission. The permanent mission might well need to go on functioning, in which case it was essential to ensure the continuation of other facilities, such as freedom of movement and communication. The considerations which arose in the case of a permanent mission to an international organization were quite different from those applying in the case of bilateral relations between States.

The meeting rose at 1.10 p.m.

1027th MEETING

Friday, 25 July 1969, at 11.30 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney,

Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218/Add.1)

[Item 1 of the agenda]
(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 47 (Facilities for departure) and

ARTICLE 48 (Protection of premises and archives)
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the texts of articles 47 and 48 proposed by the Drafting Committee.
2. Mr. ROSENNE said that the Commission would probably wish to request the Drafting Committee to reconsider the text of those two articles in the light of the discussion which had taken place. In response to an invitation conveyed to him by the Chairman the previous evening, he would like to suggest that the Drafting Committee consider the introduction of a new article, worded on the following lines:

"The severance or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles. The establishment or continued existence of a permanent mission on the territory of the host State does not in itself affect the situation in regard to diplomatic or consular relations between the host State and the sending State."

3. In drafting that suggested new article, he had drawn on the wording of article 74 of the Vienna Convention on the Law of Treaties¹ and of article 7 of the draft on special missions as adopted by the Sixth Committee of the General Assembly in 1968.² The new article, which was in general terms, might be placed either at the end of the group of articles under discussion or in the introductory part of the draft, but that was a matter for consideration by the Drafting Committee.
4. The introduction of the new article would involve some consequential changes in the texts of articles 47 and 48 proposed by the Drafting Committee. In article 47, the words "even in case of armed conflict" should be replaced by the words "whenever required", and the words "to leave at the earliest possible moment" by the

words "to leave its territory". The amended text would thus also be deliberately general in character. In article 48, the words "even in case of armed conflict", in both paragraphs 1 and 2, would be replaced by the words "at all times".

5. Mr. AGO said that the actual subject-matter of articles 47 and 48, namely, facilities for leaving the territory and the protection of the premises, property and archives of a permanent mission, raised problems that were comparatively easy to solve and were mainly a matter of drafting.

6. He entirely agreed that article 48 should be modelled on the Vienna Convention on Diplomatic Relations, with the few additions that were required.

7. The real difficulty lay in the reference, in both articles, to the possibility of armed conflict. In bilateral relations, if a war broke out between the two countries concerned, diplomatic relations were automatically severed and the diplomats had to leave the receiving State. The position was quite different for members of permanent missions who were representatives of the sending State, not to the host State, but to an international organization. What was essential was to safeguard such representation even in case of armed conflict between the host State and the sending State. The mere fact that in articles 47 and 48, based on the Vienna Convention on Diplomatic Relations,³ the hypothesis of armed conflict was mentioned would entail a serious risk of implying that, in case of armed conflict between the host State and the sending State, members of the permanent mission of the sending State would have to leave the territory of the host State, whereas, quite obviously, any such implication must be avoided.

8. The best solution would be to deal with that situation in a separate article; articles 47 and 48 could then be made more concise. He would, however, prefer to have time to study the proposal Mr. Rosenne had just made before giving a definite opinion on it.

9. One point to be decided was whether the article was to deal solely with the severance of diplomatic relations or whether it was to deal with armed conflict as well. In any event, great caution was required. The difficulty could not be evaded by arguing that the position of the permanent mission of the sending State to an international organization was in no way altered by the development of an abnormal situation such as war or the severance of diplomatic relations between the host State and the sending State. Even less could it be argued that its position was completely changed. That was the delicate question to be decided.

10. Mr. JIMÉNEZ de ARÉCHAGA said he supported Mr. Rosenne's suggestion that the phrase "even in case of armed conflict" be replaced in article 47 by the words "whenever required" and in article 48 by the words "at all times", because the retention of that phrase would make it necessary to take into account a great many situations, including the possibility of a conflict in which the organization itself was involved.

¹ United Nations Conference on the Law of Treaties, *Official Records, Documents of the Conference*, A/CONF. 39/27.

² See *Official Records of the General Assembly, Twenty-third session, Annexes*, Agenda item 85, document A/7375, annex I.

³ United Nations, *Treaty Series*, vol. 500, p. 122, articles 44 and 45.

11. He was in favour of the Drafting Committee considering the new article proposed by Mr. Rosenne, which stated two important points; first, that the absence of diplomatic or consular relations between the host State and the sending State did not affect the obligations of either State under the draft articles, and second, that the existence of a permanent mission on the territory of the host State did not imply the existence of diplomatic relations between the host State and the sending State. If the new article was referred to the Drafting Committee, the Special Rapporteur might himself make a proposal on the subject.

12. Mr. USTOR said articles 47 and 48 would lose some of their importance if a new article were introduced containing general provisions to deal with the situation of the permanent mission and its personnel in extraordinary circumstances.

13. On a first examination of the new article proposed by Mr. Rosenne, he thought it might be interpreted as being inapplicable to cases other than the severance or absence of diplomatic or consular relations. In fact, an article of that kind was necessary to cover all cases, including armed conflict.

14. He agreed that articles 47 and 48, together with the proposed new article, should be referred to the Drafting Committee and that the views of the Special Rapporteur should be sought.

15. Sir Humphrey WALDOCK said that a text on the lines of the proposed new article was necessary, but it would be quite independent of articles 47 and 48.

16. Since the question of armed conflict was covered in a corresponding article of the Vienna Convention, there would be an obvious gap in the present draft if no provision were included on the subject. It was, furthermore, the one case where really serious difficulties were likely to arise in connexion with the application of articles 47 and 48. The application of the proposed general article to such matters as freedom of communication would, of course, give rise to delicate problems, and the Drafting Committee should give careful consideration to the whole question.

17. The CHAIRMAN, said that, in the light of the various suggestions made during the discussion of articles 47 and 48, it should now be possible for the Commission to adopt a fairly clear position on those two articles.

18. Mr. ROSENNE suggested that the Commission should not adopt any position on the two articles at that stage, but should simply ask the Drafting Committee to redraft them and examine the proposed new article.

19. He recognized that there was a strong case for retaining the reference to armed conflict, but it was essential that that reference should be in very general terms. Care should be taken not to suggest that the text was confined to the case where the host State was involved in a conflict. It would not be incompatible with his own proposals to combine them with that reference. For example, the relevant passage in article 47 might read "whenever required and even in case of armed conflict".

20. Mr. RUDA said that when the Commission had

first considered articles 47 and 48 at its 999th meeting, it had not examined them at length. At that meeting, which had been the last one of the present session attended by the Special Rapporteur, the Commission had chiefly discussed article 49.

21. A very important discussion had now taken place on articles 47 and 48 and he, too, thought that the Commission should not adopt any position at that stage, but should refer those articles to the Drafting Committee, together with Mr. Rosenne's proposal. It was also likely that the Special Rapporteur, on being informed of the discussion, would have proposals of his own to make.

22. Mr. CASTRÉN said he was still convinced that reference should be made to the case of armed conflict, but had no strong views on the particular form it should take. On the other hand, he did not think a reference to the absence of relations or to the severance of diplomatic or consular relations would be sufficient.

23. The CHAIRMAN said he had not wished to suggest that the Commission should take a decision on the articles at that stage; indeed, it could not take an informed decision until it had a definitive text before it. He thought, however, that the Commission's views on article 47 were relatively clear and that it was mainly a question of finding the most satisfactory wording. He accordingly suggested that, since it was physically impossible to consult the Special Rapporteur, article 47 be referred back to the Drafting Committee.

*It was so agreed.*⁴

24. The CHAIRMAN, turning to article 48, said that the text before the Commission was based on article 47 of the draft on special missions.⁵ The Commission would have to decide whether to approve that text or to request the Drafting Committee to prepare a new text based on article 45 of the 1961 Vienna Convention on Diplomatic Relations.

25. Speaking as a member of the Commission, he said he was in favour of the second alternative and hoped that the Drafting Committee would follow article 45, sub-paragraphs (a) and (b), of the 1961 Vienna Convention, *mutatis mutandis*.

26. Mr. CASTRÉN said that most members of the Commission were in favour of taking article 45 of the 1961 Vienna Convention as a model. He supported that view, particularly so far as the desirability of reproducing sub-paragraph (b) was concerned.

27. Mr. KEARNEY said he saw no basic problem in taking article 45 of the Vienna Convention on Diplomatic Relations as a general model for article 48; he still thought, however, that the latter ought to include some provision to the effect that the sending State should either withdraw its property and archives within a reasonable time or place them in the custody of a third State or of the organization. The situation was different from that of the severance of diplomatic relations in

⁴ For resumption of the discussion, see 1032nd meeting, para. 13.

⁵ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 366.

bilateral diplomacy; in the latter case it might be assumed that relations would at some time be resumed, but in the former case, as one or two speakers had pointed out, the sending State might decide that the benefits derived from maintaining the permanent mission were not worth what it cost. For that reason, there was some justification for basing article 48, at least in part, on the corresponding provision of the draft on special missions, although some reference should also be included to the custodial function of a third State, as mentioned in article 45, sub-paragraph (b), of the Vienna Convention on Diplomatic Relations.

28. Mr. JIMÉNEZ de ARÉCHAGA said that he doubted the need to include a reference to the custodial function to be performed by a third State, since that was a consequence of the protection by a third State provided for in article 45 sub-paragraph (c), of the Vienna Convention on Diplomatic Relations. From a practical point of view, the full application of that provision could be obtained by placing the archives of the permanent mission in the custody of the same State's permanent mission.

29. Mr. ROSENNE said he supported Mr. Kearney's suggestion concerning the custodial function of a third State. He proposed, however, that the Commission take no decision of principle on article 48 at the present stage, but refer it back to the Drafting Committee for further consideration.

30. The CHAIRMAN suggested that article 48 be referred back to the Drafting Committee.

*It was so agreed.*⁶

ARTICLE 49 (Consultations between the sending State, the host State and the Organization)⁷

31. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 49.

32. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 49

Consultations between the sending State, the host State and the Organization

Consultations shall be held between the sending State, the host State and the Organization on any question arising out of the application of the present articles.

33. The Drafting Committee had simplified the article considerably. In the Special Rapporteur's draft it had been divided into two paragraphs, paragraph 1 consisting of two sentences and paragraph 2 of a single sentence. Of that text, the Committee had kept only the first sentence of paragraph 1, which stated the substantive rule. The second sentence of that paragraph had listed certain articles the application of which had to be the subject of consultations. For the reasons put forward

in the Commission by Mr. Tammes,⁸ whose observations had been supported by several members, the Committee had decided to delete that sentence.

34. Paragraph 2 had stipulated that the preceding paragraph was "without prejudice to provisions concerning settlement of disputes contained in the present articles or other international agreements in force between States or between States and international organizations or to any relevant rules of the Organization". The Committee had noted that the draft so far contained no provisions on the settlement of disputes. Such provisions as were embodied in other international agreements or in the rules of international organizations were formally safeguarded by articles 3 and 4, which the Commission had adopted at its twentieth session.⁹ The Committee had accordingly deleted paragraph 2 *in toto*.

35. During the earlier discussion, some members had objected to the word "question", but there seemed to be no better term that could be substituted for it. It should be understood in the sense of "difficulty" or "problem", not of "subject", which was much too broad.

36. Mr. JIMÉNEZ de ARÉCHAGA said it should be made clear that the proposed text of article 49 was not designed to cover all cases of the settlement of disputes. That would not constitute progressive development when compared with the existing rules, such as article VIII, section 30, of the Convention on the Privileges and Immunities of the United Nations, which stated, *inter alia*: "If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."¹⁰

37. Mr. CASTRÉN said that, in his opinion, the Drafting Committee had considerably improved the Special Rapporteur's text. The second sentence of paragraph 1 had given an incomplete enumeration and had mentioned articles which were out of place in that provision, while paragraph 2 had not been really necessary. The remaining sentence might be recast; in particular, the word "disagreement" should be substituted for the word "question". He supported the suggestion made earlier by the Chairman that the phrase "at the request of one of the parties" should be added,¹¹ as that would give greater force to the idea of disagreement.

38. Mr. EUSTATHIADES said he agreed with Mr. Castrén. He suggested that the last phrase of article 49 be amended to read "on any disagreement . . . if necessary." Worded in that way, the article could not be interpreted as necessarily requiring tripartite consultations on any question.

⁸ See 999th meeting, paras. 31-34.

⁹ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

¹⁰ United Nations, *Treaty Series*, vol. I, p. 30.

¹¹ See 999th meeting, para. 40.

⁶ For resumption of the discussion, see 1034th meeting, para. 48.

⁷ For previous discussion see 999th meeting, para. 25.

39. Mr. ROSENNE said that, like the previous speakers, he found the Drafting Committee's text for article 49 an improvement on the original text. However, it still caused him considerable uneasiness and he could not vote for it in its present form, since he regarded it as too loosely drafted.

40. Paragraph 3 of the Special Rapporteur's commentary to the original article 49 stated that "Paragraph 1 is drafted in such a flexible manner as to envisage the holding of consultations between the sending State and the host State or between either or both of them and the Organization concerned". In his opinion, the text of the article conveyed the idea that only tripartite consultations would be held. With regard to the discussion in the Sixth Committee following the incident involving Guinea and the Ivory Coast referred to in that same paragraph 3 of the commentary, the Chairman of the Sixth Committee had ruled that there was to be no debate on the Legal Counsel's statement at the 1016th meeting of that Committee, which was an *ex parte* statement, although that did not imply any stand on the part of the Committee members. In his view, therefore, the Commission should be extremely cautious about drawing from that isolated statement, which related exclusively to the United Nations, any broad conclusion that every international organization to which the draft article would apply had a general interest in such matters which entitled it to be consulted at all times, on the basis of a unilateral request and independently of the relevant treaty provisions.

41. He shared the doubts expressed by previous speakers about the words "on any question", since the word "question" was very broad and since there were at least two kinds of consultations which could be envisaged, namely, those designed to prevent difficulties from arising and those intended to resolve them once they had arisen.

42. Concerning the jurisdictional problem, he thought that while the Drafting Committee had been right to omit paragraph 2 of the Special Rapporteur's draft, that problem still remained. Mr. Jiménez de Aréchaga had referred to article VIII, section 30, of the Convention on the Privileges and Immunities of the United Nations, but in his opinion that provision was of little value. It had never been formally invoked, and the study by the Secretariat was extremely reticent in describing the experience that had been gained.¹²

43. The CHAIRMAN, speaking as a member of the Commission, proposed the following text for article 49: "If necessary, consultations shall be held on any question relating to the interpretation or application of the present articles, at the request of one of the parties".

44. Mr. RUDA said that he accepted the Drafting Committee's proposal to delete the second sentence of paragraph 1 of the Special Rapporteur's text.

45. He had his doubts, however, about the deletion of paragraph 2, which concerned the settlement of disputes. In introducing article 49, the Special Rapporteur

had said that, for formal disputes on the application or interpretation of the draft articles, "other means of settlement should be provided, possibly in the final clauses of the present draft, or should be worked out on an *ad hoc* basis for particular disputes".¹³ Paragraph 2 seemed to be intended to serve that purpose, a view which Mr. Jiménez de Aréchaga appeared to share.

46. Thus, while he was prepared to accept the text of article 49 proposed by the Drafting Committee on a provisional basis, he thought the commentary should mention the possible future need for some such provision as paragraph 2, to deal with the problem of the settlement of disputes.

47. With regard to the text suggested by the Chairman, he had no objection to the insertion of the words "if necessary", but could not agree to the insertion of the word "interpretation", which would only complicate the problem.

48. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the words "interpretation or" would best be omitted.

49. Speaking as Chairman, he suggested that the Commission ask the Drafting Committee to consider the possibility of preparing a new article on the lines suggested by Mr. Rosenne earlier in the meeting. That article might deal with the cases of armed conflict and of the non-recognition of a government.

It was so agreed.

The meeting rose at 1.5 p.m.

¹³ See 999th meeting, para. 27.

1028th MEETING

Monday, 28 July, at 3.15 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218/Add.1)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 49 (Consultations between the sending State, the host State and the Organization) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Drafting Committee's text

¹² See *Yearbook of the International Law Commission, 1967*, vol. II, pp. 296, paras. 388-391, and 321, paras. 175-181.

for article 49. At the previous meeting, in his capacity as a member of the Commission, he had proposed a new wording for the article and his final text now read:

“Consultations shall be held between the sending State, the host State and the Organization, at the request of one of them, on any question relating to the application of these articles.”

2. Mr. Tammes had submitted an amendment consisting in the addition of a paragraph 2 and a change in the title of the article. He invited him to introduce it.

3. Mr. TAMMES said that article 49, as worded by the Drafting Committee, was more general in character than the article on consultations originally proposed by the Special Rapporteur (A/CN.4/218/Add.1). The Special Rapporteur had focussed attention on particular articles, such as those on the size of the permanent mission and on the duty to respect the laws and regulations of the host State, whereas the Drafting Committee, and now the Commission itself, had considered that the consultations procedure might be useful in connexion with all the draft articles.

4. The Drafting Committee had dropped the Special Rapporteur's paragraph 2, which stated that the provisions of the article were without prejudice to any international agreements concerning settlement of disputes. The omission of that paragraph left a gap in the draft which his amendment was intended to fill.

5. In providing for recourse to an impartial procedure only if the consultations failed to achieve a result satisfactory to the parties concerned, his amendment followed article VII, section 24, of the Convention on the Privileges and Immunities of the Specialized Agencies.¹ The resulting sequence of procedures was in keeping with the spirit of Article 33 of the Charter, which implied that the parties to a dispute should seek a solution by negotiation before resorting to such methods as arbitration or judicial settlement.

6. Section 24 of the Convention specified that any dispute as to whether an abuse of a privilege or immunity had occurred should be submitted to the International Court of Justice for an advisory opinion. That somewhat artificial procedure was necessitated by the fact that specialized agencies could not technically be parties in cases before the Court. As indicated by the Secretariat study,² the practice of the agencies showed that that procedure was too cumbersome and that no agency or State had so far had recourse to it.

7. He had therefore couched his own amendment in very general terms and his proposed new paragraph 2 merely stated:

“2. If such consultations fail to achieve a result satisfactory to the parties concerned, the matter shall be submitted to an impartial procedure which shall be established within the Organization.”

8. His proposal involved a consequential amendment to the title of the article, which would now read: “Procedures to be followed with respect to any question arising out of the application of the present articles.”

9. He was prepared to accept the Chairman's wording for paragraph 1; the insertion of the words “at the request of one of them” made the text more precise.

10. Mr. KEARNEY said he could accept the Chairman's rewording, which was an improvement on the Drafting Committee's text.

11. The new paragraph 2 proposed by Mr. Tammes made good an omission in the draft, and the Commission would have to consider its contents at some stage. It was true that certain sections of the draft were still outstanding, such as those dealing with permanent observers and with delegations to international conferences, and article 49 would thus have to cover a wider field than permanent missions. He was nevertheless in favour of adopting a new paragraph 2 at that stage, subject to any later redrafting to cover other cases. A similar problem of rewording would also arise in regard to paragraph 1 of article 49.

12. With regard to the substance of the proposed new paragraph 2, he noted that the paragraph did not lay down any hard and fast rule on the procedures to be followed, but merely imposed a duty to provide a procedure for impartial settlement. The provision was also sufficiently flexible to cover the variety of procedures established by the different organizations. The point was important because article 49 dealt with privileges and immunities acquired as a result of membership in an organization, and there might be considerable differences in the relevant provisions of the various headquarters agreements.

13. He shared the view that disputes of the type under consideration were not suitable for full treatment by the International Court of Justice. The purpose of the proposed new paragraph 2 would generally be to deal with relatively minor disputes where no agreement could be reached between the host State and the sending State concerned.

14. Mr. REUTER said that the amendments by the Chairman and Mr. Tammes had not removed all the uncertainties in the original version of article 49 (A/CN.4/218/Add.1). In the first place, he would like to know what was to be the relationship between article 49 and the similar articles already included in the constituent instruments of international organizations. The article not only formed a final clause to the present articles, but also served that purpose as between the present articles and the other agreements now in force.

15. The article specifically defined the part to be played by an international organization itself in the type of dispute in question. The original version had tended to place the sending State, the host State and the organization on the same footing—a tendency which had been strengthened by the Chairman's amendment, since it provided that the initiative in requesting consultations might be taken by any one of the three parties. It might also be asked whether, in the new paragraph 2 proposed by Mr. Tammes, the organization was to be

¹ United Nations, *Treaty Series*, vol. 33, p. 276.

² See *Yearbook of the International Law Commission*, 1967, vol. II, p. 321.

regarded as an interested party or not. He, personally, had some difficulty in imagining how triangular disputes could arise.

16. It would also be necessary to make it clear what was meant by an "impartial" procedure and a procedure "established within the Organization". Was the procedure to be established by an internal act of the organization or by agreement among its member States? What would happen if the host State was not a member of the organization? That was a specific technical problem. It was necessary to define the status of an organization involved as a legal entity in such a dispute.

17. If the article was envisaged as one of subsidiary importance, establishing a general obligation to hold consultations, it would not raise any substantive difficulties, but the meaning of "consultations" and "questions" would, perhaps, at least have to be defined. Could a "question" arise before a dispute existed? But if it was decided that the provision would apply only where a formal dispute existed, it would be necessary to specify the exact cases to which the article applied as well as the procedure, and that would give rise to many difficulties.

18. Accordingly, though he was not opposed to the various texts submitted to the Commission, he was not prepared to take a definite position until he had seen the final clauses as a whole.

19. Sir Humphrey WALDOCK said he shared many of the doubts expressed by the previous speaker. In his view, the Commission should first take a decision on the purpose and scope of article 49.

20. His own impression had been that the purpose of the article was to establish a right to a procedure of consultation in cases arising essentially between the host State and a sending State. If the Commission wished to be more ambitious and to draft a provision dealing with the whole question of the settlement of disputes arising out of the application of the draft articles, such a provision should form part of the final clauses. It should, however, be remembered that the Commission had hitherto avoided going too deeply into the question of the general settlement of disputes. In its draft articles on the law of treaties, it had included a clause dealing with some aspects of the matter, particularly with the very special problems arising out of the provisions on the invalidity and termination of treaties. At the Vienna Conference on the Law of Treaties, the question of the settlement of disputes had become one of the central issues and the convention ultimately adopted had contained much more extensive provisions on the subject.

21. He had some sympathy for the proposal submitted by Mr. Tammes, but had misgivings with regard to a provision requiring that a certain procedure "shall be established within the Organization". It seemed to him that such a provision would have the effect of writing something into the constitution of the organization concerned.

22. With regard to the Chairman's proposed text for article 49, he was in favour of the change made to the words "arising out of the application of the present

articles", which were inadequate, if only because the problems that would occur would very often arise out of the non-application of certain privileges and immunities. For that reason, it was better to use the more general wording "relating to" or "concerning".

23. He was not altogether satisfied with the words "at the request of one of them", if they meant that the organization could itself request the holding of consultations independently of the wishes of the States concerned. It had been his understanding that article 49 was primarily concerned with disputes between the host State and a sending State and was intended to cover the situation that would arise in the event of one of those States adopting an intransigent position. In such a situation, it was a normal practice at present to bring into consultation the senior official of the organization concerned; and he agreed that the organization was itself interested in any problem affecting its smooth functioning.

24. If such was the purpose and scope of article 49, the article might conveniently be reworded on the following lines:

"If any question arises between a sending State and a host State concerning the application of the present articles which has not been settled by negotiation, either State may require that consultations on the question shall be held between them and the Organization."

He did not put that text forward as a proposal, but for the purpose of finding out what precisely was the scope of the article which the Commission had in mind.

25. Mr. ROSENNE said he associated himself with the doubts expressed by the two previous speakers regarding the scope and purpose of article 49 and the proposed new paragraph 2.

26. As he had already said, he found it difficult to accept the premise that an organization would be a party to a question arising out of the application of the draft articles.³

27. The proposed new paragraph 2 referred to the failure to achieve "a result satisfactory to the parties concerned". It seemed to him that the meaning of that phrase needed some clarification, since any settlement would usually be unsatisfactory to at least one of the parties.

28. With regard to the point of principle raised by Sir Humphrey Waldock, he would go even further and dispute the right of an organization to assert its own position in a bilateral dispute between two States. As indicated in the opening sentence of paragraph 3 of the Special Rapporteur's commentary to his article 49 (A/CN.4/218/Add.1), the intention had been to avoid such a result. The text now under discussion lacked the flexibility which the Special Rapporteur had had in mind and which to some extent also marked the text put forward by Sir Humphrey Waldock.

29. Mr. USTOR said that he shared some of Sir Humphrey Waldock's views on the proposed new para-

³ See previous meeting, para. 40.

graph 2. If the constituent instrument of the organization concerned contained provisions on the settlement of disputes, those provisions would apply in accordance with article 3 of the present draft.⁴ If it contained no such provisions, he did not believe that the situation would be remedied by the proposed new paragraph. The present draft could not impose on an organization the obligation to amend its basic instrument.

30. The essential problem involved in article 49 was whether the organization itself should be entitled to initiate a procedure for the settlement of questions arising between a sending State and the host State. On that point, he would himself adopt a somewhat liberal approach, bearing in mind the provisions of article 23 *bis*,⁵ which the Commission had not yet examined but which dealt with the assistance to be given by an organization to sending States in respect of privileges and immunities. The provisions of that article would not only confer upon the organization a right, but would impose upon it a duty, to assist the sending State concerned. It should be remembered that even if a particular sending State did not protest against the failure to observe a privilege or immunity, the matter was still of interest to the organization and to other sending States.

31. Mr. EUSTATHIADES said that the amendments proposed by the Chairman and by Mr. Tammes improved the proposed procedure for consultations. But the preliminary question of the scope of the article had to be settled first. Reference to paragraphs 4 and 6 of the Special Rapporteur's commentary and to his explanations at the Commission's 999th meeting showed that the article was intended to deal with the practical difficulties which might arise in day-to-day relations. There was no question of making the article a general clause for the settlement of disputes concerning the interpretation and application of the future convention.

32. In any event, the distinction was clear in practice. That was demonstrated by, for example, article IV, section 14 of the Headquarters Agreement between the United Nations and the United States of America,⁶ and by article VIII, section 30, of the Convention on the Privileges and Immunities of the United Nations.⁷ Consultations could not, therefore, be the final stage in a procedure for the settlement of disputes. Thus, although the text proposed by Mr. Tammes was a step forward, it failed to make it clear whether the procedure provided for was to be an intermediate stage in relation to the future article concerning the settlement of disputes.

33. If it was agreed that the article was concerned with practical difficulties, it would be seen that the text proposed by Sir Humphrey Waldock had several advantages, especially that of the requisite flexibility. The other texts seemed to imply that consultations must be held automatically whenever a difficulty arose, which

was neither consonant with the practice of international organizations nor desirable *de lege ferenda*.

34. Lastly, though he did not object to the idea of consultations with the organization, he thought that the main issue in that particular instance was the difficulty, or disagreement, between the host State and the sending State. The wording should therefore bring out the fact that consultations were to be the second stage, after the breakdown of negotiations, as Sir Humphrey Waldock proposed.

35. Mr. JIMÉNEZ de ARÉCHAGA said he supported the Chairman's proposal that the words "arising out of" should be replaced by the words "relating to".

36. With regard to the wording suggested by Sir Humphrey Waldock, he thought it would be a mistake to lay down a rigid rule that consultations should take place only after the failure of negotiations. In practice, consultations with the organization could take place simultaneously with the negotiations between the two States concerned.

37. He was in favour of including a second paragraph in the article to make it clear that consultations did not bring the matter to an end, and would be satisfied with a text similar to that originally proposed by the Special Rapporteur, if the one proposed by Mr. Tammes were considered too ambitious. Some of the substantive provisions included in the present draft undoubtedly required procedural safeguards. A case in point was the new paragraph which the Commission had added to article 44, introducing the equivalent of the *persona non grata* system for members of permanent missions.⁸

38. The organization as such could certainly have a real interest of its own in upholding the privileges and immunities of permanent representatives. On that point, the Special Rapporteur had drawn attention, at the end of paragraph 3 of his commentary to article 49, to the Secretary-General's view that the United Nations might be one of the "parties" in the sense in which that term was used in section 30 of the Convention on the Privileges and Immunities of the United Nations. The existence of that provision had an effect of its own, whether it was applied or not.

39. Mr. YASSEEN said that, as he saw it, article 49 did not state a general rule for the settlement of disputes, but established a procedure for resolving certain difficulties likely to arise in applying the convention. The text proposed by Mr. Tammes went further than that relatively limited aim.

40. If a disagreement arose between the host State and a sending State, it could naturally be settled in accordance with international law or with certain special instruments. But the direct contact thus established between the two parties might not lead to a satisfactory settlement. The procedure contemplated in article 49 was to associate the international organization with the contact for consideration of the question. Indeed, the representatives of the organization might play a useful part in such situations.

⁴ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

⁵ See 1030th meeting, para. 54.

⁶ United Nations, *Treaty Series*, vol. 11, p. 24.

⁷ *Op. cit.*, vol. 1, p. 30.

⁸ See 1024th meeting, para. 6.

41. If the Commission agreed that the article went no further than that, it might accept the text proposed by Sir Humphrey Waldock. It was the normal practice for contact first to be established between the host State and the sending State. He, too, was in favour of using the term "disagreement", which was more precise than "question". If there was no disagreement, consultations would not be necessary.

42. The CHAIRMAN, speaking as a member of the Commission, said that the basic idea of the article was to provide for the possibility of intervention by the organization in regard to questions arising out of the application of the future convention. Otherwise, as consultations and negotiations could always be held between the sending State and the host State at the request of either, it was impossible to see what purpose the article would serve.

43. As drafted by the Special Rapporteur, however, the article might give the impression that consultations were mandatory in any event and on any question. He had therefore proposed in his amendment the insertion of the phrase "at the request of one of them", but because of the objections raised to the option thus given to the organization, that phrase might be omitted and, instead, the words "if necessary" inserted at the beginning of the articles, as he had originally had in mind.

44. Sir Humphrey Waldock's proposal seemed to be based on a similar idea. It would, however, have the effect of instituting a method of settling disagreements in two stages, first by negotiations and then, if they failed, by consultations with the organization. It was dangerous to suggest disagreements, even by implication, whereas consultations might serve to settle any questions that arose even before a disagreement had developed. And even in the event of a disagreement, if the host State or the sending State wished for tripartite discussions before bilateral negotiations were initiated, there ought to be some provision making that possible.

45. Mr. Tammes' proposal was to establish within the organization a procedure for the settlement of disputes. He himself found it acceptable, but it was only one move among many, as was clear from Article 33 of the United Nations Charter. But in any event it involved the more general question of the settlement of disputes concerning the interpretation or application of the articles. It would be better to state in the commentary that the purpose of article 49 was to provide for consultations, not to establish machinery to be available in the last resort for the solution of any dispute.

46. The Special Rapporteur had said that he would draft an article concerning the settlement of disputes arising out of any part of the convention. It would therefore be better to wait until he had completed the draft.

47. Sir Humphrey WALDOCK said there could be no question of excluding the normal day-to-day consultations between the organization and the host State, which would, of course, take place before a situation such as that contemplated in article 49 was reached. He did not believe, however, that the article was merely intended to give general approval to that process of

informal consultation. Its purpose was to deal with the difficulty which arose when there was a difference of views between the host State and a sending State on a matter of privileges or immunities. The provisions of article 49 were intended to confer upon each of the States concerned, and in particular upon the host State, a formal right to set in motion the process of consultation. That formal right would be exercised when one of the two States concerned believed that the other was being intransigent.

48. Mr. CASTRÉN said that the Chairman's proposal considerably improved the text submitted by the Special Rapporteur, as amended by the Drafting Committee. He did not, however, think it would be desirable to substitute the phrase "if necessary" for "at the request of one of them", as the Chairman had proposed orally, since it was too general; it was self-evident that consultations would only be held if necessary.

49. The text proposed by Sir Humphrey Waldock departed too far from the Special Rapporteur's original idea, by giving the organization a more restricted role than the Special Rapporteur and even the Drafting Committee had provided for it. The organization should preferably be able to intervene *ab initio* in the settlement of a question arising between a sending State and the host State. Moreover, the organization must safeguard its own interests. Hence article 49 should not be amended as radically as Sir Humphrey proposed.

50. It might be preferable to make the new paragraph 2 proposed by Mr. Tammes into a separate article and to improve its wording, although the proposal it contained, while sound in itself, was a source of some misgivings.

51. Mr. AGO said that the Commission ought to be quite clear about what it meant to say in the article. The words "any question" could apply to several kinds of dispute. For instance, they might apply to a dispute between the host State and a particular sending State over, say, a criminal offence committed by a member of the latter's permanent mission. In that case, the matter would be settled by direct negotiations or by the other procedures normally used in relations between two States. But although that would be a bilateral inter-State dispute, the organization might have an interest in being kept informed and being allowed to have its say, since the settlement of the dispute might create a precedent and thus affect the interests of the organization as such. The Commission, therefore, had to decide whether it wished to give the organization an opportunity of defending its interests by stipulating that it must be consulted.

52. Another type of dispute might arise between the host State and not just one, but all the sending States if, for example, the State took legislative or administrative measures which affected all the sending States. There was no necessity to provide for compulsory consultation of the organization in such a case, for it would be the organization itself which would make representations to the host State.

53. Furthermore, while it might be desirable to provide for the possibility of consultations with the orga-

nization in case of a dispute between the host State and a sending State, it was important to avoid giving the impression that such consultations exhausted the means of settlement of disputes. In that respect Mr. Tammes' proposal for resort to an impartial procedure within the organization had merit, but it was open to two objections; first, that small and highly specialized organizations might not perhaps consider it desirable to establish such a complicated internal procedure and, secondly, that the host State might not be a member of the organization and might thus not consider itself bound by an internal procedure of the organization. Again, different organizations with headquarters in the same host State might establish different procedures.

54. For those reasons, the Commission should not take a hasty decision on those aspects of the problem. The Special Rapporteur had thought of reserving all such questions for the end of his report, in other words, of deferring them until the Commission had examined all the problems arising from the relations between States and international organizations.

55. It would be better, therefore, for the time being, just to draft a very brief article merely imposing an obligation on the sending State and the host State to consult the organization in the event of a dispute between themselves concerning the application of the articles so far considered, and to postpone until a later stage the preparation of a more ambitious article covering the problem of the settlement of disputes in relation to the draft articles as a whole.

56. Mr. RUDA said that his original doubts about article 49 had increased as the debate proceeded. As Mr. Ago had pointed out, the article might give rise to complicated problems. In paragraph 1 of his commentary to the article, the Special Rapporteur had said that the purpose of the consultations referred to in paragraph 1 "would be to provide remedies for difficulties which may arise as a result of the non-application, between States members of international organizations and between States members and the organizations, of rules of inter-State bilateral diplomatic relations regarding *agrément*, the declaring of a diplomatic agent as *persona non grata* and reciprocity". In paragraph 6 of his commentary, the Special Rapporteur had gone on to say that the purpose of paragraph 2 of article 49 was "to make clear that the consultations envisaged in the article relate to difficulties of a practical character and not to disputes of a rather more formal character to which the interpretation of the articles may give rise . . .". The ideas referred to in those two paragraphs of the commentary were far from simple and were quite distinct.

57. He also shared Mr. Reuter's uncertainty regarding the exact meaning to be given to the word "consultations". In bilateral diplomatic relations, such "consultations" might be more correctly described as "negotiations", and for that reason, he could support the amendment proposed by Sir Humphrey Waldock.

58. He thought it would be more prudent for the Commission to postpone a decision on provision for the settlement of disputes until it had the whole draft before

it, as well as some idea of the Special Rapporteur's wishes in the matter.

59. Sir Humphrey WALDOCK said that he agreed with the views expressed by the last two speakers. The main difficulty, to his mind, was that the proposed article 49 was neither a general article nor an article designed to deal effectively with disputes between the host State and the sending State. The amendment proposed by the Chairman seemed to be limited to relations between the host State and the sending State, with the possibility of intervention by the organization to protect its own interests; but, as Mr. Ago had said, there were also larger issues in which the organization might have to play a part. If the organization was to provide some formal procedure for consultations, he could only recommend his own proposal; on the other hand, in view of the more general aspects of the problems involved, it might be better to defer consideration of article 49 until the Commission had the draft articles as a whole before it.

60. Mr. USTOR suggested that the Commission might tentatively adopt the present text of article 49, explaining in the commentary that it was intended for consideration by Governments and that the whole matter would be reconsidered by the Commission at a later stage. It should, however, make clear in its report that it had deferred its decision on article 49 until it had dealt with the following chapter of the draft.

61. Mr. ROSENNE said he shared Mr. Ustor's view; the Commission's position would be liable to misunderstanding if it did not include even a tentative text for article 49. Some of the articles were relatively far reaching in scope, and if the Commission failed to point out at the present stage that it envisaged some procedure for dealing with any questions which might arise in connexion with them, the draft might be open to serious misinterpretation. Many of the present articles might look remarkably similar to the corresponding articles of the Vienna Convention on Diplomatic Relations, but inasmuch as they concerned permanent missions to international organizations, they were not at all the same.

62. As Mr. Ustor had said, if the Commission decided to defer its decision on article 49, it should include a full account of the present discussion in its report in order to elicit the views of Governments.

63. Mr. RAMANGASOAVINA said he agreed with other members of the Commission that it was not possible to anticipate the full scope of article 49 at the present stage of the Commission's work, since the draft articles were not yet complete. For the time being, therefore, any text that the Commission drafted must be tentative.

64. Mr. KEARNEY said that, after hearing the arguments of Mr. Ago and Mr. Ruda, he too had reached the conclusion that the Commission should postpone any action on article 49. His ideas had been largely modified by the discussion of the role the organization should play in the consultations. He could not agree with those who considered that the organization had no special role to play; since it was a contracting party

to the relevant headquarters agreement, he thought it would have a role to play in connexion with almost any problem involving a sending State. Entirely different problems might arise, however, in connexion with delegations to international conferences. He believed, therefore, that for the present the Commission's best course would be to defer a decision on article 49.

65. The CHAIRMAN, speaking as a member of the Commission, said he was still convinced that an article was needed, no matter how it was worded, providing that the organization might intervene in certain circumstances to help the host State and the sending State settle a dispute arising out of the application of the articles. The host State did not always have diplomatic relations with all the member States of an organization and in some cases therefore could negotiate, if necessary, only through the organization. It was also possible that a sending State might wish to enter into negotiations with the host State in order to conclude agreements or to clarify certain matters in the presence of a representative of the organization. That was a quite conceivable situation, since relations between the host State and the sending State were not, strictly speaking, bilateral relations, but relations arising from the organization's presence in the host State's territory.

66. Some text was essential, even if it was of a tentative character, so that the Commission could draft the article in its final form on the basis of the comments elicited from Governments. The Commission could adopt any wording, for example, that proposed by Sir Humphrey Waldock, with the omission of the phrase "which has not been settled by negotiation", but it should do so forthwith and not wait until it had considered the draft articles as a whole, since the next sections would deal with different subjects. The Special Rapporteur had had his reasons for proposing the article, and the Drafting Committee should therefore be asked to make one more effort to produce a satisfactory text.

67. The situation mentioned by Mr. Ago, in which the host State took measures contrary to the interests of all the members of the organization, was a matter of general concern, not a question arising out of the application of the articles, so it was not covered by article 49.

68. Mr. JIMÉNEZ de ARÉCHAGA said that paragraph (8) of the Commission's commentary to article 16 (Size of the permanent mission) as adopted at the previous session read: "Some members of the Commission raised the question of the remedies available to the host State in case of non-observance by the sending State of the rule laid down in article 16. They suggested that a provision should be included in the text of the article for consultation between the host State, the sending State and the organization. When it takes up the remainder of the draft articles, the Commission will consider inclusion of an article of general scope concerning remedies available to the host State in the event of claimed abuses by a permanent mission."⁹

Since, at the present session, it had been considered necessary to provide guarantees to the host State in connexion with article 44, it would, in his opinion, be a serious mistake to omit a separate article on consultations.

69. He was prepared to accept Sir Humphrey Waldock's proposal, provided that consultations were not made subordinate to negotiations.

70. Mr. AGO said he had proposed allowing the Commission time to ponder a delicate problem. If, however, the Commission wished to adopt a tentative text forthwith, it should make it quite plain that its intention was not to solve the problem of the settlement of disputes arising out of the application of the articles as a whole, but merely to ensure that, in the event of a dispute between the host State and the sending State, the interests of the organization would be safeguarded and it would be consulted. It should, furthermore, use language which clearly showed that it was dealing with an obligation, and not with a mere possibility or vague contingency.

71. Mr. RUDA, pointing out that article 49 was the last article in part II of the draft, dealing with permanent missions to international organizations, asked whether it would therefore apply only to the articles preceding it or to all subsequent articles as well.

72. The CHAIRMAN, speaking as a member of the Commission, said that, in his view, article 49 applied only to the preceding forty-eight articles. That should perhaps be stated in the article itself or in the commentary.

73. Speaking as Chairman, he said that the Commission was divided on the question of the need for the article. Before he put that question to the vote, however, he would suggest that the article be referred back once more to the Drafting Committee with a request that it make one final effort to produce a generally acceptable text in the light of the discussion.

74. Sir Humphrey WALDOCK said that he supported the Chairman's suggestion. He also endorsed Mr. Jiménez de Aréchaga's view that adequate remedies should be available to the host State. He hoped that the Drafting Committee would give full attention to the interests of all three parties, namely, the sending State, the host State and the organization.

75. The CHAIRMAN said that, in the absence of any objection, he assumed that his suggestion to refer article 49 back to the Drafting Committee was accepted.

*It was so agreed.*¹⁰

The meeting rose at 6.10 p.m.

⁹ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

¹⁰ For resumption of the discussion, see 1034th meeting, para. 92.

1029th MEETING

Tuesday, 29 July 1969, at 11.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Ustor, Sir Humphrey Waldo, Mr. Yasseen.

Co-operation with other bodies

[Item 5 of the agenda]

(resumed from the 1021st meeting)

**STATEMENT BY THE OBSERVER FOR THE EUROPEAN
COMMITTEE ON LEGAL CO-OPERATION**

1. The CHAIRMAN invited the observer for the European Committee on Legal Co-operation to address the Commission.

2. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said that the Council of Europe Committee which he represented was following with increasing interest the codification work being undertaken by the United Nations on the basis of texts prepared by the International Law Commission. The Committee particularly welcomed the successful outcome of the Vienna Conference on the Law of Treaties, which had adopted the text proposed by the International Law Commission almost unchanged. The law of treaties was of special interest to the Council of Europe, whose activities were mainly reflected in the conclusion of inter-State instruments, the total number of which had now reached sixty-seven. Certain practices had had to be developed before such a large number of conventions could be concluded, in particular, rules of procedure to govern the preparation of their texts and their opening for signature. The Committee of Ministers of the Council of Europe had referred to article 5 of the draft Vienna Convention¹—it had not been adopted at the time—when confirming recently, as a rule of procedure governing the opening of conventions for signature by member States, what might be called the rule of “reverse unanimity”, whereby a convention was opened for signature if no member State objected.

3. Since the Commission's last session, there had been opened for signature a European agreement concerning the immunity of persons invited to appear before the European Commission or Court of Human Rights. It was an instrument conferring immunity from jurisdiction for anything spoken or written by a petitioner, the representative of a petitioner or the representative of a Government before the European Commission or Court of Human Rights.

4. Two further documents of interest to the Commission had been virtually completed, the first being a convention on State immunity from jurisdiction, the main feature of which was a listing of the various situations in which a foreign State did not enjoy immunity from jurisdiction in the courts of another contracting State, and, the second, a report on the privileges and immunities of international organizations, a copy of which had been transmitted to the secretariat of the International Law Commission.

5. During the past year, the Committee of Ministers had adopted a resolution providing for the publication of a model plan for digests of national State practice in the field of public international law.² A copy of the model plan had already been sent to the Secretary-General of the United Nations in accordance with General Assembly resolution 2099 (XX) on technical assistance to promote the teaching, study, dissemination and wider appreciation of international law.

6. Another matter which might be of interest to the Commission was the number of signatures and ratifications of European conventions. Satisfactory progress was being made, especially since members of parliaments participating in the work of the European Committee for Legal Co-operation had been encouraging their own parliaments to ratify conventions.

7. The Council of Europe's current work included a draft on civil liability for motorists, the harmonization of processes for computerizing legal data in the western European countries, in particular the terminology of international treaties, and a draft convention on the international validity of judicial decisions in criminal cases, providing for the possibility of transferring proceedings from one State to another and for the possibility of the recognition and enforcement of foreign judicial decisions; those two principles were embodied in the convention on road traffic offences which had already been ratified by two States.

8. With regard to the work of the European Court of Human Rights, the Commission might be interested in the judgement in the Belgian languages case, which embodied certain novel elements relating to discrimination, and was based on article 14 of the European Convention on Human Rights.

9. The European Committee on Legal Co-operation highly appreciated the codification work performed by the United Nations and was encouraging its member States to ratify several universal conventions, in particular the Vienna Conventions on Diplomatic and Consular Relations and the International Convention on the Elimination of All Forms of Racial Discrimination.

10. There was every reason to hope that the tardiness of European countries in that respect would soon be overcome. At its session in June 1969, the Committee had considered holding more frequent exchanges of views between its member States on the draft conventions and other instruments prepared by the International Law Commission, before they were submitted to the Sixth Committee or to a diplomatic codification conference. It had held exchanges of views of that kind

¹ See *Yearbook of the International Law Commission*, 1966, vol. II, p. 191.

² *Op. cit.*, 1968, vol. I, p. 239, para. 3.

in the past on the draft convention on the law of treaties and the draft on special missions.

11. He would be glad to provide members of the Commission with any information or documentation they might wish on the subjects he had touched upon and hoped that an observer for the Commission would be able to attend the next meeting of the Committee which was due to be held from 1-4 December next.

12. The CHAIRMAN, thanking the Observer for the European Committee on Legal Co-operation for his interesting statement, said that during its consideration of the statements by the observers for the Inter-American Juridical Committee³ and the Asian-African Legal Consultative Committee⁴ the Commission had appreciated the great value of the work of such regional committees for the codification and progressive development of contemporary international law. The Commission was very glad to hear that the European Committee had moved from the stage of preparing drafts to that of preparing conventions, treaties and agreements. It had been most unfortunate that the Commission had been unable to be represented at the Committee's recent session because their sessions had overlapped. It was to be hoped that in future the two bodies would always be able to be represented at each other's sessions. He asked Mr. Golsong to convey to the European Committee the International Law Commission's congratulations on the work it had already done and good wishes for the work it proposed to undertake in the future.

13. Mr. EUSTATHIADES said he associated himself with the Chairman's congratulations. Two of the most important points mentioned by Mr. Golsong were the desirability of universal implementation of General Assembly resolution 2099 (XX) on technical assistance to promote the teaching, study, dissemination and wider appreciation of international law, and the very favourable reception accorded to the model plan for digests of national State practice in the field of public international law. The Commission had a twofold interest in the activities of regional organizations concerned with law; an indirect interest, because they promoted codification, and a direct interest, because certain studies and resolutions by regional organizations were directly useful for universal codification. That was true of the model plan for digests of national State practice in the field of public international law. Another example of the practical value of studies by a regional organization was the work on computerization codes carried out by the European Committee on Legal Co-operation. That was a new subject, on which the European States had worked in two stages, first, in the European Conference of Deans of Law Faculties and, secondly, in the European Committee for Legal Co-operation through the Committee of Experts for the Study of the Law of European States. The aim was to process data concerning European international treaties by computer. The data which it had been decided to process were very abundant and included legal statistics. Such work was

carried out at the world level by the Secretariat of the United Nations, and it would not be long before the United Nations would have to consider recommending the general application of the method, which provided ready access to valuable material.

14. Mr. AGO said he had been particularly struck by the concise and factual nature of Mr. Golsong's statement. The increasingly practical nature of the relations between the Commission and the European Committee on Legal Co-operation was extremely gratifying and he welcomed the influence on the Committee of the Commission's ideas and preliminary work and of the results of United Nations conferences which it had been possible to convene solely as a result of the International Law Commission's work. The two bodies should be represented more actively and permanently at each other's sessions in order to draw the bonds between them even closer.

15. The CHAIRMAN thanked the Observer for the European Committee on Legal Co-operation for the great interest which his Committee had taken in the Commission's work on the law of treaties. The Commission highly appreciated the Committee's efforts to promote the entry into force of universal conventions, in particular the Convention on the Law of Treaties, the International Law Commission's greatest achievement, which was of the utmost importance for the codification and progressive development of contemporary international law.

Relations between States and international organizations

(A/CN.4/218/Add.1)

[Item 1 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 44 (Respect for the laws and regulations of the host State)

16. The CHAIRMAN reminded the Commission that it had decided that the title of article 44 should be "Respect for the laws and regulations of the host State"⁵ and had adopted paragraphs 1 and 2 of the article as proposed by the Drafting Committee.⁶ It had also approved the new paragraph 3 in principle and had instructed the Drafting Committee to prepare a text.⁷ The Drafting Committee now proposed the following wording for paragraph 3:

"3. In case of grave and flagrant violation of the criminal law of the host State, committed outside the exercise of his functions by a person enjoying immunity from criminal jurisdiction, the sending State shall, unless it waives this immunity, either recall the

³ See 999th meeting, paras. 63-80.

⁴ See 1021st meeting, paras. 1-19.

⁵ See 1024th meeting, paras. 69 and 87.

⁶ *Ibid.*, paras. 88 and 90.

⁷ *Ibid.*, paras. 6 and 91.

person concerned or terminate his functions with the mission, as appropriate.”

17. Mr. ROSENNE said that, as he had only just received the document containing the new text, his comments would necessarily be of a preliminary character. He had some difficulty in understanding the first clause in the new paragraph 3 proposed by the Drafting Committee and, in particular, the meaning of the word “flagrant”.

18. Mr. CASTRÉN said that although, in general, he found the new text very satisfactory, he, too, did not understand why the adjective “flagrant” had been introduced as a qualification of violation.

19. Sir Humphrey WALDOCK said there were two new elements in the proposed text for paragraph 3 which he hoped some member of the Drafting Committee would explain to him. One was the reference to “grave and flagrant violation of the criminal law of the host State”, and the other was the expression “committed outside the exercise of his functions”.

20. Mr. USTOR, speaking on behalf of the Drafting Committee, said that the problem confronting the Drafting Committee had been how to express in precise terms the duty of the sending State either to waive the immunity enjoyed by the person concerned, or to recall him or to terminate his functions. The question whether that person had, in fact, violated the criminal law of the host State was always a delicate one, since in most cases a violation could not be presumed until he had been duly convicted of the charge brought against him. Some members of the Drafting Committee had, indeed, pointed out that the Commission should take care not to run counter to the principle that a man was presumed innocent until proved guilty. Since, however, the Commission had already approved paragraph 3 in principle, the Drafting Committee had chosen to use the word “flagrant” in order to convey the idea that the obligation of the sending State arose only in cases where a violation was obvious and indisputable.

21. The expression “committed outside the exercise of his functions” was based on the idea that the representative in question might make statements in the organization, in one of its organs or outside it, which could be considered a grave violation of the criminal law of the host State. After lengthy deliberation, therefore, the Drafting Committee had decided to insert that phrase in order to make it clear that when such statements were made within the exercise of the representative’s functions, they could not be regarded as constituting grounds for his recall.

22. Mr. AGO said that the commentary should be drafted with extreme care. Though the need to ensure respect for the laws of the host State must be taken into account, the way should not be opened to abuses.

23. The commentary should bring out clearly that the provision in paragraph 3 certainly did not mean the termination of an immunity which was perhaps the most important of all immunities. It must be emphasized that the sending State’s obligation to recall the person concerned or terminate his functions, unless it

waived that immunity, applied only to cases where a grave and flagrant violation had unquestionably been committed. It should also be specified that the violation must be a violation of the ordinary law, not an act performed in the exercise of the permanent representative’s functions.

24. Mr. KEARNEY said he had serious doubts about the changes proposed by the Drafting Committee in paragraph 3. In particular, he felt that the word “flagrant” was susceptible of a variety of interpretations and that its use in conjunction with the word “grave” might give rise to disputes concerning its exact meaning. Even after hearing Mr. Ustor’s explanation, he was still not convinced that it was desirable to introduce the word “flagrant” with the meaning of “indisputable”, since he did not consider that it should be necessary to require the presentation of a case against which no defence was possible. That would seem to place a burden on the host State which, in most legal systems, went beyond the normal requirements in any criminal case, such as the requirement under the common law of “proof beyond reasonable doubt”. After all, the worst that could happen to the person in question, even if he were guilty of manslaughter in a motor vehicle accident while driving under the influence of alcohol, was that he would be recalled from the permanent mission.

25. It was difficult to understand precisely what was meant by the phrase “outside the exercise of his functions”, since nowhere in the draft were the functions of a member of a permanent mission, as distinct from those of the permanent mission itself, defined with exactitude. Indeed, as conceived by the sending State, his functions might even include espionage, which could hardly be invoked as a reason for immunity from jurisdiction. To revert to the example of manslaughter, if, in the exercise of his official duties, a driver of a permanent mission, while intoxicated, should run down and kill a pedestrian, he saw no reason why such a person should not have his immunity withdrawn or should not be recalled by the sending State. For those reasons, he thought that the word “flagrant” and the expression “outside the exercise of his functions” should be deleted from paragraph 3.

26. Mr. RAMANGASOAVINA said he appreciated the Drafting Committee’s efforts to mitigate the threat to privileges and immunities which might be presented by the new paragraph 3. The text was, however, open to three objections. First, the title still contained the words “laws and regulations”, whereas, in accordance with the Commission’s wishes, “criminal law” had been substituted for those words in the body of the article. It was true that the title did not have the same force in law as the text of the article, but it was an element in its interpretation. The conclusion might be drawn that “criminal law” meant “laws and regulations”, thus making the change in the text of the article pointless.

27. Secondly, the words “grave and flagrant”, used to qualify the violation in order to restrict the scope of the paragraph, might entail some contradiction. The gravity might derive from the particularly heinous nature of the act or from the repetition of acts violating the criminal law. As a violation was flagrant when the

person concerned was caught in the act, the article could not be concerned with repeated acts. There were thus few cases in which violations could be classified as both grave and flagrant.

28. Thirdly, the violation must have been committed outside the exercise of the functions of the person concerned. He could not see what grave and flagrant violation could be committed in the exercise of those functions. Moreover, the violations of which the persons concerned were sometimes guilty outside the exercise of their functions were mainly of a minor character.

29. Those contradictions and ambiguities at least required very full treatment in the commentary.

30. Sir Humphrey WALDOCK said that, like Mr. Kearney, he had misgivings about the two new elements which the Drafting Committee had introduced into paragraph 3. The Drafting Committee's object was to try to prevent any abuse by the host State of the provision in that paragraph, but he questioned whether the danger of abuse was such as to justify the additions.

31. The clause dealt with the obligations of the sending State, rather than with the right of the host State to expel a person who had violated its criminal law. Someone had to determine whether or not the conditions existed for bringing the clause into operation, and that decision had to be made in the first instance by the sending State. If a complaint of a grave violation was made, the sending State would be faced with the question whether it gave rise to an obligation to recall the person concerned or to terminate his functions. Should a difference of view arise between the sending State and the host State, the procedure laid down in article 49 could be invoked and the organization might be brought into the consultations.

32. The additions suggested by the Drafting Committee might do more harm than good, because if it were assumed, as would be logical, that paragraph 3 was intended to deal only with grave violations, the insertion of the words "and flagrant" only made for uncertainty. In English, the word "flagrant" was susceptible of different meanings. It could be interpreted as meaning *in flagrante delicto* in the sense that the case was so evident that there was virtually no chance of the individual involved escaping conviction. On the other hand, it might be read as meaning that the event had aroused much public notice and had inflamed public opinion. The word "grave" seemed quite sufficient to cover what was intended. The question could not be decided unilaterally by the host State. In the first instance, it would be for the sending State to decide whether or not a grave violation of the criminal law had been established which would oblige it to recall the individual concerned.

33. He agreed with Mr. Kearney that, on the assumption that the paragraph was concerned with grave violations, the introduction of the phrase "outside the exercise of his functions" was illogical; many cases likely to arise in practice would not be covered by the paragraph. An obvious example that sprang to mind was that of a car driven by a chauffeur or even by a diplomatic member of the permanent mission under the influence of drink, becoming involved in an accident resulting in man-

slaughter on the way to or from an official function. It might be arguable whether or not the person driving the car had been doing so in the exercise of his functions, but under most systems of law, the answer would be in the affirmative and the crime would be regarded as a grave violation of the criminal law justifying a demand for the individual's recall. The addition suggested by the Drafting Committee in order to protect the host State would exclude such cases from the obligation to recall, but they were precisely the cases which arose most frequently in practice and which the Commission had previously said must be covered. Moreover, he doubted whether, in the case of a permanent mission to organizations, the sending State was in a weak position to resist an unreasonable request for the recall of a member of the mission. The host State had no right to declare him *persona non grata* and the sending State could bring the matter to the notice of the organization, when the other member States would be likely to support it in resisting any unreasonable request of which they might themselves be the victim on another occasion.

34. He accordingly thought it would be preferable to drop the two additions suggested by the Drafting Committee; the position of the sending State would not be unduly weakened as a result.

35. Mr. BARTOŠ said he would like to make it clear at the start that the Drafting Committee had unanimously considered that political offences were excluded from the scope of the new paragraph 3, that a statement to that effect should be made to the Commission and that the point should be mentioned in the commentary. The fact that they were so excluded was an essential condition for the unhampered exercise of the functions of members of a permanent mission. He wished those remarks to be included in the summary record of the meeting.

36. The Drafting Committee had considered that it ought to specify that the violations must have been committed outside the exercise of functions, because host States had been known to protest against criticism of them made by permanent representatives in the exercise of their functions. It was obvious that, even if such criticisms constituted a violation of the criminal law of the host State, they would not be grounds for the application of the new paragraph 3, if it were adopted.

37. It was true that in French law, the term "*flagrant délit*" was used to describe the case when a person was caught in the act. But neither the Drafting Committee nor he himself had had that specific meaning of the term in mind; they had rather been thinking of a violation which had indisputably been committed.

38. Another case which had not been considered by the Drafting Committee was that in which members of the family also enjoyed immunity from criminal jurisdiction. The sending State could, of course, waive their immunity, but it could neither recall them nor terminate their functions. The wording therefore needed amending.

39. Mr. RUDA said that the Drafting Committee's text for paragraph 3 was an improvement on the original text proposed by Mr. Kearney,⁸ because it gave greater

⁸ See 1024th meeting, para. 6.

protection to the host State's interests in the matter of immunity from criminal jurisdiction. He favoured the addition of the words "and flagrant", as it would make the clause easier to apply in practice. In many systems of law, elected members of legislative bodies lost their immunity in cases of flagrant violation of the criminal law; the addition was therefore appropriate and removed all ambiguity.

40. He still had doubts, however, about who was to determine whether a violation of the criminal law had been grave and flagrant. In order not to destroy the whole principle of immunity from criminal jurisdiction, the matter should be clearly explained in the commentary.

41. He shared Mr. Kearney's doubts about the phrase "outside the exercise of his functions", particularly since the functions of a member of a permanent mission necessarily had to be exercised legally and in accordance with the provisions of article 7. The phrase could only cause confusion and should be dropped.

42. Mr. ROSENNE said that the determination whether or not a violation of the criminal law of the host State had been a grave one could not be unilateral. The process was initiated by the host State and if the sending State concurred in its finding, that was the end of the matter; otherwise, the procedure provided for in article 49 would come into play. Clearly the sending State could not have the deciding voice or take a unilateral decision.

43. In his view, the words "and flagrant" should be deleted from the Drafting Committee's text for paragraph 3. He would prefer to use wording on the lines of Mr. Kearney's text and to say "in case of serious violation", because the Commission should avoid any terminology which might have a technical connotation in the criminal law of any State.

44. The reference to the functions of a person enjoying immunity should also be dropped, not only in paragraph 3 but elsewhere in the draft. He understood what the Drafting Committee had been trying to achieve and regarded its view as fundamentally correct, but some such wording as "outside the exercise of the functions of the permanent mission" would meet the point and would make a direct reference back to article 7. The wording of article 41, paragraph 2, which referred to the functions of a person coming to an end might also need to be reconsidered.

45. Article 33 provided for the waiving of immunity when that could be done "without impeding the performance of the functions of the permanent mission", but no one other than the officials of the sending State could really know what were the functions of any person in a permanent mission. Therefore the wording "or terminate his functions with the mission", in the Drafting Committee's text for paragraph 3, should be modified so as to refer not to the functions, but to the appointment of the member of the mission. Under article 17, the sending State had the obligation to notify the host State of the appointment of members of the permanent mis-

sion, but not of their functions, the former being an external and the latter an internal matter. A similar change should be made in all articles of the draft referring to the termination of a person's functions with a mission.

46. Mr. CASTAÑEDA said he had no criticism of the drafting, which he thought was as satisfactory as was possible. But with regard to the substance, the rule stated in paragraph 3 was both unnecessary for the protection of the basic interests of the host State and dangerous, because it might lead to abuse. The Special Rapporteur had gone into the matter and had not seen any need to include that rule in his draft article. The proposed rule was very categorical, since it contained a formal and restrictive statement of the steps to be taken by the sending State. He did not believe that reasons for going so far could be found in practice. Another objection was that the rule gave the host State an unusual right, since in practice it would be for the host State to request the sending State to recall the person concerned or terminate his functions.

47. The procedure for consultations provided for in article 49 should be adequate for the settlement of any problems that might arise out of the violation by a member of a permanent mission of the obligation to respect the laws and regulations of the host State. The existence of that procedure made the proposed rule superfluous and he was therefore opposed to the adoption of the new paragraph 3.

48. Mr. AGO said that the paragraph challenged a protective principle that was vital to individual security. A person could not be deemed guilty of a violation until he was convicted of it. Who was to say, under the terms of the new paragraph 3, that a grave violation had been committed? He had been willing to set his doubts aside with regard to flagrant violation, because in that case there was a sufficient presumption of violation, even if a court had not delivered its judgement. But, except in that case, neither the sending State nor the host State could express a well-grounded opinion as to whether a violation had or had not been committed. The international organization itself could not act in lieu of a court. Neither a procedure for tripartite consultations nor even a procedure within the organization could dispose of that objection.

49. With regard to the expression "outside the exercise of his functions", there was no point in dwelling on minor matters. The criminal law of the host State might contain rules under which opinions expressed by a permanent representative might constitute a criminal offence. If he had to be recalled for that reason, the exercise of his functions would be impossible. Immunity from criminal jurisdiction was so essential to the unhampered performance of the functions of a permanent mission that it should not be hastily jettisoned under cover of the article.

The meeting rose at 1.10 p.m.

1030th MEETING*Wednesday, 30 July 1969, at 10.20 a.m.**Chairman:* Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218 and Add.1)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 44 (Respect for the laws and regulations of the host State) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of the text for paragraph 3 of article 44 proposed by the Drafting Committee. Mr. Kearney had now submitted, to replace that text, the following two paragraphs:

“3. In case of grave and clearly established violation of the criminal law of the host State by a person enjoying immunity from criminal jurisdiction, the sending State shall, unless it waives this immunity, either recall the person concerned or terminate his functions with the mission, as appropriate.

“4. The provisions of this article do not apply to words spoken or acts performed within the Organization or any of its organs in carrying out the functions of the permanent mission.”

2. Sir Humphrey WALDOCK said that most of his misgivings concerning the Drafting Committee's text for paragraph 3 were dispelled by the wording now proposed by Mr. Kearney. The expression “clearly established violation” was preferable to “flagrant violation” and the proposed paragraph 4 was less open to objection than the phrase “committed outside the exercise of his functions”, which had been proposed by the Drafting Committee and had given rise to difficulties.

3. Mr. JIMÉNEZ de ARÉCHAGA said he could accept either the Drafting Committee's text or Mr. Kearney's wording although, for reasons which he would explain, he did not believe that the proposed new paragraph 4 was really necessary.

4. Paragraph 3 did not reflect the existing practice, under which the host State enjoyed much greater powers, accompanied by fewer safeguards. The existing head-

quarters agreements of international organizations gave the host State the right to expel any member of a permanent mission who committed an act which the host State deemed to be contrary to its security or interests. That provision had been generally interpreted as meaning that a right of expulsion existed whether the act constituted a criminal offence or not. Many headquarters agreements, such as those relating to the United Nations in New York, FAO at Rome and IAEA at Vienna, contained purely formal safeguards with respect to the exercise of that right. The only important restriction was that expulsion could not be ordered by a minor official or even by the Minister for Internal Affairs; it must be ordered by the Minister for Foreign Affairs after consultation with the sending State.

5. The most important progressive feature of the texts now under consideration was perhaps the non-recognition of the right of expulsion. Another such feature was the transfer of the obligation to the sending State, which was required to withdraw the offending official. Lastly, there was the requirement of consultation not only with the sending State but also with the organization itself. Since, however, under the texts proposed for paragraph 3, the host State would be denied the right of expulsion, some provision must obviously be made to protect it against the danger of a person who had committed a crime, but enjoyed immunity, remaining in its territory.

6. With regard to the crimes to be covered by paragraph 3, he agreed that it was desirable not to use the word “flagrant”, which was a term of art having a special connotation. He would suggest instead the word “manifest”. He also favoured the deletion of the words “committed outside the exercise of his functions”. Paragraph 3 related to immunity from criminal jurisdiction, which was always absolute. The distinction between official and unofficial acts applied only to immunity from civil jurisdiction.

7. He did not believe it was necessary to add the new paragraph 4 proposed by Mr. Kearney. By virtue of Article 105 (2) of the Charter, and of the corresponding provisions of the constituent instruments of the specialized agencies, representatives enjoyed such privileges and immunities as were necessary for the independent exercise of their functions in connexion with the organization. Those provisions would not in any way be strengthened by inserting in the present draft articles a second line of defence in the form of the proposed paragraph 4.

8. Mr. KEARNEY said that in his proposal, the words “flagrant violation”, had been replaced by the words “clearly established violation”, and the words “committed outside the exercise of his functions” had been dropped in order to meet the objections raised by some members during the discussion.

9. His proposed paragraph 4 was not legally essential; he had introduced it to allay the apprehensions expressed by certain members. Its purpose was to make it clear that nothing in the draft articles could impair the full liberty of action of members of permanent missions in the performance of their functions within the organization.

10. The text covered all the provisions of the draft articles; it was particularly relevant to those of article 44, paragraph 1, prohibiting interference in the internal affairs of the host State. It might be necessary for a representative, in the exercise of his functions, to attack, within the organization, some aspect of the internal policy of the host State, where that policy was a matter of legitimate concern to the organization.

11. He believed that his proposal constituted the minimum which would satisfy the needs of a host State. The Commission should adopt a text capable of securing the acceptance of the main host States concerned; a text which did not meet those requirements would serve no useful purpose.

12. Mr. CASTRÉN said he had noted the explanation given of the meaning of the word "flagrant" as used in the Drafting Committee's text for paragraph 3, but that word was open to several interpretations. The words "clearly established" went too far in the other direction, for they gave the impression that the person concerned had already been convicted. The word "flagrant" might perhaps be replaced by the word "manifest", or it might be enough simply to speak of grave violation.

13. The additional paragraph 4 proposed by Mr. Kearney was too restrictive. A member of a permanent mission might exercise his functions outside the organization. He was therefore in favour of retaining the phrase "outside the exercise of his functions", as in the Drafting Committee's text.

14. Another question to be considered was that of the members of the family. Either they could be excluded from the scope of article 44 by substituting the words "a member of the permanent mission" for "a person enjoying immunity from criminal jurisdiction", or they could be covered by a stipulation that, in the situation contemplated, they must leave the country within a reasonable time or be liable to expulsion.

15. Mr. ROSENNE said he shared the doubts of other speakers regarding the expression "clearly established violation". Indeed, he saw no reason to adopt any qualification of that type and suggested that the opening words should simply read: "In case of serious violation . . .".

16. He also had misgivings regarding Mr. Kearney's proposed new paragraph 4. In practice, some of the functions performed by a member of a permanent mission would not be "performed within the Organization or any of its organs". For example, a permanent representative could be called upon to appear on a television programme in his official capacity. He therefore suggested that, instead of introducing that additional paragraph, the phrase "committed outside the exercise of his functions" in the Drafting Committee's text for paragraph 3 be replaced by the phrase "committed otherwise than in carrying out the functions of the permanent mission".

17. Mr. REUTER said it was extremely difficult to draft a text which would be acceptable to the principal host States and at the same time provide certain

safeguards in relation to the present situation. The headquarters agreements in force gave host States substantial rights, even though they might be reluctant to avail themselves of those rights in practice.

18. The text proposed by Mr. Kearney was a definite step forward, although it was still open to criticism. The word "established" had a very strong connotation in English and the word "manifest" would be more satisfactory. It might perhaps be more straightforward to refer to the existence of serious, specific and concurring presumptions. That would bring out the preventive character of the safeguard provided for the host State.

19. Furthermore the new paragraph 4 raised the problem of the classic distinction in parliamentary law between privilege and immunity. In his view, the protection given to words spoken or acts performed within an organization went beyond immunity, and in fact constituted privilege. Where immunity from criminal jurisdiction existed, that immunity protected the person enjoying it against prosecution for an offence which nevertheless had been committed. On the other hand, even where words might, for instance, be held to be defamatory under the ordinary law, there was no offence if they were uttered within the organization.

20. On the subject of immunity, it was clear that, for lack of a jurisdictional authority competent to define the meaning of the expressions "in the exercise of his functions" and "outside the exercise of his functions", a fairly vague wording would have to suffice. The differentiation was not always easy, as was shown by the jurisprudence of the Court of Justice of the European Communities. The Commission had, however, accepted the principle that rules might be established independently of the means of settling disputes; otherwise no codification would be possible. In the case in point, the settlement of difficulties should be left to the practice of international organizations. In that respect, the machinery for consultation provided for in article 49 might prove very useful.

21. He was therefore inclined to favour the text proposed by the Drafting Committee for the new paragraph 3, provided that at least the word "manifest" was substituted for the word "flagrant".

22. The CHAIRMAN, speaking as a member of the Commission, said he found the text proposed by the Drafting Committee entirely satisfactory. Clearly, it did not cover all the violations that a member of a permanent mission might commit, so it was the procedure laid down in article 49 for consultations between the sending State and the host State, together, if necessary, with intervention by the international organization, that would normally be applicable. Article 44 dealt with exceptional cases in which grave and flagrant violations were committed. Only a special case of that sort justified imposing upon the sending State the obligation to recall the person concerned or to terminate his functions.

23. Which of the two proposed alternatives was used would depend on the legal status of the person concerned. If he was a national of the sending State, that State would have to recall him. If he was not a national of the sending State, then it could only terminate his func-

tions. A similar distinction had been made in article 17.¹ That, at least as he saw it, was how the alternatives in the case of a grave and flagrant violation should be understood.

24. A grave violation was hard to define. It depended on the law of the State in whose territory the violation had been committed. Only certain violations were regarded as grave under all legal systems. That did not, however, justify dropping the qualification "grave". The expression "flagrant violation" denoted an evident or manifest violation in the criminal law of almost all countries. The words "clearly established", "evident" or "manifest" might, of course, be used, but the drawback was that they were not legal terms, whereas the word "flagrant" belonged to legal terminology and was perfectly clear and comprehensible in any system of criminal law.

25. As had already been observed, it was impossible to explain in detail the meaning of the expression "committed outside the exercise of his functions". But it was not the first time that the Commission had had recourse to the idea; it had done so, for instance, in article 40, paragraph 1, adopted at the 1023rd meeting.² There could be no question of listing in the commentary all the cases which were or were not covered by the words. But that was no argument against using a form of words which might be regarded as standard, and leaving any difficulties to be settled in practice, in particular, by means of consultations.

26. He had no objection to the wording proposed by Mr. Rosenne, which seemed to express the same idea in a different form.

27. In the text proposed by Mr. Kearney, the word "flagrant" had been replaced by the words "clearly established". That expression was less juridical in character and would give rise to more difficulties.

28. Mr. Kearney also proposed the deletion of the expression "committed outside the exercise of his functions" in paragraph 3, and its replacement by a new paragraph 4 covering only "words spoken or acts performed within the Organization or in any of its organs in carrying out the functions of the permanent mission." Apart from the difficulty of interpreting those concepts, the new provision implied, indirectly at least, that the words spoken and acts performed in the circumstances in question always constituted grave and clearly established violations, since they were excluded from the application of paragraph 3, which was concerned precisely with grave and clearly established violations. He was therefore opposed to the proposed paragraph 4.

29. One might share Mr. Castañeda's doubts about the usefulness of the new paragraph 3, but if the idea of including it in the draft was accepted, the wording proposed by the Drafting Committee was the most satisfactory, subject perhaps to the purely drafting change suggested by Mr. Yasseen, who would prefer the expres-

sion "criminal laws" to be substituted for "criminal law".³ No matter what expression was used, it was the laws or law of the host State which would determine whether it embraced both laws and regulations. The Commission had in mind a broad expression, and it would be as well to explain in the commentary that, in general, the expression covered both laws and regulations.

30. Mr. AGO said he appreciated that the word "flagrant" might cause some difficulty, especially to English-speaking jurists. The idea, however, seemed clear. The reference was to a person who was accused of committing a violation. But it was impossible to know whether the accusation was justified, because the courts were the only authority competent to decide that, and they would be precluded from doing so by the immunity of the person concerned.

31. So what safeguard should be required? The sole requirement could not be that the violation must be a grave one. The essential point was that an accusation should not be lightly made. The violation, even if not established by an objective procedure, must at least be manifest to all. That was what happened when it was "flagrant". The expression "clearly established" was inappropriate, since only a court could "establish" a violation. Though his preference was for the word "flagrant", he would accept the word "manifest", which several members of the Commission were prepared to support, or any other word with a similar meaning.

32. The distinction between acts performed in the exercise of functions and acts performed outside the exercise of functions was a standard distinction. The difficulties to which it gave rise in applying other conventions were settled by practice. The question arose whether it was better to draft a separate paragraph rather than use the expression "outside the exercise of his functions" in paragraph 3.

33. In any event, he would be against any provision limited to words spoken and acts performed at the headquarters of the organization. The hypothetical cases mentioned often concerned acts performed outside the organization or its organs. The Commission should therefore find some way of reverting to the classical distinction.

34. Sir Humphrey WALDOCK said that paragraphs 3 and 4 should be more closely related to paragraphs 1 and 2. In particular, paragraph 3 should be placed after paragraph 1 with which it was directly connected.

35. The original purpose of paragraph 3 had been to protect the host State against grave abuses of privileges and immunities and those abuses would include not only serious offences, such as manslaughter by a drunken driver, but also repeated offences of a less serious character, such as the constant violation of traffic regulations. The retention of the proviso "committed outside the exercise of its functions" would have the effect of altering the purpose of paragraph 3 by placing the emphasis on the protection of the sending State. In fact, the position of the sending State

¹ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

² For text, see 1022nd meeting, para. 46.

³ See 1024th meeting, para. 52.

was already safeguarded by the opening words of paragraph 1: "Without prejudice to their privileges and immunities . . .".

36. He supported the idea dropping the adjective "flagrant" and would be prepared to accept the suggested alternative "manifest". The evidence of the offence would not necessarily be public knowledge; it was sufficient that the offence should be manifest to the two interested parties, namely, the sending State and the host State.

37. Mr. EUSTATHIADES said that the use of the word "established" should be avoided, as it was likely to give rise to some confusion in that it raised the question of the procedure to be used in establishing a violation. The word "manifest" was preferable to the word "flagrant", as it often occurred in legal texts and in international case-law. Perhaps, too, it should be made clear that the provision also covered violations which, though not grave in themselves, were repeated, and it would then be better to say "in case of grave and manifest or repeated violation of the criminal law".

38. Mr. YASSEEN said that the interests of the host State must certainly be safeguarded, but that did not mean opening the door wide to abuses. Penalties must be provided for the most serious cases, but it was necessary to rely on the good faith of States and to assume that, in principle, a sending State would not have the effrontery to maintain in his functions one of its representatives who had committed a crime. The idea was, therefore, that precautions must be taken against abuses on either side, but without going too far.

39. He preferred the word "manifest" to the French word "*flagrante*", which perhaps had no exact English equivalent, and to the words "clearly established", which assumed that some body or procedure existed to establish the violation.

40. It would be better to retain the words "outside the exercise of his functions". A member of a permanent mission might well commit a grave violation not in the exercise of his functions, but incidentally to the exercise of his functions, for example, if during a hostile demonstration against the mission, he committed a violation by going beyond self-defence against a demonstrator. In such cases the matter could be settled directly between the host State and the sending State, but not by virtue of an abstract rule. It should therefore be stated that acts which were grounds for recall must be committed outside the exercise of functions.

41. There was not much need for the paragraph 4 proposed by Mr. Kearney, since it was quite obvious, for example, that a member of a permanent mission who committed a grave violation totally extraneous to his diplomatic functions on the premises of the Palais des Nations should be recalled, even though the act had been performed "within the Organization".

42. Mr. KEARNEY said he was prepared to accept the substitution of the words "manifest violation" for the words "clearly established violation", in paragraph 3 of his proposal.

43. He agreed that the retention of the words "com-

mitted outside the exercise of his functions" in paragraph 3 would completely alter the purpose of the paragraph and would probably make it unacceptable to most host States. If, as he assumed, the purpose was to provide protection in respect of words spoken or acts performed within the organization in carrying out the permanent mission's functions, that purpose would be served by his own suggested paragraph 4 or a text on similar lines.

44. Reference had been made during the discussion to the possibility of an appearance on television by a permanent representative. In his view, it would be intolerable for a permanent representative to use such a forum for interference in the internal affairs of the host State. In no circumstances could he admit that such action formed part of a permanent mission's functions with respect to an organization.

45. Lastly, he wished to re-emphasize that it would be extremely unwise to formulate draft articles which did not meet the problems of host States. If the draft articles were to be of any practical use, they would have to be acceptable to the States immediately concerned.

46. Mr. RAMANGASOAVINA said he did not consider that either the word "flagrant" or the word "manifest" was appropriate. The terms were practically synonymous and both conveyed the idea of indisputability, but the word "flagrant" in the expressions "flagrant offence" or "flagrant crime" was a standard term, meaning that the person committing the offence or crime had been caught in the act or pursued by hue and cry. The word "flagrant" could not, therefore, be used in the context with which the Commission was concerned. Furthermore, if the provision was to be restricted to violations of a flagrant character, the word "grave" became open to question, since the gravity of a violation was determined, first, by the laws of the country and, secondly, by repetition of the violation. Hence "grave" and "flagrant" could not be equated.

47. The same applied to the word "manifest". A thing that was manifest needed no proof. But to ascertain the truth an investigation was usually needed. No inquiry or investigation could be made in the case of members of a permanent mission, but proof of a violation could be established by the evidence of witnesses or by serious, specific and concurring presumptions. Offences and crimes, however, especially foul crimes, were not usually committed in the public eye, and an investigation was needed to determine the person responsible. If an investigation was held, the violation was not manifest, but the person who had committed it must nevertheless be prosecuted. In the case with which the Commission was dealing, however, the person who had committed a violation would be subject, not to prosecution, but to recall; it was more appropriate, therefore, to use the words "grave and clearly established violation", as Mr. Kearney proposed, since violations were often neither manifest nor flagrant, but could be established by an investigation.

48. Mr. JIMÉNEZ de ARÉCHAGA said that the word "grave" had been used in article 41, paragraph 1,

of the Vienna Convention on Consular Relations,⁴ which provided that: "Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime . . .". The word "flagrant" had a more technical meaning and implied that the offender had been caught red handed while committing a crime.

49. The real issue in article 44, however, was whether to retain the words "committed outside the exercise of his functions", or to adopt Mr. Kearney's proposed paragraph 4, which referred to "words spoken or acts performed within the Organization or any of its organs in carrying out the functions of the permanent mission". In his opinion, Mr. Kearney's wording was rather too restrictive, while the Drafting Committee's expression "committed outside the exercise of his functions", seemed rather too broad, as Sir Humphrey Waldock had pointed out. The problem, therefore, was to find some formula which would strike a proper balance between the two. He suggested that such a balance might be found by combining, in some appropriate way, the introductory clause of Mr. Kearney's paragraph 4 with the language of Article 105 (2) of the Charter, which read: "Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization".

50. The CHAIRMAN said the discussion seemed to show that paragraph 3 should be based on the text proposed by the Drafting Committee. Since opinions were much divided on the expression "outside the exercise of his functions", he suggested that Mr. Ago and Mr. Kearney should consult together informally and work out a satisfactory form of words, and that the Commission should defer its decision till the next meeting.

51. Mr. RUDA suggested that Mr. Jiménez de Aréchaga be asked to participate in the consultations with Mr. Ago and Mr. Kearney.

52. The CHAIRMAN said he accepted that suggestion. If there were no objection, he would take it that the Commission agreed to defer a decision on article 44 pending the discussions between Mr. Ago, Mr. Kearney and Mr. Jiménez de Aréchaga.

*It was so agreed*⁵

ARTICLE 22 (General facilities)

ARTICLE 23 (Accommodation of the permanent mission and its members)⁶ and

ARTICLE 23 *bis* (Assistance by the Organization in respect of privileges and immunities)

53. The CHAIRMAN invited Mr. Ustor to introduce the Drafting Committee's texts for articles 22 and 23 and the suggested new article 23 *bis* together.

54. Mr. USTOR said that the Drafting Committee proposed the following texts:

Article 22

General facilities

The host State shall accord to the permanent mission full facilities for the performance of its functions. The Organization shall assist the permanent mission to obtain such facilities and shall accord to it those which lie within its competence.

Article 23

Accommodation of the permanent mission and its members

1. The host State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its permanent mission or assist the latter in obtaining accommodation in some other way.

2. The host State and the Organization shall also, where necessary, assist permanent missions in obtaining suitable accommodation for their members.

Article 23 bis

Assistance by the Organization in respect of privileges and immunities

The Organization shall, where necessary, assist the sending State, its permanent mission and the members of the permanent mission in securing the enjoyment of the privileges and immunities provided for by the present articles.

55. The only change which the Drafting Committee had made in article 22 was to delete the second part of the first sentence, which had read: "having regard to the nature and task of permanent missions to the Organization". The Special Rapporteur had wished to retain that phrase, which was taken from the draft on special missions, but he had subsequently cabled two alternative texts and had proposed that those words be either deleted or replaced by the words "having regard to the needs of the permanent mission". The Drafting Committee had finally decided that the phrase was not really necessary, since the idea was already adequately covered by the words "for the performance of its functions". Mr. Kearney had suggested that "full facilities" was perhaps not the best expression, because the second sentence also referred to facilities to be provided by the Organization;⁷ the Drafting Committee, however, had thought that that was not really an inconsistency and had decided to retain those words.

56. The Drafting Committee had made no change to either the title or the text of article 23, which remained as approved at the 1015th meeting, but it was proposing article 23 *bis*, which was based on a suggestion by the Chairman,⁸ and which it considered a useful provision.

57. Mr. RUDA said that he supported the Drafting Committee's deletion of the phrase "having regard to the nature and task of permanent missions to the Organization" from the first sentence of article 22.

58. With regard to the second sentence of that article, the Special Rapporteur had stated in a communication

⁴ United Nations, *Treaty Series*, vol. 596, p. 296.

⁵ For resumption of the discussion, see 1032nd meeting, para. 26.

⁶ For previous discussion see 1014th and 1015th meetings.

⁷ See 1014th meeting, para. 16.

⁸ *Ibid.*, para. 32.

from New York that he did not consider it necessary to include a reference to the competence of the organization, first, because the wording might create a number of problems of interpretation and, secondly, because the idea was already covered by article 3 (Relationship between the present articles and the relevant rules of international organizations).⁹

59. The Special Rapporteur had proposed two alternative texts for a second paragraph, concerning the role of the organization. The first alternative read: "The Organization shall render the assistance necessary for the performance of the functions of the permanent mission", while the second read: "Paragraph 1 shall not affect the obligation of the Organization to assist the permanent mission in obtaining the facilities required for its functions". He proposed that the Commission adopt the first alternative.

60. Mr. USTOR said that the Drafting Committee had considered the Special Rapporteur's suggestions, but had finally decided that the second sentence, including the reference to facilities "within its competence", was really necessary.

61. Sir Humphrey WALDOCK said he could accept the text proposed by the Drafting Committee, but suggested, purely from the standpoint of English drafting, that the second sentence be amended to read: "The Organization shall assist the permanent mission in obtaining those facilities and shall accord to the mission such facilities as lie within its own competence".

62. Mr. ROSENNE said it was not clear to him why the first sentence of article 22 should not follow the text of article 22 of the draft on special missions and provide that: "The host State shall accord to the permanent mission the facilities required for the performance of its functions, having regard to the nature and task of the permanent mission".

63. With regard to the second sentence, he thought it might be removed from article 22 and embodied in article 23 *bis*, amended to read: "The Organization shall, where necessary, assist the sending State, its permanent mission and the members of the permanent mission in obtaining the necessary facilities and in securing the privileges and immunities provided for by the present articles".

64. He suggested that the words "if requested" be inserted after the words "The host State shall", in paragraph 1 of article 23. Paragraph 2 of that article was unnecessary, since the idea it contained was already covered by article 23 *bis*.

65. Mr. USTOR said that the Drafting Committee had adopted the wording of the first sentence of article 22 because it considered that the permanent mission should not be accorded any less facilities than were accorded to a diplomatic mission under article 25 of the Vienna Convention on Diplomatic Relations.¹⁰

66. With regard to the second sentence, he could

accept the amendment proposed by Sir Humphrey Waldock, but believed that some reference to the facilities which could be accorded by the organization was important and should be retained.

The meeting rose at 1 p.m.

1031st MEETING

Wednesday, 30 July 1969, at 3.5 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 22 (General facilities) (continued)

ARTICLE 23 (Accommodation of the permanent mission and its members) (continued) and

ARTICLE 23 *bis* (Assistance by the Organization in respect of privileges and immunities) (continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of the Drafting Committee's texts for articles 22, 23 and 23 *bis*. Four amendments to those articles had been submitted.

2. Sir Humphrey Waldock had submitted the following wording for the English text of the second sentence of article 22: "The Organization shall assist the permanent mission in obtaining these facilities and shall accord to the mission such facilities as lie within its own competence". The purpose of that amendment was to bring the English version into line with the French and Spanish versions.

3. Mr. Rosenne had proposed three amendments. The first was the deletion of the second sentence in article 22. The second was the insertion of the words "if requested" after the words "the host State shall" in paragraph 1 of article 23. The third was the insertion of the phrase "in obtaining the necessary facilities and" after the words "members of the permanent mission" in article 23 *bis*, so that the article would read: "The Orga-

⁹ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

¹⁰ United Nations, *Treaty Series*, vol. 500, p. 108.

¹ For texts see previous meeting, para. 54.

nization shall, where necessary, assist the sending State, its permanent mission and the members of the permanent mission in obtaining the necessary facilities and in securing the enjoyment of the privileges and immunities provided for by the present articles".

4. Mr. USTOR pointed out that the amendments proposed by Mr. Rosenne to articles 22 and 23 *bis* would alter the arrangement adopted by the Drafting Committee, which had disposed the provisions of those articles to deal first with facilities and secondly with privileges and immunities.

5. Mr. ROSENNE said that his amendments were indeed intended to change the arrangement adopted by the Drafting Committee and to deal first with the host State and secondly with the organization; but he did not think they should cause undue difficulties.

6. Mr. JIMÉNEZ DE ARÉCHAGA said that there were certain facilities, such as protection against picketing or unauthorized entry, which could be guaranteed only by the organization. If the text proposed by Mr. Rosenne were adopted, such facilities would not be covered.

7. Mr. CASTRÉN said he was opposed to Mr. Rosenne's text for the reasons given by Mr. Jiménez de Aréchaga.

8. Mr. ROSENNE said he agreed with the Special Rapporteur's view, to which Mr. Ruda had referred at the previous meeting,² that it was unnecessary to include the phrase "which lie within its competence", first, because it might give rise to difficulties of interpretation, and secondly, because the purpose of that proviso was already covered by the general saving clause in article 3. The Special Rapporteur had preferred to deal with that point in the commentary.

9. Protection against picketing was a matter for the local police, and the normal procedure at United Nations Headquarters in New York was therefore to approach the United States Mission. Entry into, and activities in, the building itself would be covered by article 3.³

10. The articles under consideration should group the general duties of the host State and those of the organization. In that connexion, the order of article 23 *bis* and 22 might even be reversed.

11. Mr. JIMÉNEZ DE ARÉCHAGA said that picketing inside the building would not be covered by article 3. The issue was whether or not the organization should be required to accord to the mission the facilities which lay within its own competence.

12. The CHAIRMAN, speaking as a member of the Commission, said he supported Mr. Rosenne's amendment to article 23 *bis*, though he thought it would be preferable to deal with "facilities" and "privileges and immunities" separately, as had been done in other conventions.

13. The idea that the organization should help the permanent mission to obtain certain facilities and accord to it those which lay within its competence should be retained in article 22. If, for example, a permanent mission needed accommodation in the organization's own building, it was the organization that would be competent to obtain it.

14. With regard to article 23, paragraph 2, it was going too far to impose the same obligation on the organization as on the host State. The host State was in a better position to find accommodation for members of permanent missions. The second sentence in article 22 already stated the organization's obligation to assist the permanent mission in obtaining facilities for the performance of its functions and that obligation should extend to obtaining accommodation. He therefore suggested that there should be no reference to the organization in article 23, paragraph 2.

15. Speaking as Chairman, he suggested that the Commission should take a decision on the amendment to article 23 *bis* proposed by Mr. Rosenne.

16. Mr. JIMÉNEZ DE ARÉCHAGA proposed that Mr. Rosenne's amendment to article 22 should be voted on first, since the result might affect the vote on his amendment to article 23 *bis*.

17. Mr. ROSENNE said that the two amendments should be regarded as a single entity and voted on together.

18. Mr. USTOR agreed. The two amendments would alter the arrangement adopted by the Drafting Committee, since they would divide the articles according to the entities responsible, instead of according to the subject-matter.

19. The CHAIRMAN read out rule 130 of the rules of procedure and suggested that the Commission should vote on the motion that Mr. Rosenne's proposals be put to the vote separately.

The motion was carried by 10 votes to 1, with 2 abstentions.

20. Mr. ROSENNE said he saw little point in voting on a truncated version of his proposals, and requested that they should not be put to the vote. He would have to vote against the texts for articles 22, 23 and 23 *bis* proposed by the Drafting Committee.

21. Sir Humphrey WALDOCK said that the issue of principle could be decided by the vote on article 22. If Mr. Rosenne's amendment to that article was adopted, the Commission could proceed to consider his amendment to article 23 *bis* in the light of that decision.

22. Mr. ROSENNE agreed that his amendments could be put to the vote on that understanding. He proposed that, in order to simplify the procedure, the two sentences of article 22 should be put to the vote separately.

It was so agreed.

23. The CHAIRMAN invited the Commission to vote on the first sentence of article 22.

The first sentence of article 22 was adopted by 12 votes to none, with 1 abstention.

² See para. 58.

³ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

24. Mr. ROSENNE explained that he had abstained from voting because he would have preferred the Commission to follow the text adopted by the Sixth Committee for article 22 of the draft convention on special missions.⁴

25. The CHAIRMAN, passing on to the second sentence of article 22, invited the Commission to take a decision first on the amendment to the English text proposed by Sir Humphrey Waldock.

The amendment to the English text was adopted.

26. Referring to a question by Mr. RUDA as to whether Mr. Rosenne's proposal for the deletion of the second sentence was still before the Commission, Mr. BARTOŠ asked the Chairman to follow the practice whereby members who voted for the second sentence would be voting against Mr. Rosenne's proposal, and *vice-versa*.

27. The CHAIRMAN put the second sentence of article 22, as amended, to the vote on that understanding.

The second sentence of article 22, as amended, was adopted by 11 votes to 2.

28. The CHAIRMAN put article 22, as a whole, to the vote.

Article 22, as a whole, as amended, was adopted by 11 votes to 1, with 1 abstention.

29. The CHAIRMAN, passing on to article 23, invited the Commission to vote on Mr. Rosenne's amendment inserting the words "if requested" after the words "the host State shall" in paragraph 1. Although the paragraph had already been approved by the Commission, it could be amended by a two-thirds majority.

The amendment to article 23, paragraph 1, was rejected by 5 votes to 4, with 4 abstentions.

30. The CHAIRMAN put article 23, paragraph 2, to the vote.

Article 23, paragraph 2, was adopted unanimously.

31. The CHAIRMAN put article 23, as a whole, to the vote.

Article 23, as a whole, was adopted by 12 votes to none, with 1 abstention.

32. Mr. ROSENNE said he withdrew his amendment to article 23 *bis*. He could not vote for the text proposed for that article by the Drafting Committee.

33. The CHAIRMAN put article 23 *bis* to the vote.

Article 23 bis was adopted by 12 votes to none, with 1 abstention.

ARTICLE 24 (Inviolability of the premises of the permanent mission)⁵

34. The CHAIRMAN invited the Commission to consider the Drafting Committee's new text for article 24, which was as follows:

Article 24

Inviolability of the premises of the permanent mission

1. The premises of the permanent mission shall be inviolable. The agents of the host State may not enter them, except with the consent of the permanent representative. Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the permanent representative.

2. The host State is under a special duty to take all appropriate steps to protect the premises of the permanent mission against any intrusion or damage and to prevent any disturbance of the peace of the permanent mission or impairment of its dignity.

3. The premises of the permanent mission, their furnishings and other property thereon and the means of transport of the permanent mission shall be immune from search, requisition, attachment or execution.

35. Mr. USTOR, explaining the changes introduced by the Drafting Committee in article 24, said that the third sentence of paragraph 1 had been largely modelled on the Argentine amendment to article 25 of the draft convention on special missions,⁶ which was a compromise adopted by the Sixth Committee at the twenty-third session of the General Assembly. The Drafting Committee had not been particularly satisfied with that wording and he himself had been definitely opposed to it, but the Committee had failed to find anything better.

36. In the French version of paragraph 3, the word "*biens*" had been substituted for the word "*objets*", as being a more accurate rendering of the word "property".

37. Mr. ROSENNE observed that an issue of substance had arisen over the term "property". During the discussion of articles 24 and 30, some members had pointed out that the draft failed to provide for protection of the permanent mission's property;⁷ he wished to know whether the Drafting Committee had considered that point, and if so, what conclusion it had reached.

38. Mr. USTOR acknowledged that the matter had been discussed in the Commission, but had been overlooked by the Drafting Committee.

39. Mr. ROSENNE said that, in that event, he would like to suggest that paragraph 3 be modified by inserting the words "and other property wherever situated" after the word "transport", so as to give such property the same measure of protection as means of transport, which would not necessarily be in the permanent mission's garage.

40. Paragraph 1 raised some doubts in his mind. His understanding of the Commission's discussions had been that there was a consensus in favour of a text on the lines of the Argentine amendment to article 25 of the draft on special missions, mentioned by Mr. Ustor. The Drafting Committee's text, however, contained nothing corresponding to the final phrase of the Argentine

⁴ See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 85, document A/7375, annex I.

⁵ For previous discussions, see 1015th meeting, para. 20.

⁶ See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 85, document A/7375, para. 190 (d).

⁷ See 1015th meeting, para. 50 and 1018th meeting, para. 6.

amendment "or, where appropriate, of the head of the permanent mission", which recognized the possible function of a diplomatic mission in a situation of the kind that article 24 was intended to cover. In order to take account of two of the cases mentioned during the Commission's discussions, such a phrase might be added at the end of paragraph 1.

41. The Commission had also discussed a third case, namely, that in which the offices of a permanent mission were situated in the headquarters building of an international organization. It had learnt, however, from the Secretariat study on the practice of international organizations,⁸ that there were only two instances of such an arrangement—at the headquarters of UNESCO and ICAO—and it therefore seemed unnecessary to provide for it in paragraph 1.

42. Mr. TSURUOKA, referring to Mr. Rosenne's suggestion regarding paragraph 3, said that article 24 was primarily concerned with the mission's premises. It might be necessary to deal with the question of the mission's property and archives, but it would be better not to put too much in article 24.

43. Mr. EUSTATHIADES observed that two special cases had to be taken into consideration: the permanent mission might be accommodated in the premises of an international organization or in the premises of a diplomatic mission. The first case seldom arose, and it could be dealt with in the commentary so as not to overload the text of article 24. The second case raised a substantive question with which the Commission must concern itself. The situation was not the same as in the case of a special mission, since there was no real connexion between the permanent mission and the diplomatic mission: they merely happened to be in the same place. In the case of the permanent mission, it seemed doubtful whether the consent of the head of the diplomatic mission was necessary, but since paragraph 1 provided that intervention was possible when the express consent of the permanent representative could not be obtained, the present wording seemed adequate. It would be too complicated to provide for all possible cases in the text of the article itself. If it was considered that the consent of the head of the diplomatic mission would be sufficient, that could be stated in the commentary. What was important was to reach agreement on the substance.

44. Mr. ROSENNE agreed with the previous speaker that the problem was a delicate one. He had had in mind the case of a small permanent mission occupying say one or two rooms in an embassy. The permanent mission might consist only of the permanent representative, his other staff being supplied by the embassy. The Commission would need to consider further the whole question of the position of individuals coming within the scope of the draft articles on representatives of States to international organizations, when they also came within the scope of the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations. That task should be undertaken at the next

stage of the work on Mr. El-Erian's report. In view of the difficulties of the subject, it would be wiser to leave article 24, paragraph 1, as it stood, not to expatiate on it at great length in the commentary and to await the comments of governments.

45. In reply to Mr. Tsuruoka, he said that unfortunately article 24, paragraph 3, specifically mentioned means of transport. He thought that the wording of article 25, paragraph 3 of the draft on special missions,⁹ namely "other property used in the operation of the special mission" would meet the point he had in mind. Thus, if the Commission concluded that the phrase "and other property thereon" was too restrictive, broader wording to cover all property could be found without undue difficulty.

46. Mr. RUDA said that the Drafting Committee's text was acceptable. The wording of the Argentine amendment to article 25, paragraph 1, of the draft on special missions had been prompted by the fact that special missions were often situated in premises occupied by diplomatic missions or consular posts, so that it was natural to model the provisions concerning the inviolability of premises on the corresponding article 22 of the Vienna Convention on Diplomatic Relations.¹⁰ But particularly complex problems arose in the case of permanent missions, so that it would be preferable to leave the Drafting Committee's text for article 24, paragraph 1, as it stood until government comments had been received.

47. The Drafting Committee's text for paragraph 3 was satisfactory and correct because it did not purport to deal with property outside the premises, to which the general rules of international law relating to immunity and to foreign property would apply.

48. Mr. BARTOŠ said there was no juridically recognized connexion between a permanent mission and a diplomatic mission, except where the permanent mission was a small one sharing the diplomatic mission's premises. Hence it would be preferable not to refer to the consent of the head of the diplomatic mission in that case. A situation in which the permanent mission was accommodated in the building and premises of the diplomatic mission constituted a special case, and it was obvious that the consent of the head of the diplomatic mission would then be requested. In his opinion the Drafting Committee had found the best possible wording.

49. Mr. USTOR said he thought that the Drafting Committee's text for paragraph 1 could be left as it stood, because both the second and third sentences contained references to the consent of the permanent representative. A legal rule of the kind under consideration must be drafted in general, not in exhaustive terms. If it failed to meet a particular case, its wording would have to be interpreted. If the Commission wished to be explicit, it would need to insert some proviso such as "except with the consent of the permanent representative or, in his absence, of his deputy or, in the absence

⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 154.

⁹ *Ibid.*, p. 360.

¹⁰ United Nations, *Treaty Series*, vol. 500, pp. 106-108.

of his deputy, with the consent of any other person who may be entitled under the law of the sending State". To take the example of a permanent mission to United Nations Headquarters in New York, it was possible that a permanent representative or his deputy might be absent, but that the foreign minister of the sending State might be present as head of the delegation to the General Assembly and might be entitled, on behalf of the sending State, to give agents of the host State permission to enter the premises.

50. Although the Drafting Committee had not dealt with the point mentioned by Mr. Rosenne in paragraph 3, the Commission should note that the wording was based on article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations. The insertion of a reference to property other than that found on the premises would constitute an undue extension of the immunities of permanent missions.

51. Mr. JIMÉNEZ DE ARÉCHAGA said that, to his recollection, the Drafting Committee had discussed the question of property when dealing with paragraph 3, but had decided to retain the wording of article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations, even though that instrument provided no definition of "premises". He himself had proposed in the Drafting Committee that the matter should be mentioned in the commentary, so that the defect could be remedied by the Commission at its next session. The premises, including the residence of the head of the permanent mission, ought to be defined, but at that stage the Commission could do no more than accept the Drafting Committee's text. To insert a phrase such as "wherever situated" would be going too far.

52. Mr. ROSENNE said it was generally agreed that the word "thereon" in the expression "other property thereon" was misleading. Article 31, paragraph 4, of the Vienna Convention on Consular Relations¹¹ contained the phrase "the property of the consular post" and article 25, paragraph 3, of the draft on special missions contained the phrase "other property used in the operation of the special mission". While the Commission might feel that his suggested wording, "wherever situated", was too broad, he did not think it would be entirely satisfactory to rely on the general rules of international law regarding immunity. Not all the property of the permanent mission would necessarily be situated on its premises. In view of the conflicting accounts of the discussions in the Drafting Committee, and since he understood that the meaning of the word "premises" was to be clarified at a later stage, he could support the Drafting Committee's wording for paragraph 3 on a purely provisional basis.

53. The CHAIRMAN, speaking as a member of the Commission, said he had already stated that he did not approve of the last sentence of paragraph 1. For paragraph 3, the Vienna Convention on Consular Relations might be taken as a model, and the words "other property thereon" be replaced by the words "the property of the permanent mission", which would show clearly

that what was meant was all the property of the permanent mission, wherever it was situated. It was self-evident that all the property of a permanent mission was inviolable.

54. Mr. CASTRÉN said he was in favour of the text submitted by the Drafting Committee.

55. Mr. EUSTATHIADES observed that if Mr. Rosenne's proposal concerning the property of the permanent mission was adopted, the title of article 24 would no longer quite fit the content. It would perhaps be preferable to substitute the title: "Inviolability of the premises and property of the permanent mission".

56. The CHAIRMAN pointed out that article 31 of the Convention on Consular Relations was entitled "Inviolability of the consular premises", though paragraph 4 referred to "The consular premises, their furnishings, the property of the consular post and its means of transport". Similar titles were to be found in other conventions and draft conventions, and it would probably be better to keep the title of article 24 as it stood; otherwise, there might be some danger of confusion, which could lead to differing interpretations.

57. Mr. BARTOŠ observed that the expression "property thereon" had certain practical advantages. It showed clearly that everything situated on the premises of the mission belonged to or was used by the mission, and would make it impossible to claim that such property belonged to other persons and must be withdrawn from the permanent mission for that reason. It would therefore be preferable to retain that wording.

58. Sir Humphrey WALDOCK said that he, personally, would have had no objection to the phrase "their furnishings, and other property and means of transport of the permanent mission", which would have been a correct statement of the law. Most members of the Commission agreed that identifiable property of the permanent mission outside the premises was State property and thus came within the general principle of immunity. The small gap that existed in paragraph 3 could be regarded as similar to that in article 31, paragraph 4, of the Vienna Convention on Consular Relations and covered in the same way by the general principle of immunity.

59. The second sentence of the Drafting Committee's text for paragraph 1 was acceptable and he was in favour of its inclusion, particularly in the light of the compromise reached in the Sixth Committee with the adoption of the Argentine amendment to article 24 of the draft on special missions.

60. Mr. EUSTATHIADES said that the text of paragraph 3 as it stood gave the impression that all the property on the premises of a permanent mission must be protected, whether it belonged to the mission or not, whereas the intention was probably to protect only property belonging to the mission. The words "of the permanent mission" should in fact qualify both the property and the means of transport. The phrase might read: "the premises of the permanent mission, their furnishings and the other property and means of transport of the permanent mission".

¹¹ United Nations, *Treaty Series*, vol. 596, p. 288.

61. The CHAIRMAN observed that a question of substance was involved. The best course would be to model the text either on article 22 of the Convention on Diplomatic Relations or on article 31 of the Convention on Consular Relations. It would be better not to try to draft a new text which might be open to different interpretations.

62. Mr. ROSENNE explained that he had not made any formal proposal concerning paragraph 3, but only a suggestion. The ensuing discussion had tended to obscure the meaning of the article. If the premises of a permanent mission were inviolable, how could they be subjected to search, requisition, attachment or execution? Surely the Commission's intention must be to confer inviolability on all property on the premises in order to deny the host State any pretext for violating the immunity of the premises on the ground that some non-immune property was on those premises. The Commission should perhaps leave the Drafting Committee's text as it stood, but during the second reading it might consider formulating an article dealing exclusively with the premises, including the residence of the head of the permanent mission, and a separate article on movable property, the most obvious example of which was means of transport. The French version of paragraph 3 had been framed in such terms as to make it plain that the provision could not possibly be confined to property on the premises.

63. Mr. RUDA said he agreed with Mr. Rosenne. For the time being the Drafting Committee's text should be left as it stood: it clearly dealt with inviolability of the premises as such. The problem of property and the use of that word in the English text had given rise to some confusion. The property of the mission, whether inside or outside the premises, should be dealt with in another article.

64. Mr. CASTRÉN said he did not think the text of paragraph 3 ought to be amended. In his opinion, it dealt not only with all property of the permanent mission, but with all property situated on its premises. The premises were inviolable and immune from requisition.

65. Mr. JIMÉNEZ DE ARÉCHAGA said that the scope of article 31, paragraph 4, of the Vienna Convention on Consular Relations was not as broad as that of paragraph 3 of the Drafting Committee's text for article 24, so that the analogy drawn between the two provisions was not valid. It might prove undesirable to grant excessively wide immunity to all property of a permanent mission, and the scope of the corresponding provision in the draft on special missions had deliberately been restricted. For that reason, he was opposed to changing the Drafting Committee's text.

66. Mr. ROSENNE pointed out that there was a discrepancy between the English and French versions of paragraph 3, which would at least be reduced by inserting a comma after the word "furnishings" in the English text. It would then be clear that the words "and other property" meant the same as the words "*et les autres biens*".

67. Sir Humphrey WALDOCK said that although he

had not interpreted the English version in the same way as Mr. Rosenne, the French version was undoubtedly clearer. Perhaps the difficulty was not as serious as might appear and the meaning would be correctly understood, since the object of the provision was plainly to prevent an investigation of the contents of the permanent mission's premises by agents of the host State; for unless that was prevented, the principle of inviolability would be destroyed.

68. Mr. EUSTATHIADES said that in view of the differences of opinion on paragraph 3, he would be in favour of approving the text proposed by the Drafting Committee. The matter warranted further study, however. It might perhaps be possible to replace the words "*ainsi que les moyens de transport*" by "*et les moyens de transport*" in the French text. The grammatical construction was bound up with the substantive issue.

69. Mr. TESLENKO (Deputy Secretary to the Commission) explained that the expression "*ainsi que les moyens de transport*" had been used in the French text to show that the means of transport were protected wherever they were situated, which was logical, since cars were not usually kept on the mission's own premises.

70. Mr. TSURUOKA said he was in favour of retaining the text proposed by the Drafting Committee.

71. The CHAIRMAN said he understood that the members of the Commission were in general agreement that the text prepared by the Drafting Committee should not be amended. He suggested that the Commission should vote separately, first on the first two sentences of paragraph 1 and then on the third sentence. He did not think it was necessary to vote on paragraphs 2 and 3.

The first and second sentences of paragraph 1 were adopted unanimously.

The third sentence of paragraph 1 was adopted by 10 votes to 2, with 1 abstention.

Paragraph 1 was adopted unanimously.

Article 24, as a whole, as adopted unanimously.

The meeting rose at 5.30 p.m.

1032nd MEETING

Thursday, 31 July 1969, at 10.10 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldox, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218 and Add.1)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 25 (Exemption of the premises of the permanent mission from taxation)¹

1. The CHAIRMAN invited Mr. Ustor to introduce the text proposed by the Drafting Committee for article 25, since that text had been considered by the Committee in the absence of its Chairman.

2. Mr. USTOR said that the text proposed by the Drafting Committee read as follows:

Article 25

Exemption of the premises of the permanent mission from taxation

1. The sending State, the permanent representative or another member of the permanent mission acting on behalf of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the permanent mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State, the permanent representative or another member of the permanent mission acting on behalf of the mission.

3. It would be noted that the Drafting Committee had inserted the words "or another member of the permanent mission acting on behalf of the mission" after the words "the permanent representative". That insertion was self-explanatory, since the owner of the premises might well be some other member of the permanent mission.

4. In the French version of paragraph 2, the Drafting Committee had replaced the phrase "*la personne qui traite*" by "*la personne qui a contracté*", which was closer to the English text.

5. During the Commission's previous discussion of the article, the question had been raised whether the text of paragraph 2, which closely followed the corresponding provision of the Vienna Convention on Diplomatic Relations,² should be allowed to stand or whether it should be deleted. The Drafting Committee had concluded that the best course would be to retain the text of the paragraph and to mention the problem in the commentary.

6. Lastly, as Mr. Jiménez de Aréchaga had pointed out at the previous meeting, article 1 (use of terms) did not define the word "premises", so that it might be

advisable for the Commission to adopt a definition of that word at some later stage.

7. Mr. ROSENNE suggested that the Commission should adopt the definition of the word "premises" given in article 1 (i) of the Vienna Convention on Diplomatic Relations,³ namely, "the 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission".

8. Mr. TSURUOKA said he thought it was grammatically incorrect, in French, to replace the word "*traite*" in paragraph 2 by the words "*a contracté*".

9. Mr. REUTER agreed. It would be better to keep the word "*traite*", which had the same substantive meaning.

10. Mr. ROSENNE thought that the French text of paragraph 2 should follow the French text of article 24 of the draft on special missions, which had already been adopted by the Sixth Committee.⁴

11. The CHAIRMAN explained that the verb "*traiter*" had been used in the corresponding provision of the Vienna Convention on Diplomatic Relations, the verb "*contracter*" in that of the Vienna Convention on Consular Relations and the verb "*traiter*" in that of the draft on special missions. He proposed that, in the text now before it, the Commission should use the expression "*la personne qui a traité avec l'Etat d'envoi*", which was more correct in French.

It was so agreed.

12. The CHAIRMAN suggested that the Commission should adopt article 25 with that amendment.

Article 25, as amended, was adopted.

ARTICLE 47 (Facilities for departure)⁵

13. The CHAIRMAN invited Mr. Ustor to introduce the text proposed by the Drafting Committee for article 47, since that text had also been considered by the Committee in the absence of its Chairman.

14. Mr. USTOR said that the text proposed by the Drafting Committee read as follows:

Article 47

Facilities for departure

The host State must, whenever requested, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave its territory. It must, in case of emergency, place at their disposal the necessary means of transport for themselves and their property.

15. The Drafting Committee proposed that the words "even in case of armed conflict", in the first sentence of

¹ For previous discussion, see 1016th meeting, paras. 42-58 and 1017th meeting.

² United Nations, *Treaty Series*, vol. 500, p. 108, article 23, para. 2.

³ *Ibid.*, p. 98.

⁴ See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 85, document A/7375, annex I.

⁵ For previous discussion, see 1026th and 1027th meetings.

its previous draft,⁶ should be replaced by the words "whenever requested". The Drafting Committee had also thought it inappropriate to use the words "to leave at the earliest possible moment", with reference to permanent missions to international organizations and therefore proposed the substitution of the words "to leave its territory". The words "in particular" in the previous text of the second sentence had been deleted and the words "in case of emergency" had been substituted for the words "in case of need".

16. During the Commission's discussion, it had been suggested that a special provision on freedom of entry for members of the permanent mission was perhaps unnecessary in view of the provisions of article 22 (general facilities) and article 27 (freedom of movement). The views of the Special Rapporteur had been obtained on that point and he had expressed the opinion that there was no need for a special provision on the matter, which he believed was already covered by article 22.

17. Mr. ROSENNE said that he himself had originally raised the question of the host State's obligation to facilitate the entry of the permanent mission. He was prepared to accept, on a provisional basis, the Special Rapporteur's reply that the issue was already covered by existing provisions of the draft, but he asked that the point should be adequately explained in the commentary on article 27.

18. Mr. KEARNEY proposed that, for purely stylistic reasons, the word "must", in articles 47 and 48, should be replaced by the word "shall".

It was so agreed.

19. Sir Humphrey WALDOCK said he doubted whether the French words "*en cas de circonstances exceptionnelles*" had the same meaning as the English words "in case of emergency".

20. Mr. RUDA said he had similar doubts about the Spanish version.

21. Mr. EUSTATHIADES suggested that the most suitable wording for the French text would be "*en cas de nécessité absolue*".

22. Mr. USTOR said he did not share the Special Rapporteur's view that it was unnecessary to include an article expressly confirming the host State's obligation to facilitate the entry of members of the permanent mission into its territory. On the contrary, it should be explicitly laid down in the draft, either in a provision to be inserted after article 22 or in a separate paragraph of article 27, that the host State could not refuse to grant visas to members of a permanent mission appointed by the sending State. He was not in favour of coupling such a provision with article 47, which was in the section of the draft dealing with the end of the functions of the permanent representative, as the problem also arose during the exercise of those functions.

23. The CHAIRMAN suggested that the Secretariat should be asked to prepare a text for inclusion in the commentary, dealing with the host State's obligation to

permit members of permanent missions to enter its territory to take up their posts. The Commission could take a decision on that text when it came to consider the commentary on article 47.

It was so agreed.

24. Mr. EUSTATHIADES said he reserved his position on the expression "*circonstances exceptionnelles*". Article 47 stated two rules: the first was a general rule requiring the host State to grant facilities for certain persons to leave its territory; the second was a special rule requiring the host State to place at the disposal of those persons the necessary means of transport for themselves and their property. The latter rule imposed, on a State acting as host to an international organization with a large membership, a burden that was justified only in exceptionally serious cases. Hence the use of the "*nécessité absolue*" was not merely a question of form, but also one of substance.

25. The CHAIRMAN suggested that the Commission should provisionally adopt article 47, the final wording of which would depend on that of the new article prepared by the Drafting Committee at the suggestion of Mr. Rosenne, to which Mr. Kearney had submitted an amendment.⁷

Article 47 was adopted provisionally.

ARTICLE 44 (Respect for the laws and regulations of the host State)⁸

26. The CHAIRMAN reminded the Commission that it had asked Mr. Ago, Mr. Kearney and Mr. Jiménez de Aréchaga to draw up a generally acceptable text for paragraph 3 of article 44.⁹ The text proposed was as follows:

"3. In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from criminal jurisdiction, the sending State shall, unless it waives this immunity, either recall the person concerned or terminate his functions with the mission, as appropriate. This provision shall not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission within either the Organization or the premises of a permanent mission."

27. Mr. REUTER asked whether the word "within" in the second sentence of the English text had an exclusively locative or both a locative and a functional connotation.

28. Mr. KEARNEY said that the three members of the Commission who had prepared the new text of the paragraph had agreed to substitute the word "manifest" for the word "flagrant" in the first sentence, because that seemed to make it clear that the requirement in question would not be applicable in cases involving a substantial degree of doubt. The new second sentence had been added with a view to reconciling certain diver-

⁶ See 1026th meeting, para. 2.

⁷ See 1035th meeting, paras. 9 and 13.

⁸ For previous discussion and text, see 1029th meeting, paras. 16-49.

⁹ See 1030th meeting, paras. 50-52.

gent aims. In particular, the drafters had tried to ensure that a member of the permanent mission would be guaranteed complete freedom of speech when he was engaged in activities directly connected with the mission's functions, as opposed to activities which were peripheral to those functions and which might result in the commission of a crime of the type connected with motor vehicle accidents.

29. The words "within either the Organization or the premises of a permanent mission" had been used because any expression such as "within the headquarters area of the organization or the premises of a permanent mission" would have been too restrictive; at a large international conference, for example, the organization might find it necessary to take accommodation outside the headquarters area. The words "the premises of a permanent mission" had been adopted to provide for the possibility that an official act performed by a member of one permanent mission might be carried out in the premises of another permanent mission.

30. The CHAIRMAN, speaking as a member of the Commission, said that the text was still unsatisfactory. The second sentence in particular was not clear; it was difficult to see what was meant by "carrying out the functions of the permanent mission within... the premises of a permanent mission" and by the phrase "*l'exercice des fonctions de la mission permanente à l'Organisation*" in the French text, where the words "*auprès de l'Organisation*" should be substituted for "*à l'Organisation*". He saw no objection to replacing the word "flagrant" in the first sentence by "manifest", but apart from that amendment, he was in favour of the text proposed by the Drafting Committee.

31. Mr. AGO observed that the text was a compromise proposal, the drafting of which could certainly be improved. The essential point was to reach agreement on the substance. The proposed text met two requirements: first, to express the idea that the obligation to recall, or terminate the functions of, a person guilty of an offence did not apply to acts performed by that person in the exercise of his functions, that was to say, to written or oral statements made within the organization or one of its organs or in the premises of a permanent mission, or to acts performed in defence of the permanent mission; secondly, to safeguard the interests of the host State and its nationals, especially in traffic accident cases. The compromise reached by the authors of the text was based on the idea that the provision applied only to what might happen between the headquarters of the organization and the premises of the permanent mission, when the representative was obviously not exercising his functions. In his opinion, therefore, although the compromise text was awkwardly worded, it could be accepted.

32. Mr. YASSEEN said he still found it difficult to accept the second sentence, which, in his view, should end with the words "in carrying out the functions of the permanent mission", the remainder being deleted.

33. Mr. CASTRÉN said he preferred the Drafting Committee's text, but, in a spirit of compromise, he was willing to accept the proposed new text in the light

of the explanations given by Mr. Kearney and Mr. Ago. It should, however, be remembered that, as Mr. Bartoš had pointed out, the text was not applicable to members of the families of members of permanent missions.¹⁰

34. Mr. ROSENNE said he was not sure that the proposed new text bore out the interpretations which had been given to it. In particular, he had been impressed by Mr. Reuter's question as to whether the word "within", in the second sentence, had a locative or a functional connotation. He himself believed that its connotation must be considered to be functional in relation to the organization and locative in relation to the premises of the permanent mission. He suggested that the text of the second sentence might be made clearer by deleting the word "either" after the words "permanent mission within" and inserting the word "in" after the words "Organization or".

35. Mr. RUDA said that his first preference would be for Mr. Yasseen's suggestion that the words "within either the Organization or the premises of a permanent mission" should be deleted. His second preference would be for the Chairman's suggestion. If neither of those suggestions were adopted, he would be obliged to abstain from voting on the paragraph.

36. Mr. EUSTATHIADES commended the authors of the proposed text on the spirit of compromise they had shown. He was, however, still opposed to any explicit statement of the kind contained in the second sentence, the debate having revealed all the difficulties to which that gave rise. Moreover, it might well be asked why the immunity referred to in the first sentence of paragraph 3 should not apply to acts performed in the exercise of official functions outside the premises of the organization or the premises of the permanent mission. The compromise went too far. It would be advisable to delete the last sentence altogether.

37. The main idea of article 44, as expressed in paragraph 1, was that privileges and immunities were inviolable. The second idea, which was expressed in all the previous conventions, was the obligation to respect the laws and regulations of the host State, but so far, that obligation had never been accompanied by sanctions. It was the first time that the gap was to be filled by providing, in paragraph 3, that in case of grave and manifest violation of the criminal law of the host State, the sending State must either waive the immunity of the person in question, recall him, or terminate his functions. Once the value of such a provision was accepted, its effectiveness should not be negated by immediately adding a reservation which deprived it of all its meaning. The second sentence of the compromise text was a retrograde step. It would be contrary to the spirit of paragraph 3 to provide exemption from punishment for grave violations on the ground that they had been committed in the exercise of functions and in a particular place. In such a case, the only solution open to the sending State would be to agree to waive immunity. The choice of punishment was necessary for the protection of the host State's interests, for the proper working

¹⁰ See 1029th meeting, para. 38.

of the international organization and for the efficient performance of the mission's functions. The proposed compromise was praiseworthy but unacceptable. The Commission must choose between drafting article 44 on the same lines as the corresponding provisions of the other conventions and introducing the idea of sanction, without attaching a reservation which would make it difficult to apply.

38. Mr. REUTER said he was in favour of the compromise submitted to the Commission. In determining the cases to which paragraph 3 did not apply, the authors had been guided by two ideas. First, they had postulated a functional connexion, but without defining it too closely. Secondly, they had adopted the new idea that a connexion between the act committed and the premises had some bearing on the situation. It was useful to introduce that second idea in a text designed to elicit comments from governments.

39. Specific difficulties could not, of course, be overcome with any certainty by that text, but the uncertainty was not necessarily undesirable. He was prepared to accept drafting amendments to the French text, which was perhaps too precise as compared with the English; he was also prepared to accept Mr. Rosenne's amendments. But he did not think the Commission should try to define the ideas underlying the text more precisely. It was unlikely to succeed, and even if it did, the result would not be satisfactory, since it was quite evident from the relevant case-law that specific cases had been decided in many different ways.

40. Sir Humphrey WALDOCK said that he accepted the compromise text, which would provide a workable rule if applied in good faith and which attempted to deal with the real problems involved. It was an improvement on the Drafting Committee's text, which in effect imposed no obligation on the sending State to recall a person who had committed a serious offence, so long as it could be said that the act had occurred in the course of the performance of official functions. That text would leave unsolved the pressing problem of serious motoring offences and was therefore unacceptable.

41. The compromise text should be read in very close conjunction with the text of article 44, paragraph 1,¹¹ the opening words of which, "Without prejudice to their privileges and immunities", provided an element of protection for the sending State. If the act in question had clearly been performed in the course of official functions, it would be very difficult for the host State to assert in good faith that it was not covered by those words. That remark was particularly true of freedom of speech in the organization. Notwithstanding any provisions in the laws of the host State attributing a criminal character to statements against its public authorities, that State could not legitimately claim that an official statement made in the organization constituted a violation of the rule requiring respect for its laws.

42. The second sentence of the compromise text admittedly might fail to cover some kinds of acts which

were not committed either "within the Organization" or in "the premises of the permanent mission", but it went far towards solving the main practical problems.

43. If the compromise text were not accepted, he would prefer a text containing no reference at all to the performance of functions. It must be remembered that the host State was in a weaker position than the sending State, because of the absence of any right to terminate the residence of the persons concerned under a *persona non grata* rule. The sending State, for its part, could always approach the executive head of the organization and request the discussion of any unreasonable demand by the host State for the recall of a member of a permanent mission.

44. If neither of those solutions was adopted, he would prefer to have no provision at all on the subject rather than fall back on the Drafting Committee's text.

45. Mr. JIMÉNEZ DE ARÉCHAGA said he fully agreed with the previous speaker. It was necessary to bear in mind not only the existing practice in the matter, but also the international instruments in force. Those instruments made provision for a practically unlimited right of expulsion. It was now proposed, in the Commission's draft, to abolish that right of expulsion; some compensation had therefore to be given to the host State.

46. The concern which had been expressed regarding freedom of opinion in international organizations was unfounded. That freedom was protected by much stronger provisions than any that could be included in the present draft.

47. The text under discussion did not cover grave crimes committed by members of permanent missions while in transit between the permanent mission and the organization. Experience showed that driving offences accounted for much of the current adverse reaction to diplomatic privilege. In practice, however, a diplomatic agent who committed a grave offence of that kind was transferred elsewhere, which was the most satisfactory solution for all concerned.

48. Lastly, he opposed the suggestion that the concluding words "within either the Organization or the premises of the permanent mission" should be deleted, because that would destroy the whole basis of the compromise proposal and would represent an unnecessary sacrifice of the rights of the host State.

49. Mr. TSURUOKA said he approved of the compromise text in principle. In diplomatic practice, the problems dealt with in article 44, paragraph 3, were solved by common sense, which was the conclusion reached by the authors of the compromise text. It would make little difference in practice whether paragraph 3 was included in the draft or not. Consequently, he was not opposed to adopting it as it stood.

50. The objections raised by Mr. Eustathiades were valid in theory, but the grave apprehensions of those who feared that the first sentence of paragraph 3 might lead to abuses should also be taken into account. The authors of the compromise text had succeeded in finding a happy mean between conflicting considerations.

¹¹ See 1024th meeting, para. 2.

51. Mr. YASSEEN said he was opposed to taking account of the place where a violation had been committed. Could the theory of extritoriality really be invoked to justify such a solution? In his opinion only the functional link should be considered. He therefore asked that the words "within either the Organization or the premises of a permanent mission" should be deleted.

52. Mr. RAMANGASOAVINA said he could accept the new text submitted to the Commission, subject to Mr. Rosenne's amendments. It was an improvement on the text proposed by the Drafting Committee. It was a compromise, and consequently, even though he still thought that the scope of the first sentence was greatly reduced by requiring the violation to be both grave and manifest, he supported the new text, which the Commission would find it hard to better.

53. Mr. USTOR pointed out that the obligation to respect the laws and regulations of the host State, which was the subject matter of article 44 (as indicated by its original title), had two meanings. It meant, first, an obligation on the part of persons enjoying privileges and immunities to observe those laws and regulations, and secondly, an obligation on the part of the sending State to ensure that its officials did in fact observe them. If that rule were broken, there was not only a breach by the offending individual of the laws and regulations of the host State, but also a violation by the sending State of a rule of international law.

54. In so far as a violation of international law was committed, the case would be one of State responsibility and the paragraph now under discussion attempted, in effect, to lay down sanctions for such a violation. In fact, the remedies mentioned in the paragraph—waiver of immunity, recall and termination of functions—by no means covered the whole range of possible sanctions. In particular, the injured State could claim damages in accordance with the principles of State responsibility.

55. Since the proposed paragraph 3 would not cover the whole ground, he was inclined to agree that it was preferable to drop it altogether. Its omission would leave the matter to be governed by the general rules of State responsibility. By virtue of those rules, the sending State would have either to waive immunity or to recall or dismiss the offending person.

56. The proposed paragraph 3 had the further disadvantage of restricting the freedom of the host State. A host State was entitled to demand the recall of a person whose presence was rendered undesirable by some act which did not constitute a criminal offence, but which could impair good relations between the States concerned.

57. For those reasons, he suggested that paragraph 3 should not be adopted, and that the matter should only be mentioned in the commentary.

58. Mr. REUTER explained that he had never intended to construe the new text as a revival of the principle of extritoriality. The premises of the organization and of the permanent mission were centres of an active functional life and it was not unreasonable to take that fact into account.

59. The CHAIRMAN, speaking as a member of the Commission, said that in principle he was opposed to the addition of paragraph 3 to article 44. But the text proposed by the Drafting Committee, with the substitution of the word "manifest" for "flagrant", could be accepted. He was even prepared to support the compromise text before the Commission, provided that the words "within either the Organization or the premises of a permanent mission" were deleted. If necessary, the last part of the second sentence might be worded: "in carrying out the functions of the permanent mission to the Organization".

60. Mr. BARTOŠ observed that any attempt at compromise involved some concessions on substance. The second sentence of the new text was a striking example. The wishes expressed by several members of the Commission that the application of paragraph 3 should be restricted to ordinary crimes had not been taken into account. He would like to emphasize that omission.

61. It was essential to keep the functional link as the ground for the non-application of paragraph 3, irrespective of the place where the unlawful act had been committed. The premises of the organization and of the permanent mission were protected by the principle of inviolability, which should not be confused with functional immunity. He was therefore in favour of deleting the reference to the place where the act was committed.

62. Lastly, it should not be forgotten that, in addition to the measures specified in paragraph 3, there was a diplomatic procedure, which was not even that embodied in article 49, concerning consultations. In cases such as those to which paragraph 3 might apply, it was customary for the host State discreetly to request the recall of the person concerned through the usual diplomatic channel. The recall was not based on any right of the host State, but on the diplomatic usage respected by States which wished to maintain good relations. In his view, the provision in the proposed paragraph 3 was without prejudice to that diplomatic practice.

63. Mr. KEARNEY said he could not accept the changes of wording suggested by Mr. Rosenne, because they involved more than drafting; they affected the substance in a way that would undo the difficult compromise solution reached.

64. Mr. ROSENNE said that his only purpose had been to clarify the text. It had not been his intention to disturb the compromise and he therefore withdrew his suggestion.

65. Mr. CASTRÉN formally proposed the substitution of the word "a member of the permanent mission" for "a person enjoying immunity from criminal jurisdiction" in the first sentence of paragraph 3, so that the expression would not cover members of the family.

66. Mr. USTOR supported Mr. Castrén's proposal, which was a logical one. Since the first sentence referred to the "recall" of the person concerned, it was appropriate to replace the broad reference to "a person enjoying immunity from criminal jurisdiction" by the narrower wording suggested by Mr. Castrén, which related only to persons who could be recalled.

67. Mr. KEARNEY asked Mr. Castrén how the provision, as amended by him, would apply to the son of a permanent representative who committed a grave offence.

68. Mr. CASTRÉN observed that there was no need to deal with members of the family in article 44. The sending State could always waive immunity in respect of them, since provision had been made for such action earlier in the draft.

69. Mr. BARTOŠ remarked that the question of violations committed by members of the family was not an academic hypothesis; it had arisen on several occasions in New York. Mr. Castrén's proposal was, however, a sound one. The simplest course in a situation of that kind was either to waive immunity or to require the person concerned to leave the country within a reasonable time.

70. Mr. ROSENNE stressed the need to bear in mind that the whole concept of *persona non grata* was inapplicable to permanent missions. It was because no such remedy was available to the host State in the circumstances under consideration that paragraph 3, as proposed by the Drafting Committee, was entirely appropriate.

71. Lastly, with reference to Mr. Ustor's earlier remarks, he reminded the Commission of its decision to replace the original title of article 44, "Obligation to respect the laws and regulations of the host State", by "Respect for the laws and regulations of the host State".¹²

72. Mr. JIMÉNEZ DE ARÉCHAGA said he was against the change proposed by Mr. Castrén. Paragraph 3 should be read in conjunction with article 44, paragraph 1. The provisions of that paragraph were very broad and covered "all persons enjoying such privileges and immunities", that was to say, not only the permanent representative and members of the diplomatic staff of the mission, but also members of the administrative and technical staff, who enjoyed immunity from criminal jurisdiction, and the families of members of the mission. It would defeat the whole purpose of article 44 to restrict the provisions of paragraph 3 in the manner proposed. In practice, most of the problems arose from offences committed not by members of permanent missions, but by the younger members of their families.

73. Mr. USTOR said that he had supported Mr. Castrén's proposal in the interests of logic; but logic could also be satisfied by making the alteration elsewhere. Bearing in mind the point raised by the previous speaker, the words "recall the person concerned" could be amended so as to refer not only to an official who could be recalled, but also to any "person enjoying immunity from criminal jurisdiction".

74. Mr. CASTRÉN said he thought the members of the Commission might support a simpler solution. The words "a person enjoying immunity from criminal jurisdiction" could be retained, but the words "unless

it" might be deleted. The latter part of the first sentence would then read: "the sending State shall waive this immunity, recall the person concerned or terminate his functions with the permanent mission, as appropriate". There would thus be three possible solutions; the first would be the only one that could be applied to members of families, but all three could, of course, be applied to members of the permanent mission.

The meeting rose at 1.25 p.m.

1033rd MEETING

Thursday, 31 July 1969, at 3.40 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsu-ruoka, Mr. Ustor, Sir Humphrey Waldo, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218/Add.1)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 44 (Respect for the laws and regulations of the host State) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of the compromise text for article 44, paragraph 3, submitted at the previous meeting¹ by Mr. Ago. Mr. Jiménez de Aréchaga and Mr. Kearney.
2. Speaking as a member of the Commission, he said he could not accept the proposal made by Mr. Castrén at the end of the previous meeting that the last part of the first sentence be amended to read "the sending State shall waive this immunity, recall the person concerned or terminate his functions with the mission, as appropriate". There were in fact only two alternatives: the sending State could waive the immunity of a person who had committed a grave violation, or it could recall the person concerned or terminate his functions, depending on his nationality and type of function. He therefore preferred the compromise text or the originally submitted by the Drafting Committee.² In his view, Mr. Castrén's first proposal that the words "a member of the permanent mission" should be substi-

¹² See 1024th meeting, paras. 69 and 85-87.

¹ See para. 27.

² See 1029th meeting, para. 16.

tuted for "a person enjoying immunity from criminal jurisdiction" was more acceptable.

3. Mr. YASSEEN said he supported Mr. Castrén's second proposal. The sending State could not recall members of the family. It might perhaps recall the principal agent because of the misconduct of a member of his family, but in that case liability for an act committed by another person would have to be established, and that was certainly not made clear in the existing text. It should be specified that paragraph 3 referred only to a principal agent.

4. Mr. CASTRÉN said he did not share the Chairman's views regarding the phrase "unless it waives this immunity". The sending State had only one choice where members of the family were concerned, namely, to waive their immunity. Hence the words "unless it" had no place in the sentence. Where members of the permanent mission were concerned, the sending State had a choice between recalling them and terminating their functions.

5. Mr. KEARNEY said that if, for example, the child of a diplomat committed a grave violation of the criminal law of the host State, it would be excessive to require that the diplomat himself be recalled. In order to cover all persons enjoying immunity from criminal jurisdiction, he suggested that the word "recall" in the English text be replaced by the word "remove".

6. Mr. AGO proposed that the word "recall" be replaced by some such expression as "secure their return to their country", which would apply to persons other than the members of the mission.

7. He was against Mr. Castrén's second amendment, which would oblige the sending State to waive immunity from criminal jurisdiction in certain cases. That consequence seemed to him to be quite unacceptable in the case of a right which the sending State should be free to waive or not.

8. Mr. CASTRÉN said he was prepared to accept the substitution of the word "remove" for the word "recall" in the English text, as proposed by Mr. Kearney.

9. Mr. YASSEEN observed that the paragraph under consideration was based on article 9 of the Vienna Convention on Diplomatic Relations,³ which did not cover members of the family. The Commission should take care not to go further than that Convention and should avoid solutions that would endanger the unity of the family. The fact that owing to diplomatic immunity there would be no judicial decision made it advisable to exercise the greatest caution.

10. Mr. TSURUOKA said he appreciated Mr. Yasseen's views, but in very grave cases the family would be disunited in any event, if not by the repatriation of the person concerned, then by his imprisonment. He could therefore accept the fact that the provision might possibly entail disruption of the family.

11. Mr. JIMÉNEZ DE ARÉCHAGA said he support-

ted Mr. Kearney's proposal. Article 9 of the Vienna Convention should not be taken as the basis for the text under consideration, since it referred only to diplomatic personnel. The paragraph should not exclude persons who might be regarded as more likely to commit a grave violation of the criminal law of the host State than the diplomat himself, such as his children.

12. Mr. AGO said that in the event of a grave violation it was the normal practice for a member of the family, who only enjoyed immunity from criminal jurisdiction indirectly, to be obliged to leave.

13. Mr. USTOR supported the views expressed by Mr. Castrén and Mr. Yasseen. The members of the family involved might well be adults and the sending State might not be in a position to enforce their repatriation. Since the Commission could not hope to cover all possible cases, the text of article 9 of the Vienna Convention on Diplomatic Relations should be taken as the model, leaving extreme cases to be settled by negotiation as and when they arose.

14. Sir Humphrey WALDOCK pointed out that in the Vienna Convention on Diplomatic Relations, article 9, dealing with the question of *persona non grata*, was widely separated from article 41, which laid down the obligation to respect the local laws. There was therefore no awkward juxtaposition of the two provisions, as in the article now before the Commission. It would seem a little strange to state, in one paragraph of the article, that all persons enjoying immunity had an obligation to respect the laws and regulations of the host State and then, in a later paragraph of the same article, relating to grave and manifest violations of the criminal law, to provide that the obligation to secure the withdrawal of the person concerned was confined to diplomatic personnel. He therefore preferred the solution suggested by Mr. Kearney, which would not present any difficulties in practice, since the sending State could always secure either the withdrawal of the person concerned or the cessation of his protection by immunity.

15. After a discussion of the correct rendering in French of the English word "remove", Mr. AGO suggested that, in order to meet the difficulty, the end of the first sentence of paragraph 3 should be amended to read: "shall recall the person concerned, terminate his functions with the mission or secure his departure, as appropriate".

16. The CHAIRMAN said that, if there were no objections, he would assume that the Commission approved the following wording for the first sentence of article 44, paragraph 3: "In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from criminal jurisdiction, the sending State shall, unless it waives this immunity, recall the person concerned, terminate his functions with the mission or secure his departure, as appropriate".

It was so agreed.

17. The CHAIRMAN, referring to the second sentence of article 44, paragraph 3, invited the Commission to vote on the proposal made by Mr. Yasseen

³ United Nations, *Treaty Series*, vol. 500, p. 102.

at the previous meeting that the words "within either the Organization or the premises of a permanent mission" be deleted.

The proposal was rejected by 9 votes to 5.

18. The CHAIRMAN said it had been proposed that the words "*au sein de l'Organisation*" should be substituted for "*à l'Organisation*" in the French version of the second sentence. There being no objection to that proposal, he put the second sentence to the vote, with the French version thus amended.

With that amendment to the French text, the second sentence of article 44, paragraph 3 was adopted by 9 votes to 5.

19. The CHAIRMAN put article 44, paragraph 3, to the vote as a whole.

Article 44, paragraph 3, as a whole, was adopted by 9 votes to 4.

20. The CHAIRMAN said it had been proposed that the order of paragraphs 2 and 3 of article 44 be reversed. He suggested that, in the absence of any objection, that proposal should be adopted.

It was so agreed.

21. The CHAIRMAN pointed out that the title of article 44 adopted by the Commission⁴ was "Respect for the laws and regulations of the host State". Paragraph 1 and the former paragraph 2 of article 44 had already been approved.⁵ He then put the article, as a whole, to the vote, as amended.

Article 44, as a whole, as amended, was adopted by 9 votes to 1, with 4 abstentions.

22. The CHAIRMAN, speaking as a member of the Commission, explained that he had voted against article 44 as a whole because paragraph 2 (formerly paragraph 3) was quite unacceptable to him.

The meeting rose at 4.55 p.m.

⁴ See 1024th meeting, paras. 69 and 85-87.

⁵ *Ibid.*, paras. 88 and 90.

1034th MEETING

Friday, 1 August 1969, at 9.40 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218/Add.1)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

Section IV: End of functions

ARTICLE 46 (End of the functions of the permanent representative or of a member of the diplomatic staff)¹

1. The CHAIRMAN, in the temporary absence of the Chairman of the Drafting Committee, invited Mr. Ustor to introduce the re-draft of article 46.

2. Mr. USTOR said that the Drafting Committee had reconsidered article 46 in the light of the Commission's discussion and proposed the following text:

Article 46

End of the functions of the permanent representative or of a member of the diplomatic staff

The functions of the permanent representative or of a member of the diplomatic staff of the permanent mission come to an end, *inter alia*:

- (a) on notification to this effect by the sending State to the Organization;
- (b) if the sending State withdraws its permanent mission to the Organization.

3. The new text differed from the previous text in that it no longer referred to members of the permanent mission in general. The scope of its provisions had been confined to the permanent representative and to members of the diplomatic staff of the permanent mission.

4. In addition, the reference in sub-paragraph (a) to notification to the host State had been dropped. The paragraph now required notification of termination of functions to be made only to the organization. The provisions of article 17 would, of course, be applicable, but it was the notification to the Organization which brought to an end the functions of the individual concerned.

5. Sub-paragraph (b) had been completely reworded. It no longer mentioned the termination or suspension of membership in the organization and dealt only with the withdrawal of the permanent mission.

6. It should be emphasized that the cases mentioned in sub-paragraphs (a) and (b) were still only examples and did not constitute an exhaustive list of cases of termination.

7. In consequence of those changes in the text, the Drafting Committee now proposed the title "End of functions" for section IV and the title "End of the functions of the permanent representative or of a member of the diplomatic staff" for article 46 itself.

¹ For previous discussion and text, see 1025th meeting, paras. 5-84.

8. The CHAIRMAN, speaking as a member of the Commission, proposed that sub-paragraph (b) of the article be redrafted to read: "(b) if the permanent mission is temporarily or definitely recalled". That would be in line with the Drafting Committee's new text for article 48, paragraph 1.² It would also be better to use the word "recall" rather than "withdraw", in accordance with the accepted terminology.

9. Mr. CASTRÉN said he was prepared to accept the Drafting Committee's text with the Chairman's amendment.

10. Sir Humphrey WALDOCK said he was prepared to accept the changes of wording proposed by the Chairman, but would suggest that the word "definitely" should be replaced by "finally" in the English text of sub-paragraph (b).

11. Mr. ROSENNE said he would have to abstain from voting on article 46. It was illogical to include a provision on the effects of a notification of termination of functions in a draft which made no corresponding provision for an obligation to notify the commencement of those functions. The duty to notify the appointment had been specified elsewhere in the draft, but no obligation had been laid down to notify the commencement of the functions, either to the organization or to the host State.

12. Mr. RUDA said that he could accept article 46 with the changes proposed by the Chairman. On a point of drafting, he said he thought the words "to this effect" in sub-paragraph (a) were unnecessary, since they added nothing to the meaning.

13. Mr. USTOR said he was prepared to accept the Chairman's amendment and the change suggested by Sir Humphrey Waldoack.

14. In reply to the point raised by Mr. Rosenne, he explained that a provision similar to that in article 46 was contained in article 43 of the 1961 Vienna Convention on Diplomatic Relations,³ which also included an article on notification of appointment.

15. Mr. ROSENNE pointed out that there was a considerable difference between the present article 46 and article 43 of the 1961 Vienna Convention. The latter article referred, not to the "functions" of the individual concerned, but to the "function of a diplomatic agent" which, as he understood it, meant the appointment. If the intention was to take the 1961 Vienna Convention as a model, he would be prepared to accept that wording, but in that case the reference should be to the "function", not to the "functions".

16. Mr. TESLENKO (Deputy Secretary to the Commission) explained that the French text of article 43 of the 1961 Vienna Convention used the plural, "*fonctions*", and the Drafting Committee had thought that the discrepancy between the two versions should be resolved in favour of the plural.

17. Mr. ROSENNE said that the Drafting Committee

could not work on the assumption that the authentic English text of the 1961 Vienna Convention contained a mistake. He maintained his view on the meaning of that text.

18. Mr. CASTRÉN supported Mr. Ruda's proposal that the words "to this effect" be deleted.

19. Mr. TSURUOKA said he was not sure that the functions of a permanent representative did come to an end when a country recalled its mission temporarily. If so, did they come to an end permanently or temporarily?

20. Sir Humphrey WALDOCK said that Chairman's amendment introduced a useful distinction between the final and the temporary withdrawal of a permanent mission. Article 46 specified that the functions of the individual concerned came to an end on the withdrawal of the mission and that statement was true even where the withdrawal was temporary. The functions of the individual concerned could, of course, be revived when the mission was re-opened, but the fact remained that his privileges and immunities would end upon the temporary withdrawal of the mission.

21. The CHAIRMAN, speaking as a member of the Commission, said that he had been in favour of simply deleting sub-paragraph (b). If the sending State recalled its permanent mission, whether temporarily or finally, the functions of all members of the permanent mission, came to an end. When there was no permanent mission, there was no permanent representative. The important provision in the text of article 46 was sub-paragraph (a), which dealt with the case in which the sending State no longer wished to be represented by the person who had performed the functions of permanent representative and who might seek to retain those functions against the sending State's wishes. That was certainly the idea underlying article 43 of the Vienna Convention on Diplomatic Relations.

22. Mr. AGO said he was in favour of retaining sub-paragraph (b), since it was possible that, when a permanent mission was recalled, the permanent representative might assert that the recall was not in order. It would be clearer to specify that if the permanent mission was recalled, the functions of the permanent representative came to an end automatically.

23. Only the question of temporary recall raised a problem. Where that had taken place and the permanent mission had then resumed its functions, was it considered that the permanent representative had to be re-accredited or did he resume his post automatically?

24. The CHAIRMAN, speaking as a member of the Commission, observed that if reference was made to the recall of a permanent mission without including the words "temporarily or finally", the text would not be in line with the text proposed by the Drafting Committee for article 48. In any event, if notification of the permanent representative's recall had been given, notification must certainly be given of his subsequent re-accreditation.

25. Sir Humphrey WALDOCK stressed that the provisions of article 46 were closely connected with the

² See para. 49 below.

³ United Nations, *Treaty Series*, vol. 500, p. 122.

question of privileges and immunities. Paragraph 2 of article 41⁴ specified that privileges and immunities normally ceased at the moment when a person left the country on termination of his functions, or on the expiry of a "reasonable period" in which to do so. In view of that provision, it would not be wise to introduce a reference to the suspension of the permanent mission into article 46, since it would not be clear what the consequences of such a suspension would be from the standpoint of privileges and immunities.

26. He suggested that the text be adopted with the changes proposed by the Chairman. The article would thus make it clear that on withdrawal of the permanent mission, notification of the termination of the functions of the individuals concerned must be made to the organization. In the absence of such a clear-cut provision, there was some danger that an individual might stay on after the termination of his functions and continue to claim privileges and immunities.

27. Mr. BARTOŠ said that diplomatic practice was not consistent. When diplomatic relations were resumed, an ambassador sometimes simply resumed his functions and sometimes was re-accredited. In any case, where permanent missions to international organizations were concerned, he supported the view that the recall of a permanent mission put an end to the functions of the permanent representative and the members of the diplomatic staff of the mission, since the appointment of the permanent representative was not subject to *agrément*, as in ordinary diplomacy: the sending State merely transmitted a notification and the international organization took note of it. It must also be borne in mind that the period of temporary recall might vary, and when a certain time had elapsed, the persons concerned had often been appointed to other posts.

28. Mr. ROSENNE said it was undesirable for the Commission to seek a hasty solution to the delicate problem of re-accreditation of a permanent representative on the re-opening of a permanent mission which had been temporarily closed.

29. In article 1 (Use of terms), as adopted at the previous session,⁵ the Commission had included a sub-paragraph (e), in which the permanent representative was described as "the person charged by the sending State with the duty of acting as the head of a permanent mission". That established a link between the existence of a permanent mission and the description of an individual as a permanent representative. In the light of that provision, it was logical to say in article 46 that if the permanent mission was withdrawn, the functions of the permanent representative and of the members of the diplomatic staff of the mission came to an end.

30. The problem raised by the Chairman's amendment was whether the description in article 1 (e) should be carried to its logical conclusion in the case of a temporary withdrawal of the permanent mission. He himself believed that it would be better for the Commission to

avoid taking a decision on that difficult question. He also wished to place on record his request that, when the Commission came to re-examine article 1 (e) on second reading, it should carefully consider whether it wished to maintain such a close link between the description of a "permanent representative" and the existence of a permanent mission.

31. It had clearly been the Chairman's intention to propose wording for sub-paragraph (b) of article 46 which would be consistent with his amendment to paragraph 1 of article 48.⁶ In fact, the subject-matter of the two articles was entirely different. Article 48 dealt with the question of the protection of premises and archives, for which temporary withdrawal had very different implications. The fact that it was useful to introduce the concept of temporary recall into article 48 did not necessarily mean that that concept should also be introduced into article 46, which dealt with the functions of the permanent representative. He therefore suggested that the best course would be not to refer to temporary withdrawal in sub-paragraph (b), or perhaps even to drop that sub-paragraph altogether.

32. Mr. USTOR said that the question of re-accreditation would arise if a State were to declare that, as long as certain circumstances prevailed, it would not continue to participate in an organization's work and would withdraw its permanent mission until such time as those circumstances changed. In the case of such a conditional withdrawal, the problem of re-accreditation would arise when the conditions specified by the State concerned were fulfilled.

33. Mr. REUTER said that, to his great regret, he would have to abstain from voting on the article, as it was not clear to him in what circumstances the text, as it stood, would be applicable.

34. Mr. EUSTATHIADES said that the main purpose of the article was to stress the role of notification. Notification fixed the moment at which the functions came to an end.

35. At the present stage in the discussion, he would not be against retaining the Chairman's wording for sub-paragraph (b), but since, in the event of temporary recall, the functions of the permanent representative might not come to an end, the words "may come to an end" might be substituted for "come to an end" in the introductory sentence of the article. The best course might perhaps be simply to delete sub-paragraph (b) and the expression "*inter alia*" in the introductory sentence. That solution would have the advantage of stressing that it was by notification that the functions came to an end. Besides, article 43 of the Vienna Convention on Diplomatic Relations referred only to notification.

36. Mr. YASSEEN considered that the end of the functions might be the factor which brought about the cessation of the status enjoyed by the permanent representative or member of the diplomatic staff concerned. Sub-paragraph (a) was therefore necessary, since it was as a result of notification to the organization that the functions came to an end. Sub-paragraph (b) also served

⁴ See 1023rd meeting, para. 54.

⁵ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

⁶ See para. 56 below.

a purpose, because the temporary recall of the permanent mission as a whole temporarily ended the functions of the permanent representative and of the members of the mission's diplomatic staff.

37. Mr. BARTOŠ said that the question was whether the permanent representative and the members of the diplomatic staff constituted the permanent mission solely by their presence in the international organization or whether there could be a permanent representative without a mission. If, as seemed reasonable, the latter view was adopted, the end of the functions of a permanent representative should not be linked with the recall of the permanent mission. There were even cases in which States did not open a permanent mission in the strict sense, and the permanent representative only visited the organization's headquarters from time to time. In ordinary diplomacy an ambassador was not conceivable without an embassy, or a consul without a consular post. On the other hand, there could be a permanent representative without a permanent mission. One case was that of a government agent attached to the International Court of Justice. The agent must have a residence within a given distance of the Court, but it need only be an address, which might be that of a notary. The permanent mission, as an objective entity, must not be confused with the permanent representative.

38. The CHAIRMAN, speaking as a member of the Commission, pointed out that article 15 (Composition of the permanent mission) provided that, in addition to the permanent representative, a permanent mission might include members of the diplomatic and other staff.⁷ It followed that a permanent mission could exist with only a permanent representative.

39. Mr. BARTOŠ thought that reference should be made to article 6 (Establishment of permanent missions),⁸ not to article 15. That article provided that member States might establish permanent missions to the organization, which meant that, though they must have permanent representatives, they need not necessarily have permanent missions.

40. Sir Humphrey WALDOCK said that the Commission was becoming involved in unnecessary difficulties. The object of article 46 was very limited, namely, to fix the time at which the functions ended for the purpose of determining the "reasonable period" within which privileges and immunities would cease if the individual concerned did not leave the country. The obvious way of fixing that time was notification.

41. Bearing in mind that limited purpose, sub-paragraph (b) of the article served to indicate that the functions of the persons concerned terminated when the sending State decided that it no longer wished to have a permanent mission and notified the organization accordingly. The personnel of the mission would then automatically lose their privileges and immunities after the lapse of a reasonable period.

⁷ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

⁸ *Ibid.*

42. In practice, the case of withdrawal of the permanent mission would be largely covered by the provisions of sub-paragraph (a) because such a withdrawal would also involve the recall of the permanent representative and the notification of that recall. He believed, however, that it would be useful to retain sub-paragraph (b), with the change proposed by the Chairman, which would serve to cover temporary as well as final withdrawal.

43. Mr. YASSEEN said he would like to know whether Mr. Eustathiades considered that, when the sending State notified the recall of its permanent mission, but not the recall of the officials composing it, that meant that those diplomats continued to exercise their functions. In his own view, recall related to representation, not to the physical aspect of the permanent mission. It did not mean simply closing down the premises.

44. Mr. EUSTATHIADES thought the general opinion was that the functions of the permanent representative and the members of the diplomatic staff came to an end. In any case, he was not definitely opposed to sub-paragraph (b). His only concern was that the members of the Commission should reach agreement.

45. Mr. TSURUOKA said he was in favour of the Drafting Committee's wording for article 46.

46. Mr. RUDA said he accepted the Chairman's amendment, which would make sub-paragraph (b) cover both final and temporary withdrawal. That amendment was useful because it clearly showed that, in the event of temporary withdrawal, re-accreditation would be necessary if the same permanent representative returned to resume his post. The Drafting Committee's text did not make that clear.

47. The CHAIRMAN invited the Commission to vote on his amendment to sub-paragraph (b) of article 46.

The amendment was adopted by 11 votes to none, with 3 abstentions.

Article 46 as a whole, as amended, was adopted by 11 votes to none, with 3 abstentions.

ARTICLE 48 (Protection of premises and archives)⁹

48. The CHAIRMAN, in the temporary absence of the Chairman of the Drafting Committee, invited Mr. Ustor to introduce the redraft of article 48.

49. Mr. USTOR said that the Drafting Committee proposed the following new text:

Article 48

Protection of premises and archives

1. When the permanent mission is temporarily or definitely withdrawn, the host State must respect and protect the premises as well as the property and archives of the permanent mission. The sending State must take all appropriate measures to terminate this obligation of the host State within a reasonable time.

2. The host State is required to grant the sending State facilities for removing the archives of the permanent mission from the territory of the host State.

⁹ For previous discussion, see 1026th and 1027th meetings.

50. Paragraph 1 had been reworded. In the first sentence, the words "When the functions of the permanent mission come to an end" had been replaced by "When the permanent mission is temporarily or definitely withdrawn". The reference to "armed conflict" had been deleted, as that point would be covered by the new article proposed by Mr. Rosenne. The second sentence had been reworded because the Drafting Committee considered that withdrawal of property and archives might not always be necessary. There might be cases where the sending State did not wish to withdraw its property and archives because they were not of any great value. It might wish to sell or dispose of the property in some way, or it might wish to burn the archives. The Drafting Committee believed that the sending State should relieve the host State of its obligation in respect of the premises, property and archives of the permanent mission and therefore favoured the adoption of a more general provision.

51. The Drafting Committee had not thought it necessary to make any changes in paragraph 2, other than the deletion of the words "even in case of armed conflict".

52. The CHAIRMAN, speaking as a member of the Commission, asked why the second sentence of paragraph 1 also applied to cases in which a permanent mission was recalled temporarily. He would also like to know whether that sentence meant that the sending State could keep its permanent mission's premises and leave its property and archives in them, the host State being legally relieved of its obligation to respect and protect the premises, or whether it meant that the sending State must actually withdraw its property and archives and vacate the premises.

53. He noted that paragraph 2 referred to the archives, but not to the property.

54. Mr. USTOR confirmed that the second sentence of paragraph 1 also applied to the temporary withdrawal of the permanent mission. If the temporary withdrawal was for a fairly short period, the host State could be required to respect and protect the premises, property and archives of the permanent mission. But if the withdrawal continued for an indefinite period, the host State should be able, after a reasonable period, to request the sending State to make measures to terminate that obligation. It was for the sending State to decide what measures it wished to take for that purpose. It might decide to remove the property and archives of the permanent mission; it might decide to sell the premises or dispose of them in some other way, as a result of which they would cease to belong to the sending State.

55. He agreed that paragraph 2 should include a reference to the property, as well as the archives, of the permanent mission.

56. The CHAIRMAN, speaking as a member of the Commission, said he wished to propose the following text for article 48:

"1. When the permanent mission is permanently or temporarily recalled, the host State is required to respect the premises of the permanent mission and its property and archives.

"2. When the permanent mission is permanently recalled, the sending State shall withdraw the property and archives of the permanent mission within a reasonable time.

"3. The host State is required to grant the sending State the necessary facilities for removing the property and archives of the permanent mission from its territory."

57. With regard to paragraph 1, he believed that when a permanent mission was recalled temporarily, it could retain its premises and keep its archives and property in them until it resumed its functions. During that period, the host State was still required to protect the premises, property and archives of the mission.

58. The situation was different in the case of permanent recall; that was why he had devoted a separate paragraph to it. He had not mentioned the premises in that paragraph, since he considered that even in those circumstances the sending State might, if it owned the premises, keep them and put them to some other use, and the host State must therefore continue to protect them. If the sending State did not own the premises, their fate could be settled by negotiations between the host State and the sending State.

59. In paragraph 3, he had added a reference to property and made a minor correction in the wording.

60. Mr. KEARNEY, referring to paragraph 1, said that the Drafting Committee had wished to give the sending State a considerable degree of latitude in regard to the means adopted for the disposal of its premises, property and archives in the host State. The Chairman's proposal seemed more restrictive to the sending State. The Drafting Committee had believed that the sending State should be able to sell or let the premises, and to sell or store the property, if it wished; it might even ask a third Power to take over custody of the archives.

61. If the withdrawal was for a relatively short period, it was reasonable that the host State should continue to be required to protect the permanent mission's premises, property and archives. But when the withdrawal lasted for a year or more, a number of practical problems arose and the sending State might legitimately be expected to take steps to relieve the host State of that obligation within a reasonable period. He thought that the Drafting Committee's text provided a better balance between the responsibilities of the two States than the text proposed by the Chairman.

62. He supported the inclusion of a reference to the removal of property in paragraph 2.

63. The CHAIRMAN, speaking as a member of the Commission, objected that if the property and archives remained in the territory of the host State and that State was legally relieved of its obligation to respect and protect them, that was tantamount to saying that the property and archives might be broken into or destroyed. That was why he had provided, in paragraph 2 of his text, for physical withdrawal of the property and archives, and not for the purely legal termination of the host State's obligation.

64. Mr. RUDA said he approved of the deletion of

the reference to armed conflict in paragraph 1. With regard to the second sentence of that paragraph, it seemed a little strange to impose an obligation on one party to relieve another of its obligation. However, he was unable to suggest any better wording and would accept the Drafting Committee's text. It might be possible to combine paragraph 2 of the Chairman's proposed text with the second sentence of the Drafting Committee's text for paragraph 1, but on the whole he preferred the Drafting Committee's text.

65. He was in favour of mentioning "property" in paragraph 2.

66. Mr. USTOR said that the Drafting Committee had had some difficulty in expressing the idea that the sending State should not be obliged to withdraw the property and archives of the permanent mission, but could dispose of them in some other way if it wished. The purpose of the second sentence of paragraph 1 was to ensure that the host State would not be obliged to respect and protect the premises, property and archives of the permanent mission indefinitely.

67. He thought that the reference to the termination of liability in the case of temporary withdrawal should be retained. A situation might arise where a sending State found itself unable to maintain a permanent mission for a certain period; in those circumstances, the host State would expect to be relieved of its obligation after a reasonable time.

68. Mr. YASSEEN said it should be clearly understood that the second sentence of paragraph 1 was not intended to release the host State from its general obligation to protect and respect the property of persons, but only from its special obligation to respect and protect the premises, property and archives of permanent missions.

69. It was quite right to provide, as the Chairman had proposed in paragraph 3 of his amendment, that the host State should grant the sending State facilities for the removal of its property as well as its archives.

70. Mr. REUTER said he agreed with the Chairman that it would be appropriate to replace the word "withdrawn" by "recalled" in the first sentence of paragraph 1, and to provide for the granting of facilities for removing the property of permanent missions. In providing for the granting of the "necessary facilities", the Chairman's amendment imposed a more onerous obligation on the host State than did the Drafting Committee's text, but he saw no reason for not accepting that change.

71. He agreed with Mr. Ustor and Mr. Yasseen about the meaning of the second sentence of paragraph 1 of the Drafting Committee's text. The wording of that sentence obviously needed some modification.

72. He saw no objection to the idea expressed by the Chairman in connexion with paragraph 2 of his proposal, that the premises of permanent missions might remain available to the sending State for other uses, except that a foreign State's right to own or rent premises, directly or indirectly, depended on the local laws and regulations. Once a permanent mission was recalled, the rights of the sending State with regard to the premises no longer came under the rules governing diplomatic privileges and immunities, but under the ordinary

law of the land. Hence it might perhaps be more correct to say that, after the expiry of a reasonable time, the host State was bound, *vis-à-vis* the sending State, only by obligations arising from its national laws and regulations or from any other special bilateral commitments it might have entered into with the sending State.

73. Mr. BARTOŠ said he agreed with that view. The premises occupied by a permanent mission could not retain a privileged status indefinitely; when the mission was recalled or the premises were used for non-diplomatic purposes, they automatically came under the ordinary law of the land. That was so in Yugoslavia and in other countries, and in view of the principle of reciprocity and equality of treatment, it would be wrong to ask for a more liberal régime. The sending State must however be allowed a reasonable transitional period.

74. Mr. CASTRÉN said he agreed that the word "recalled" should be substituted for the word "withdrawn" in the first sentence of paragraph 1. He approved of the use of the term "necessary facilities" in paragraph 3 of the Chairman's proposal and agreed that the facilities should extend to the removal of property.

75. He preferred the second sentence of paragraph 1 of the Drafting Committee's text to paragraph 2 of the Chairman's proposal. It would be too cumbersome to combine the two texts, as Mr. Ruda had suggested, and too complicated to adopt wording on the lines suggested by Mr. Reuter. It was quite clear that the Drafting Committee's second sentence, which was very flexible, referred to the special obligation mentioned in the first sentence, that was to say, the protection provided for in article 24, on the inviolability of the premises.¹⁰

76. The CHAIRMAN, speaking as a member of the Commission, said he still could not accept the second sentence of the Drafting Committee's text for paragraph 1. First, a sending State which recalled its permanent mission could hardly be required to divest itself of the premises the mission had occupied. Secondly, the host State could not be legally relieved of the obligation to respect and protect the premises, property and archives of permanent missions. It might be accepted that it was materially relieved of the obligation, but it was in the legal sense that the second sentence in paragraph 1 must be understood. A sending State might withdraw its property and archives from the premises of its permanent mission within a reasonable time without necessarily removing them to its own territory, and the host State then remained legally bound to respect and protect them. In order to make that idea quite clear, he was prepared to add to paragraph 2 of his amendment, which dealt with the sending State's obligations when a permanent mission was permanently recalled, a provision to the effect that the sending State must also divest itself of its premises. If the mission was recalled temporarily, it seemed unnecessary to require the sending State to vacate the premises, as any abuse could be dealt with by negotiation.

77. Mr. CASTRÉN observed that in any event it was only the special protection which was removed; the pre-

¹⁰ See 1031st meeting, para. 34.

mises, property and archives of the permanent mission would remain under the protection of the ordinary law.

78. Mr. KEARNEY agreed. In order to clarify the legal position, he proposed that the word "obligation" in the second sentence should be replaced by the words "special duty", which were used in paragraph 2 of article 24.

79. Mr. ROSENNE said that although he shared Mr. Ruda's misgivings about the wording of the second sentence, he was prepared to accept it because of its flexibility. He supported Mr. Kearney's proposal that the word "obligation" be replaced by the words "special duty"; that change would further improve the text and result in a sufficiently realistic provision.

80. The CHAIRMAN invited the Commission to vote on article 48. There appeared to be general agreement that the word "recalled" should be substituted for the word "withdrawn" in the first sentence of the Drafting Committee's text, as he had proposed in the amended text he had submitted as a member of the Commission.¹¹ He suggested that the Commission should approve that sentence, thus amended.

The first sentence of the Drafting Committee's text, as amended, was approved.

81. The CHAIRMAN invited the Commission to vote on paragraph 2 of his amendment to article 48, which corresponded to the second sentence of the Drafting Committee's text for paragraph 1. As his own amendment was further removed from the Drafting Committee's text than Mr. Kearney's amendment replacing the word "obligation" by the words "special duty", he would put it to the vote first.

The amendment submitted by Mr. Ushakov was rejected by 7 votes to 2, with 6 abstentions.

82. The CHAIRMAN then invited the Commission to vote on Mr. Kearney's amendment. He explained that the words "special duty" would be rendered in French by "*obligation spéciale*", as in paragraph 2 of article 24.

The amendment submitted by Mr. Kearney was adopted by 12 votes to none, with 3 abstentions.

The Drafting Committee's text for the second sentence of paragraph 1, as amended, was approved by 14 votes to 1.

83. The CHAIRMAN, speaking as a member of the Commission, explained that he had voted against the Drafting Committee's text for the second sentence, because he could not accept the idea that the host State should be legally relieved of the obligation laid down in the first sentence.

84. He then put to the vote the Drafting Committee's text for paragraph 1 as a whole, as amended.

Paragraph 1 as a whole, as amended, was adopted by 14 votes to 1.

85. The CHAIRMAN, speaking as a member of the Commission, explained that he had voted against para-

graph 1 for the same reason as he had voted against the second sentence.

86. Speaking as Chairman, he invited the Commission to vote on paragraph 3 of his own amendment, which corresponded to paragraph 2 of the Drafting Committee's text.

87. Mr. ROSENNE observed that all the members of the Commission seemed to agree that a reference to the property of the permanent mission should be inserted in the Drafting Committee's text. The paragraph could thus be adopted without a vote if the Chairman would agree not to press his proposals to substitute the words "the necessary facilities" for "facilities" and the words "from its territory" for "from the territory of the host State".

88. The CHAIRMAN, speaking as a member of the Commission, said he would not press those amendments.

89. Speaking as Chairman, he suggested that the Commission should adopt the Drafting Committee's text for paragraph 2, with the insertion of the words "the property and" after the word "removing".

Paragraph 2, thus amended, was adopted.

90. The CHAIRMAN put article 48 as a whole, as amended, to the vote.

Article 48 as a whole, as amended, was adopted unanimously.

91. The CHAIRMAN explained that the adoption must be treated as provisional, since the final wording of article 48 depended on the decision taken by the Commission on the new article submitted by the Drafting Committee as the result of a proposal by Mr. Rosenne, and on Mr. Kearney's amendment to that article.¹²

ARTICLE 49 (Consultations between the sending State the host State and the Organization)¹³

92. The CHAIRMAN drew attention to the Drafting Committee's new text for article 49, which was as follows:

Article 49

Consultations between the sending State, the host State and the Organization

If any question arises between a sending State and the host State concerning the application of the present articles, consultations among those States and the Organization shall be held upon the request of either State or the Organization itself.

93. He explained that the purpose of the version of article 49 which he had submitted in his capacity as a member of the Commission¹⁴ was to make it clear that the consultations, in question were to be tripartite, and were not to be held only between the two States concerned. The final text of his version of the article was as follows:

"If any question arises between a sending State and the host State concerning the application of the

¹² For texts, see next meeting, paras. 9 and 13.

¹³ For previous discussion, see 1027th meeting, paras. 31-49, and 1028th meeting.

¹⁴ See 1027th meeting, para. 43 and 1028th meeting, para. 1.

¹¹ See para. 56 above.

present articles, consultations between the host State, the sending State and the Organization shall be held upon the request of either State or the Organization itself."

94. Mr. BARTOŠ asked that it should be explained in the commentary that the provision also covered cases in which several sending States had a dispute with the host State.

95. Mr. ROSENNE said he would be unable to support either the Drafting Committee's text or the Chairman's amended version. Neither of those formulations made it clear that the article envisaged bilateral consultations between the two States concerned. The injection of the reference to the organization was contrary to existing practice and, he believed, contrary to the intention of the Special Rapporteur. He therefore requested a separate vote on the concluding words "or the Organization itself".

The Commission decided by 8 votes to 1, with 4 abstentions, to retain the words "or the Organization itself".

The text proposed by the Chairman for article 49 was adopted by 11 votes to none, with 3 abstentions.

96. Mr. RUDA explained that he had abstained from voting on article 49, because it was not yet known whether the draft would include a provision on the settlement of disputes and, if so, what the content of that provision would be. He reserved his decision on article 49 until that question was decided.

97. Mr. USTOR said that, before leaving the meeting, Mr. Tammes had requested him to place on record that he (Mr. Tammes) did not wish to press his proposal for the addition of a paragraph 2 to article 49.¹⁵

Article 1, new paragraph

98. The CHAIRMAN invited the Commission to consider the following proposal for a new sub-paragraph to be inserted after sub-paragraph (k) of article 1.¹⁶

"(l) The 'premises of the permanent mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the permanent mission including the residence of the permanent representative."

99. Mr. ROSENNE said he found the proposed new sub-paragraph completely acceptable, but he suggested that it should be numbered "(k bis)" so as to obviate any changes in the designation of the existing paragraphs of article 1 as adopted at the previous session.¹⁷ Article 1 had already been submitted to governments for their comments and any changes in the numbering would create confusion.

100. Mr. RUDA said he assumed that the Spanish text of the proposed new paragraph would be similar in

wording to article 1, paragraph (i), of the 1961 Vienna Convention on Diplomatic Relations,¹⁸ on which the proposal was modelled.

101. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to adopt the proposed new paragraph as paragraph (k bis) of article 1, on the understanding that the Spanish text would be as Mr. Ruda assumed.

It was so agreed.

New article

102. The CHAIRMAN said that the Commission still had to consider the new article proposed by the Drafting Committee. It also had before it an amendment to that new article proposed by Mr. Kearney.¹⁹

103. Mr. KEARNEY said that he had submitted his amendment because the Drafting Committee's proposed new article did not reflect any deep study of the problems arising out of the outbreak of hostilities. His purpose had been to provide the Commission with a list of the main problems. Clearly each one of them would require thorough discussion, for which the Commission had no time at the present session. He therefore suggested that at its next meeting the Commission should merely take an interim decision designed to draw the attention of governments to the matter and obtain their reactions.

The meeting rose at 1.25 p.m.

¹⁸ United Nations, *Treaty Series*, vol. 500, p. 98.

¹⁹ For texts of the new article and amendment, see next meeting, 4 paras. 9 and 13.

1035th MEETING

Monday, 4 August 1969, at 3.10 p.m.

Chairman : Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

Organization of Future Work

[Item 6 of the agenda]

and

Dates and places of the Commission's meetings in 1970

[Item 7 of the agenda]

1. The CHAIRMAN announced that the Commission had taken the following decisions at a private meeting.
2. With regard to the organization of future work,

¹⁵ See 1028th meeting, para. 7.

¹⁶ See 1032nd meeting, para. 7.

¹⁷ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

the Commission reaffirmed its view that it was desirable to complete the study of relations between States and international organizations before the expiry of the term of office of its present members. As it had already stated in paragraph 104 of the report on the work of its twentieth session,¹ the Commission aimed to conclude its work on that topic in 1971, at its twenty-third session, if the scope of the work allowed. In view of the stage which the work had now reached, and taking into account the time required for the receipt of comments from governments, the Commission considered that its needs would not be best served by asking the General Assembly to authorize a winter session in 1970, the possibility of which had been reserved in the report on the twentieth session. The Commission deemed it necessary, however, to reserve the possibility of an additional or extended session in 1971 in order to achieve its stated aim. It had agreed to record that decision in the report on the work of its twenty-first session, so that arrangements for budgetary appropriations could be made in time.

3. In 1970, at its twenty-second session, the Commission intended to conclude, as a matter of priority, the first reading of its draft on relations between States and international organizations and to undertake substantive consideration of State responsibility and succession of States in respect of treaties. At that session, the Commission also planned to carry on with its study of succession of States in economic and financial matters. During its term of office, the Commission would continue its study of the most-favoured-nation clause.

4. With regard to the review of its programme and methods of work, the Commission had referred to its opinion, expressed in paragraph 98 (a) of its report on the work of its twentieth session, that the term of office of its members should be extended in order to ensure the continuity of membership that was necessary in view of the method of work provided for in its Statute and the nature of the codification process, especially when the Commission was preparing legal texts for the codification of particularly large and important sectors of international law. In order to make its intention quite clear, the Commission wished to specify that, in its opinion and in the light of its experience, the term of office of its members should preferably be seven years and that that proposal related only to the future terms of office of members of the Commission.

5. The Commission had confirmed its intention of bringing its long-term programme of work up to date in 1970 or 1971 taking into account the General Assembly's recommendations and the needs of the international community, and its intention of removing from the 1949 list those topics which were no longer suitable for treatment. To that end, in accordance with article 18 of its Statute, the Commission would again survey the whole field of international law with a view to selecting topics for codification. It had asked the Secretary-General to submit a preparatory working paper to facilitate that task.

6. Pursuant to the request made by Mr. Bedjaoui, the Special Rapporteur for State succession in respect of matters other than treaties, the Commission had decided to ask the Secretary-General to send a note to the Governments of Member States inviting them to transmit the texts of any treaties, laws, decrees, regulations or diplomatic correspondence which related to the procedure of succession for States that had achieved independence since the Second World War and which had not been transmitted in response to the Secretary-General's notes of 27 July 1962 and 15 July 1963, together with any additional documentation showing State practice in that matter. The Secretariat would assemble the information received and publish it in a volume of the United Nations Legislative Series. In addition, the Secretariat would bring up to date the digest of the decisions of international tribunals relating to State succession (A/CN.4/151) published in the 1962 *Yearbook*.

7. The Commission's next session would start on 4 May 1970.

Relations between States and international organizations

(A/CN.4/218/Add.1)

[Item 1 of the agenda]

(resumed from the previous meeting) . .

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

NEW ARTICLE

8. The CHAIRMAN invited Mr. Ustor to introduce the Drafting Committee's text for a new article.

9. Mr. USTOR said that the Drafting Committee proposed the following text:

New article

The severance, modification or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles, even in the case of armed conflict. The establishment or maintenance of a permanent mission on the territory of the host State does not in itself imply recognition or affect the situation in regard to diplomatic or consular relations between the host State and the sending State.

10. The Drafting Committee had prepared that text on the basis of the suggestion made by Mr. Rosenne.² It had largely followed Mr. Rosenne's suggestion, but had made a few changes in wording. For instance, it had added the word "modification" after the word "severance". That addition was intended to cover cases in which diplomatic relations were modified, as when two States, instead of exchanging ambassadors or ministers, exchanged *chargés d'affaires*.

11. The main departure from Mr. Rosenne's suggestion had been the inclusion of a reference to cases of

¹ *Yearbook of the International Law Commission, 1968, vol. II.*

² See 1027th meeting, para. 2.

armed conflict. The Drafting Committee had thought it would be useful to have a general provision covering that possibility, so that the article would be applicable whatever the legal situation between the sending State and the host State.

12. The second sentence of the Drafting Committee's text also differed somewhat from the wording suggested by Mr. Rosenne.

13. The CHAIRMAN drew the Commission's attention to the amendment to the Drafting Committee's text submitted by Mr. Kearney, which was as follows:

"1. The termination, modification or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles. The establishment or maintenance of a permanent mission on the territory of the host State does not in itself imply recognition or affect the situation in regard to diplomatic or consular relations between the host State and the sending State. In the absence of diplomatic or consular relations, however, either the host State or the sending State may require that all communications with the other be carried on through the Organization and the host State may limit the freedom of movement of the members of the permanent mission on its territory to within fifty miles of the Headquarters of the Organization.

"2. In the case of armed conflict between the host State and the sending State, the status of the permanent mission and the privileges and immunities of the members of the permanent mission shall be unimpaired except that the host State may impose the following limitations for the protection of the permanent mission and its own security:

"(a) That the permanent mission and its members be housed within the Headquarters area of the Organization or, if this is not feasible, within specified areas immediately adjacent to the Headquarters of the Organization;

"(b) That the movement of members of the permanent mission be limited to specified routes in the immediate vicinity of the Headquarters of the Organization;

"(c) That the permanent mission cease using its own wireless transmission facilities;

"(d) That the importation of articles for the personal use of members of the permanent mission be terminated;

"(e) That a neutral member of the Organization be designated to inspect the bag of the mission in the presence of a member of the mission to insure that no prohibited or contraband articles are brought in, and that the bag be brought in at specified places and times;

"(f) That members of the mission who leave its territory may not return;

"(g) That there be no increase in the size of the permanent mission;

"(h) That permanent residents of the host State may not be employed by the permanent mission."

14. In his capacity as a member of the Commission, he himself proposed the following amendment:

"The severance or absence of diplomatic or consular relations between the host State and the sending State shall not affect the rights or obligations of either State under the present articles, even in the case of armed conflict. The establishment or maintenance of a permanent mission by the sending State does not in itself imply recognition by that State of the host State or by the latter State of the sending State, nor does it affect the situation in regard to diplomatic or consular relations between the host State and the sending State."

15. In addition to a few drafting changes designed mainly to clarify the Drafting Committee's text, he had added a reference to the rights of the States concerned in the first sentence. After listening to Mr. Ustor's explanations, he would not press for the omission of the word "modification" from the first sentence. The changes he was proposing applied both to Mr. Kearney's amendment and to the Drafting Committee's text.

16. Mr. KEARNEY, introducing his amendment, said that the problems raised in the new article affected the most fundamental aspects of the relationship between international organizations and member States and between member States *inter se*. An international organization had to exercise its functions without regard to geographical boundaries and its objectives transcended national sovereignty. It must, however, have a specific location and exercise its functions within a particular State, so it could not divorce itself completely from the problems of that State. Obviously, the more the vital interests of the host State were affected by certain aspects of the organization's functioning, the more difficult and complicated was the task of reconciling the interest of the two parties.

17. The proposals before the Commission dealt with the most serious possibility, namely, a conflict between the needs of an international organization and those of the host State. The absence of diplomatic or consular relations between two States did not necessarily indicate the existence of difficulties between them, but in many cases the breaking off of such relations did occur as a result of substantial disagreements. It was usually accompanied by rising tension in public opinion and by hostility, and those factors must be taken into account in devising provisions to cover cases of severance of diplomatic or consular relations.

18. The same type of psychological difficulty might arise when one State refused to recognize either the government or the existence of another State. If such a situation persisted for any length of time, it was almost invariably in consequence of some profound political disagreement. The Commission could not ignore the possibility of such disagreements between the host State and the sending State and was bound to provide for certain limitations in such cases.

19. In dealing with the possibility of armed conflict, the Commission was treading on dangerous ground, because the existence of a state of war between two countries usually resulted in a situation in which States

did not observe the niceties of diplomatic behaviour that were normal in times of peace. The Drafting Committee's text completely ignored all those difficult problems and laid down a general rule that seemed to have little connexion with reality. If the Commission wished the articles to be adequate to ensure the proper functioning of an international organization, it must include a provision dealing with the severance of diplomatic or consular relations and problems of recognition as between the host State and sending States. It should be provided that if either of the States concerned so desired, the organization should act as a channel for communications between them. That was particularly important if there were problems of non-recognition.

20. Provision must also be made for the protection of members of a permanent mission in the event of public opinion becoming so hostile that rioting and attacks on members of the mission might occur. To avoid such dangers, it was only reasonable to limit the freedom of movement of members of permanent missions, and some authors even argued that the movement of diplomatic agents might be restricted. There was an illuminating passage on the subject in Sen's Handbook, which read: "Again, if at a particular time there is a strong public feeling in the country or in any particular area against the home state of the envoy, the receiving state will be well within its rights to advise the envoy not to undertake tours at that time or in the specified places".³

21. In the case of a diplomatic envoy, of course, it was also open to the host State to declare him *persona non grata* if he persisted in disregarding its advice by entering troubled areas, and riots or other difficulties ensued. If it was reasonable to argue that provision might be made for restraints of that character in the case of diplomatic agents, there was all the more justification for proposing similar limitations on travel by members of permanent missions to international organizations, whose reasons for travel would be entirely different. That was particularly true when the diplomatic mission of the sending State had already left because of the severance of diplomatic relations with the host State. A number of writers strongly held that no functional basis could be claimed for the granting of absolute freedom of movement in the host State to members of permanent missions.

22. The provisions adopted by the Commission in article 27⁴ were, on the whole, sensible and represented the practice of host States. That, however, only held true where permanent missions were located in States which adopted a tolerant attitude towards freedom of movement, freedom of expression and the like. At the present juncture, that practice did not really represent customary international law, so that article 27 represented a progressive development of the law. Account must therefore be taken of exceptional cases where diplomatic or consular relations did not exist or where there were problems of non-recognition. The host State must not be placed in the disadvantageous position of

being unable to provide the protection it was required to provide under the terms of the draft articles.

23. In drafting paragraph 2 of his amendment, he had been influenced to some extent by his personal experience during the Second World War, when he had been stationed in areas where the civilian population had suffered heavy bombing. Their reaction had been such that a car flying the emblem of the country responsible for the bombing would not have been received with equanimity, and it seemed completely out of the question to expect that the permanent mission of an enemy State could operate in the territory of the host State with any degree of freedom of movement or of communication with the population.

24. He was not attempting to decry or oppose the theory that, if satisfactory arrangements could be worked out for the protection of the sending State's permanent mission, that mission ought to remain in the territory of the host State. As United Nations experience had demonstrated, that was obviously desirable. Extremely grave problems could be solved through the United Nations, which served as a channel of communication between two belligerent States. The most striking illustration—and there were others—was the Jessup-Malik Agreement, which had put an end to the Berlin blockade, though that was not an instance of a state of war, but of an extremely grave situation. When real hostilities broke out, stringent limitations must be placed on the movements of the permanent mission of the sending State in order to protect both that State and the host State. That was the reason for sub-paragraphs (a) and (b) of paragraph 2 of his text. The other sub-paragraphs were designed to deal with the general problem of espionage. An atomic bomb could be transported in a receptacle the size of a diplomatic bag and a State fighting for its very existence could not be expected to allow even a diplomatic bag to enter its territory from the territory of the other belligerent State without ensuring that the bag did not contain devices or material which might threaten its safety. In sub-paragraph (e) he had suggested that a neutral member of the organization be designated to carry out the inspection. The same procedure would also apply to diplomatic bags leaving the territory. All the sub-paragraphs were mainly designed to safeguard the security of the host State, but also in some measure the security of the permanent mission of the sending State.

25. Since submitting his text, he had realized that an additional clause was needed to enable the host State to require the permanent mission of the sending State not to fly its flag on its premises or display its emblems on its vehicles because of the danger of provoking riots.

26. At that late stage in the Commission's session, there was no time to work out a well-balanced and comprehensive article on the subject and he therefore hoped that the problem could be submitted to Member States for detailed comment. It was undesirable for the Commission to reach even a preliminary decision on the substance of the new article.

27. Mr. CASTRÉN said he was prepared to accept the Chairman's amendment as it did not affect the substance of the Drafting Committee's text and left the legal status

³ B. Sen, *A Diplomat's Handbook of International Law and Practice*, The Hague, 1965, pp. 100 and 101.

⁴ See 1022nd meeting, para. 36.

of the permanent mission and its members unchanged in case of the severance or absence of diplomatic or consular relations or even in case of armed conflict.

28. Though he appreciated the practical reasons and the concern underlying Mr. Kearney's amendment, he thought it went too far. For example, it was unnecessary to restrict the freedom of communication or movement or any other privilege of a permanent mission or its members in the absence of diplomatic or consular relations between the sending State and the host State.

29. In cases of armed conflict the problem was more serious, so the restrictions provided for in paragraph 2, sub-paragraphs (a), (b) and (h) might be accepted, and possibly that in sub-paragraph (e), though it was more debatable because of the abuses to which the interpretation of the notion of contraband had given rise during the two world wars. Sub-paragraph (c) on the other hand, was not acceptable; the permanent mission should be permitted to use its own wireless transmission facilities even during an armed conflict. It was also hard to see why the importation of articles for the personal use of members of the permanent mission should be terminated during a conflict, especially if inspection by a neutral member of the organization was accepted, as provided in sub-paragraph (e).

30. The prohibitions in sub-paragraphs (f) and (g) were the most difficult to accept, since a member of a mission might be called upon to leave the territory of the host State to engage in important negotiations for the re-establishment of normal relations between the belligerents and it might be necessary to increase the size of the permanent mission to enable the sending State to take more effective action in the organization with a view to putting an end to the conflict or obtaining the organization's assistance in overcoming difficulties caused by the conflict.

31. In view of the short time remaining, there seemed to be no possibility of reaching agreement on such complex matters, and it was questionable whether it was really necessary to go into so much detail. He therefore proposed that either the question of armed conflict should be left aside, as had been done in the Vienna Convention on the Law of Treaties, or the phrase "even in case of armed conflict" should be inserted in articles 47 and 48, which the Commission had provisionally adopted.⁵

32. Mr. ROSENNE said he wished to thank the Drafting Committee for the text of the new article it had prepared for the Commission's consideration on the basis of his own tentative suggestion. However, despite Mr. Ustor's explanation, he still had misgivings about the addition of a reference to the "modification" of diplomatic or consular relations, the purpose of which was not clear to him.

33. The reference in general terms to the case of armed conflict was not incompatible with his original suggestion.

34. He had no strong views on the question whether the provision should deal with the problem of recogni-

tion, but would have thought that no express mention was needed.

35. The crux of the matter was dealt with in Mr. Kearney's text, from the third sentence onwards. He doubted whether that text could be properly described as an amendment to the new article submitted by the Drafting Committee, because it went on to deal with an entirely new set of hypotheses. Mr. Kearney had made out a strong case for the approach he had adopted and the Commission should certainly not shirk the issues he had mentioned in his introductory statement and dealt with in paragraph 2 and its sub-paragraphs. The first two sentences of his text were acceptable and indeed were substantially the same as the Drafting Committee's text and that proposed by the Chairman. The remainder of Mr. Kearney's text was acceptable in principle, though he agreed with its author and Mr. Castrén that the subject needed very thorough study and should be approached with great caution by the Commission. Obviously no decision could be reached at that stage, but the General Assembly and Governments should be informed that the Commission had taken that set of problems under advisement; he therefore agreed with the procedure suggested by Mr. Kearney.

36. The Commission might deal with the problems raised either in a new article with three paragraphs or in a separate chapter containing three articles. The first article or paragraph should contain the general proposition set out in the Drafting Committee's text. In the contemporary world, the case which the new article was intended to cover was neither rare nor of minor importance.

37. The second paragraph or article should deal with the whole complex of issues arising out of the absence of diplomatic or consular relations between the host State and the sending State. In the third sentence of his text, Mr. Kearney had mentioned both the question of communications between those States and the separate issue of freedom of movement. There might be other specific matters which ought to be covered in the absence of diplomatic or consular relations or in cases in which the host State did not recognize the sending State. Such matters could arise without there necessarily being an armed conflict.

38. Finally, the third paragraph or article should deal with the question of armed conflict. Mr. Kearney had limited his clauses in paragraph 2 to the case of armed conflict between the host State and a sending State and something on those lines would probably be acceptable. But there might be other kinds of situation requiring careful study.

39. The provisions should also be made applicable to observer missions and delegations to international conferences, and they would probably need to be placed at the end of the draft articles. Before the Commission could make much progress, however, it would have to obtain the views of governments. The issues with which Mr. Kearney had faced the Commission raised in his own mind once again a question which had not been satisfactorily answered when asked at the fifteenth and sixteenth sessions, namely, what the Commission's

⁵ See 1032nd and 1034th meetings.

precise purpose was in dealing with the topic of relations between States and international organizations.

40. Sir Humphrey WALDOCK said that as the end of the session was approaching, he would confine his brief comments to the problem of armed conflict, which had come up in connexion with article 47 because of the existence of a similar provision in article 45 of the Vienna Convention on Diplomatic Relations.⁶ Obviously, the principle that every proper facility should be given to diplomats to leave a country on the outbreak of war between it and the country they represented was essential and the same rule should apply to members of a permanent mission to an international organization should the need arise for them to leave. But the position of members of permanent missions to international organizations was, of course, different from that of diplomatic agents. The outbreak of war involved a whole series of possibilities. A sending State or the host State might be the aggressor and it was necessary to consider how that would affect the position of permanent missions. It was also possible that the nature of the hostilities might make the position of the organization itself untenable. Armed conflict could take many forms, ranging from full-scale war to conflicts which could be kept within manageable proportions through United Nations action, for example.

41. It was extremely difficult to lay down detailed rules in draft articles of the kind under consideration and it was certainly impossible to devise a provision in the limited time available. The Commission should therefore reserve the whole question; but it should explain its reasons for not including a provision on the lines of article 45 of the Vienna Convention on Diplomatic Relations, for States would inevitably notice the omission. The problems involved were even more complex than appeared from Mr. Kearney's detailed proposal.

42. The CHAIRMAN, speaking as a member of the Commission, said that the first two sentences of paragraph 1 of Mr. Kearney's amendment were practically the same as the Drafting Committee's text and he was prepared to accept them subject to the changes he himself had proposed. However, in order to remove any ambiguity, it would be better to say "diplomatic and consular relations" rather than "diplomatic or consular relations".

43. With regard to the third sentence, the organization, which might be called upon to assist in settling the conflict, was not the appropriate body to serve as an intermediary, and it would be more correct to provide, as in article 45, sub-paragraph (c) of the Vienna Convention on Diplomatic Relations, that the States in conflict would communicate through a third State. Further, the limits which the host State could impose on the freedom of movement of the members of a permanent mission in its territory should not be specified, since that was a matter for the host State alone. The last part of the sentence, following the word "territory", should therefore be deleted.

44. Paragraph 2 was a statement of United States

practice rather than a rule for general application and the many details it contained were out of place in a convention of general scope. Moreover, the prohibition in sub-paragraph (c) was covered by article 28, paragraph 1,⁷ which the Commission had already adopted.

45. Speaking as Chairman, he suggested that the Commission should adopt a new article worded on the lines of the text proposed by the Drafting Committee and should explain in the commentary that one member of the Commission had proposed that the article be amplified by the addition of a third sentence and a second paragraph, for which it would quote the wording proposed by Mr. Kearney.

46. Mr. AGO said that the Chairman's amendment considerably improved the drafting of the article, but all the substantive questions were not settled.

47. He still thought that in case of severance of diplomatic or consular relations, and even more so in that of armed conflict, a permanent mission should not be withdrawn; but neither could its situation remain absolutely unchanged. The Drafting Committee's text went too far in providing that the severance of diplomatic or consular relations did not affect the obligations of the host State and the sending State in any way.

48. Although he did not wholly endorse Mr. Kearney's proposal, he thought it should be taken into account. However, it covered a great variety of matters and the Commission would not have time to examine them all. The reference to armed conflict might be omitted, and the Commission might explain that it had discussed that question without coming to any decision.

49. With regard to the severance of diplomatic or consular relations, he proposed that, in view of the diversity of the situations which might arise, the Commission should defer consideration of that subject until the following year.

50. Mr. TSURUOKA said he agreed with Mr. Ago. The problem was too serious to admit of a hasty solution. It was quite right to try to safeguard the freedom of representatives to international organizations to perform their functions, but it should not be forgotten that in the event of armed conflict the national defence of host States was of vital importance. In general, the Commission had tried to equate the position of representatives of States to international organizations with that of diplomatic agents, but, in that particular instance, representatives to international organizations would be in the more favourable position.

51. Like several previous speakers, he thought the Commission should mention the matter in its report or in its commentary and say that it had not found time to come to a decision on so serious a problem; that would probably induce governments to make studies.

52. Mr. YASSEEN thought that the article embraced too many different problems, including, as it did, the severance of diplomatic or consular relations, the non-recognition of a government and the case of armed conflict.

⁶ United Nations, *Treaty Series*, vol. 500, p. 122.

⁷ See 1017th meeting, paras. 52 and 70.

53. It was clear that the severance of diplomatic or consular relations should not affect the rights and obligations laid down in the draft. The absence of diplomatic relations, which was sometimes due to non-recognition of a government, had been little discussed by legal writers or illustrated by practice, so that it would be difficult to draft rules on the subject.

54. The case of armed conflict had also been almost entirely neglected by writers and the Commission itself had reserved its position on the matter more than once. It had taken that line, for example, during the preparation of the Convention on the Law of Treaties. Consequently, the effects of an armed conflict between the host State and one of the sending States should be examined in detail, and it would take a long time to formulate them.

55. It might be said that an armed conflict should not deprive the sending State of its mission or of everything the mission needed for performing its functions, but the privileges and immunities provided for in the draft articles were certainly not all based on the notion of function. In the case of armed conflict, therefore, certain restrictions might be accepted in the interests of the host State.

56. Mr. RUDA said he fully supported Mr. Ago's suggestion that no decision should be taken at the present stage and that the problems involved should simply be listed in the commentary.

57. The new article raised three different types of problem and, when the time came, it would be more appropriate to deal with them in three separate articles. The first article would state that the establishment or maintenance of a permanent mission did not imply recognition. The second would state the rule that the severance or absence of diplomatic or consular relations between the host State and the sending State did not affect the rights and obligations of either State under the draft articles. The third article would deal with the problem of armed conflict.

58. In the third article, it would be necessary to draw a distinction between two types of conflict: a conflict between a sending State and the host State, and a conflict between a member State and the organization resulting from measures of coercion taken against that State. The two situations were different and raised very delicate problems in regard to which it would be extremely difficult to strike a balance between the interests of the host State, the sending State and the organization.

59. When the time came to draft an article on the subject of armed conflict, he would himself favour a general formula rather than an attempt to deal with specific points as in Mr. Kearney's proposal. The method followed in that proposal raised a number of problems. For example, the limitation imposed in paragraph 2 (b) was already covered by the provisions of article 27 and that in paragraph 2 (c) by the last sentence of paragraph 1 of article 28; in addition, the measure provided for in paragraph 2 (d) could be applied in the same way as that in paragraph 2 (e).

60. Mr. USTOR said that, despite the differences of opinion on a number of issues, the Commission agreed

on the general rule that the host State had a duty to make it possible for the organization to function, even in the exceptional circumstances mentioned in the new article. The host State was under a duty not to impede the sending State from participating in the work of the organization, even in those grave circumstances. That participation was necessary in the interests of the world community and served the cause of peace.

61. Opinions in the Commission differed only on the detailed arrangements to be made in the exceptional circumstances in question, especially in the event of armed conflict. He thought that in such cases negotiations would take place, as provided for in article 49. The Commission could therefore adopt a positive approach to the whole question and state the general rule, rather than adopting a negative approach and specifying the kind of restrictions which could be legitimately imposed by the host State.

62. Mr. REUTER said he supported the Chairman's proposal.

63. All the members of the Commission seemed to agree that the severance of diplomatic or consular relations should not in itself affect the rights and obligations of the host State and the sending State. But the severance of relations always implied some other situation which might justify certain steps. Armed conflict was not the only one; there were also states of tension, for example.

64. With regard to the notion of armed conflict, the views expressed by Mr. Kearney might perhaps reflect the experience of a United States citizen. He himself was, of course, a Frenchman, but what he said did not necessarily reflect the point of view of his Government. He would like that statement to be included in the record.

65. The Commission should consider the problems involved at length. For instance, some armed conflicts were localized and bilateral, so that their consequences were not nearly so grave as those of major conflicts without recourse to arms. International organizations usually established their headquarters in countries which, in normal circumstances, were liberal in various respects; but when circumstances became abnormal, the organization suffered directly.

66. For those reasons, he was in favour of deferring consideration of the subject until the following year; meanwhile he would inform the French Government of the discussion.

67. Sir Humphrey WALDOCK said he was inclined to agree with Mr. Ago that the whole problem was very complex and that consideration of it should be deferred until a later stage, when the Commission would have the benefit of the Special Rapporteur's views.

68. Mr. CASTAÑEDA said that where armed conflict was concerned it would be very difficult to formulate a general rule, because of the variety of cases which arose in practice. It might perhaps be best to adopt the course which had been followed in other drafts of the Commission and include an article simply stating that the draft related only to the law of peace and did not deal with the problem of armed conflict.

69. It would, however, be unfortunate if the Commission's work was to end in a mere statement that the subject had been discussed. He suggested that, without taking any decision on the substance, the Commission should include in the commentary an outline of the various proposals it had discussed.

70. With regard to the problems of relations and recognition, he agreed that, in view of the complexity of the situations involved, the Commission should postpone a decision until the following session. The rules in the matter were well expressed in the text proposed by the Chairman and he would himself see no objection to their provisional approval. Final adoption, however, would have to await further consideration, for which the Commission should have the benefit of the Special Rapporteur's views.

71. The CHAIRMAN, summing up the discussion, noted that the Commission considered it advisable not to mention armed conflict for the time being, and to reserve that subject for later examination. Nearly all the members were in favour of the wording of the second sentence of his own proposal. That sentence could form a separate article, as Mr. Ruda had proposed.

72. The Commission might adopt the article provisionally in order to draw the attention of governments to the subject and to show that it had been considered. It could be stated in the commentary that the Commission had discussed the case of armed conflict but had not yet taken a final decision on it.

73. Mr. BARTOŠ said he was opposed to the Commission's taking a provisional decision on a question of general international law of such wide scope. He wished that statement to be included in the record. To illustrate his point, he referred to the problems raised in practice by the recognition of régimes such as those of China and Spain.

74. The subject dealt with in the new article should not be dropped, for it affected the interests of the whole international community, of international organizations and of individual States. The Special Rapporteur should be asked to consider it in detail and governments should be invited to comment.

75. Mr. AGO said he thought the only matter the Commission could agree on was recognition, as treated in the second sentence of the Chairman's proposal. But he doubted whether that provision exhausted the whole question. Should it not first be stated that the host State must not invoke non-recognition to prevent the establishment or maintenance of a permanent mission?

76. With regard to the severance of diplomatic or consular relations, he stressed that armed conflict was always a possibility and could not be excluded. But there were many different situations in which armed conflict might occur.

77. He proposed that the Commission should refrain not only from taking any decision on the question dealt with in the new article, but also from asking governments for their views on the matter, since it was not in a position to suggest a solution.

78. The CHAIRMAN asked whether the new article should be given a title and whether the Commission's position should be set out in the commentary or elsewhere.

79. Sir Humphrey WALDOCK said that the best course would be to deal with the matter in the introduction to the group of articles on privileges and immunities.⁸ It was the Commission's practice to preface each important group of articles with introductory comments and that would be the most suitable place to discuss the issues raised by the proposed new article.

80. A cross-reference to article 47, which had given rise to the whole discussion and had led to the introduction of the proposed new article would have to be inserted in the commentary. There was a marked difference between the text of article 47 as adopted by the Commission and the text of the corresponding article 44 of the 1961 Vienna Convention on Diplomatic Relations,⁹ which did refer to the case of armed conflict. Governments would not fail to note the difference and the Commission should, at that point, indicate that the introduction to the whole section contained a statement on the Commission's discussions on the subject.

81. Mr. RUDA said he wished to make it clear that he fully supported Mr. Ago's proposal that all three problems should be deferred until the following session. He had not proposed that any decision, even a provisional one, should be taken at the present stage.

82. As to the place at which the problem should be mentioned, he agreed with Sir Humphrey Waldock.

83. Mr. USTOR said that the best place for the explanation would be at the beginning of the section on facilities, privileges and immunities. The Commission would explain, at that point, that in bilateral diplomacy the severance resulting from armed conflict or from the rupture of diplomatic relations was complete, so that no problem of privileges and immunities arose, but that in the present draft a special problem arose because the organization must continue despite the conflict or breach between the host State and one of the member States of the organization.

84. Mr. YASSEEN said that the subjects under discussion might perhaps require new articles and the Commission could give the necessary explanations in the introduction to the section on facilities, privileges and immunities. Mr. Ago might be asked to transmit a draft to the Secretariat.

85. The CHAIRMAN suggested that the Commission should not adopt the new article, but should explain its position in the introduction to the section on facilities, privileges and immunities. It might ask Mr. Ago, Mr. Reuter and Sir Humphrey Waldock to prepare a draft for the Secretariat.¹⁰

It was so agreed.

⁸ Articles 22-43.

⁹ United Nations, *Treaty Series*, vol. 500, p. 122.

¹⁰ See 1038th meeting, para. 42.

ARTICLE 47 (Facilities for departure).¹¹

86. The CHAIRMAN reminded the Commission that it had deferred a final decision on the text of article 47, in particular on the expression "in case of emergency", pending its decision on the wording of the new article. He suggested that the Commission should now finally adopt article 47 and give the necessary explanations of the notion of "emergency" in the introduction to the section on facilities, privileges and immunities.

It was so decided.

87. Mr. BARTOŠ and Mr. YASSEEN said that they had not participated in that decision.

ARTICLE 48 (Protection of premises and archives)¹²

88. The CHAIRMAN reminded the Commission that article 48 had only been adopted provisionally. Though it contained no reference to emergency, he suggested that it be stated in the commentary that the Commission had reserved its position on the cases mentioned in the relevant paragraph of the introduction to the section on facilities, privileges and immunities.

89. In the English version of paragraph 1 of article 48 the word "finally" should be substituted for the word "definitely", to bring the text into conformity with article 46.¹³

90. The wording proposed by the Special Rapporteur for the second sentence of paragraph 1 (A/CN.4/218/Add.1) had been amended, and a consequential amendment to paragraph 2 was needed to show that it was at the request of the sending State that the host State must grant the latter facilities for removing the property and archives of the permanent mission.

91. After an exchange of views, he suggested that paragraph 2 be amended to read: "The host State, if requested by the sending State, shall grant the latter facilities for removing the property and archives of the permanent mission from the territory of the host State."

It was so agreed.

Article 48, thus amended, was adopted

The meeting rose at 6.40 p.m.

¹¹ For previous discussion and text, see 1032nd meeting, paras. 13-25.

¹² For previous discussion and text, see previous meeting, paras. 48-91.

¹³ See previous meeting, paras. 8-10 and 47.

1036th MEETING

Tuesday, 5 August 1969, at 10 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: M. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 41 (Duration of privileges and immunities)

1. The CHAIRMAN said he thought the Commission ought to reconsider the text of article 41, paragraph 2, which it had already adopted.¹ The wording of the first part of the first sentence was perhaps not entirely satisfactory, the last part of it did not specify who was to grant the reasonable period for leaving the country, and there was a reference at the end to the case of armed conflict. Since the Commission did not have time to discuss paragraph 2 again, he suggested that Mr. Ago, with the help of perhaps two other members, be asked to prepare better wording.

*It was so agreed.*²

State Responsibility

(A/CN.4/208; A/CN.4/209; A/CN.4/217)

[Item 3 of the agenda]

(resumed from the 1013th meeting)

2. The CHAIRMAN invited the Commission to resume consideration of the topic of State responsibility.

3. Mr. ROSENNE said that, as he had been absent when the Commission had last discussed that topic, he now wished to congratulate the Special Rapporteur on his extremely useful review of past work and to thank him for assembling a large quantity of relevant documentation in the annexes. He understood that some difficulties had arisen in the production of the annexes, as a result of which some parts of them had appeared in a language which was not one of the official languages of the United Nations — a fact which had considerably inconvenienced him in his examination of the documents. He urged the Commission to assert its authority and insist that its documents should be submitted to it in the form considered appropriate by the Special Rapporteur concerned, not by those responsible for the physical production of documents.

4. He concurred in the general view that the Commission should ask the Special Rapporteur to continue his work in the manner he proposed.³ That would be in accordance with the decision which the Commission had taken in 1963, in the light of the detailed examination of the topic made by its Sub-Committee on State Responsibility presided over by Mr. Ago,⁴ and had confirmed at its nineteenth session in 1967.⁵

¹ See 1023rd meeting, paras. 54 and 60.

² For resumption of the discussion, see 1038th meeting, para. 6.

³ See 1011th, 1012th and 1013th meetings.

⁴ See *Yearbook of the International Law Commission, 1963*, vol. II, p. 224, paras. 52-55.

⁵ Op. cit., 1967, vol. II, p. 368, para. 42.

5. The consistency with which the Special Rapporteur had expressed his views on the general approach to the problem gave the Commission an assurance that he would not lead it on a collision course with the obstacles which had prevented the success of the 1930 Codification Conference at The Hague and which largely explained the Commission's own lack of success when it had considered the topic of State responsibility in the 1950's

6. He understood the Special Rapporteur's general objective to be the preparation of a set of terse draft articles on State responsibility as such, the existence of the substantive rules of law the violation of which gave rise to responsibility being more or less assumed. It was the objectively established violation of such a rule which constituted a ground for State responsibility as that term was understood in international law. That point had been emphasized in the Special Rapporteur's 1967 note⁶ and was reaffirmed in his present report (A/CN.4/217, para. 90). At the same time, careful attention must be paid to the possible repercussions on State responsibility of recent developments in international law.

7. In order to prevent the Commission's future work on the topic from becoming too abstract, however, it would be useful if the general rules of State responsibility, as ascertained by the Special Rapporteur, could be tested against a suitable branch of international law, say, the general law of treaties. Apart from the discussion which had led to article 73 of the Vienna Convention on the Law of Treaties,⁷ the Commission's work on the law of treaties had impinged on the topic of State responsibility on several occasions, and in dealing with a number of subjects it had found that any further exploration would lead it to encroach on that topic. An obvious example was the case of breach of a treaty. There were other less obvious examples, such as the case envisaged in article 30 of the Vienna Convention on the Law of Treaties, concerning the application of successive treaties relating to the same subject-matter.⁸

8. Lastly, he noted that the title of the topic was and remained "State responsibility" and he entirely agreed that the Commission was not concerned with questions of responsibility of, or towards, entities other than States.

9. Sir Humphrey WALDOCK said that he, too, had been absent when the Commission had discussed the topic of State responsibility, and he wished to say that he was in full agreement with the Special Rapporteur's approach, which was in conformity with that contemplated by the Commission's 1963 Sub-Committee on State Responsibility and endorsed by the Commission itself on a number of occasions. The Special Rapporteur was quite right in suggesting that the Commission should deal with State responsibility as such, in order to see what principles could be stated as principles of law in the matter.

⁶ *Ibid.*, p. 326, para. 4.

⁷ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, document A/CONF.39/27.

⁸ *Ibid.*

10. The Commission must take care not to be diverted into the study of the substantive rules of particular branches of international law. A warning on that point was given by the Secretariat paper entitled "Proposals submitted to, and decisions of, various United Nations organs, relating to the question of State responsibility" (A/CN.4/209). An examination of that paper showed that a great many of the matters discussed by the Commission in connexion with State responsibility earlier in the present session had been on the agenda of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States or on that of some other United Nations body.

11. The task of ascertaining the law of State responsibility proper, could not, of course, be undertaken in a complete vacuum. All the judicial precedents and State practice on the topic were connected with the application of substantive rules of law the violation of which had given rise to State responsibility. Nevertheless, the Special Rapporteur had acted wisely in deciding to confine his attention to State responsibility as such. With that approach, the Commission could hope to produce a valuable piece of work.

12. He associated himself with the tributes paid to the Special Rapporteur for his most useful report, which gave a lucid and precise account of the past work on the codification of the topic.

13. Mr. REUTER said he had not been present during the Commission's earlier discussion of Mr. Ago's report and wished to congratulate him on his excellent study. He approved of the course of action recommended by the Special Rapporteur.

14. Mr. BARTOŠ paid a tribute to Mr. Ago and said he agreed with his approach to the topic. State responsibility had been on the Commission's agenda for a long time; he was glad to note that Mr. Ago would probably be submitting a full report the following year.

15. Mr. AGO thanked the members of the Commission for their kind words and for their support.

16. Mr. Tammes had very clearly distinguished between the "vertical" and the "horizontal" method,⁹ both of which might be used in studying State responsibility. The "vertical" method consisted, first, in defining, by reference to customary law or treaty law, the general rules applicable in a particular field, in the present case State responsibility. It was those primary rules which established the basic obligations of States. The next step was to determine the cases in which the primary rules were broken, and the last step, to state the consequences of such breaches.

17. In the "horizontal" method, it was assumed that the rules existed, and one tried to find the common features of breaches, irrespective of the field in which they occurred. In other words, the aim was to determine the circumstances in which a breach was imputed to a State, or conversely, a State was relieved of responsibility. The next step was to establish the consequences of the wrongful act for the State which committed the

⁹ See 1012th meeting, para. 3.

breach. At that stage it might be necessary to refer to the primary rules.

18. All the members of the Commission seemed to agree that it was only by the "horizontal" method that the topic of State responsibility could be really codified. The adoption of that approach left open the question whether it was advisable to codify certain primary rules. The question of the rights of aliens, to which Mr. Castañeda had drawn attention,¹⁰ would thus be only provisionally excluded because it did not come within the framework of the codification of State responsibility. That was also true of many other problems which had been mentioned during the discussion, in particular the state of necessity, the abuse of rights and the exhaustion of local remedies.

19. Some writers had carried that distinction very far, which might lead to abstract results. And since the topic of the international responsibility of States was very concrete and contemporary, it should not be "sterilized".

20. The members of the Commission seemed to be unanimous in recognizing the need first to establish the basic conditions of State responsibility and then to determine its consequences. A twofold distinction then had to be made, relating, first, to the importance of the obligation violated and, secondly, to the gravity of the violation. The consequences of a wrongful act certainly depended on the nature of the obligation violated. Similarly, there could be different degrees of gravity in the violation itself, irrespective of the importance of the obligation violated, and there again the consequences would not be the same. In that case, it would be necessary to go back to the primary rules and, without defining them precisely, to classify them according to the consequences of their breach. The violation of some obligations entailed only the duty to make reparation, whereas the violation of others also entailed a sanction.

21. Further, as the Chairman had observed, a State whose subjective rights had been infringed might be incapable of imposing a sanction. Relations involving responsibility were established solely between the State committing the infringement and the State suffering the injury; but, even so, the infringement might be so serious as to concern the international community as a whole and to lead to the imposition of collective sanctions applied through international organizations, or to what had been called *actio publica*, which was action instituted by a State other than the injured State with a view to the adoption of measures against the infringement.

22. The question whether the notion of criminal responsibility should be included in a study on State responsibility was essentially a matter of terminology. In the case of a serious violation the possible sanction was certainly of a penal character, so that it would then be possible to speak of the criminal responsibility of a State. But that was not the usual sense in which criminal responsibility was understood.

23. Some members of the Commission had stressed the importance of responsibility for risk, but he doubted

whether it was advisable to deal with that question at the moment. When the "horizontal" method was adopted, the starting point was the idea of non-fulfilment of an international obligation. But in the case of responsibility for risk, the idea of non-fulfilment was absent; what was really involved was a primary obligation to make reparation. In a particular field, a customary rule might emerge, under which certain activities were prohibited and constituted a violation of an international obligation; that would be a case of international responsibility within the scope of the subject under consideration.

24. Mr. Kearney had recommended that an article be drafted on procedure for the settlement of disputes.¹¹ If the Commission was to codify primary rules, a provision of that kind would certainly have to be drafted, but the "horizontal" method assumed that a dispute already existed. The origin of the dispute was the breach of a primary rule, rather than the breach of any particular rules relating to responsibility. Where a treaty obligation was violated, it was the method of settlement provided for in the treaty that should apply. Disputes might arise about the application of a particular rule of responsibility, but that was something the Commission would have to consider at a later stage.

25. The question of responsibility for the acts of entities other than States, mentioned by Mr. Rosenne, would also have to be examined later.

26. In conclusion, he welcomed the unity of the views expressed by members of the Commission. He suggested that, in its report to the General Assembly, the Commission should state that it had been unable to devote sufficient time to the topic of State responsibility, but that it had nevertheless made some progress and hoped to be able to submit a set of draft articles the following year.

27. The CHAIRMAN congratulated the Special Rapporteur on behalf of the Commission. His detailed and useful report had made it possible to delimit the topic satisfactorily.

28. The Commission's report to the General Assembly might state that Mr. Ago's study had enabled the Commission to examine certain essential problems. He suggested that the Secretariat be instructed to draft something to that effect.

29. Mr. EUSTATHIADES, speaking as General Rapporteur, said he agreed with the Chairman that the report should state that Mr. Ago's excellent study had enabled the Commission to tackle the main issues and to provide the Special Rapporteur with a programme for his future work.

30. Like Mr. Ago, he thought that neither responsibility for risk nor the consequences of such responsibility were urgent problems. It was for the Special Rapporteur to decide when they should be examined.

31. Mr. ROSENNE said that the Commission's debates on State responsibility at the present session

¹⁰ See 1013th meeting, paras. 19-27.

¹¹ See 1012th meeting, paras. 25-26.

had been much more important than might appear from the number of meetings devoted to the topic. He suggested that the passage on State responsibility to be included in the Commission's report should, if possible, be fairly detailed. In particular, it might contain a historical introduction based on the note submitted to the Commission by the Special Rapporteur in 1967.

32. The CHAIRMAN said that the Special Rapporteur himself would draft that part of the Commission's report and would try to reproduce the sense of the discussion in it, but the Commission's decision would be drafted by the General Rapporteur, with the assistance of the Secretariat.

Most-favoured-nation clause

(A/CN.4/213)

[Item 4 of the agenda]

33. The CHAIRMAN invited the Special Rapporteur to introduce his first report on the most-favoured-nation clause (A/CN.4/213).

34. Mr. USTOR (Special Rapporteur) said that he had considered asking the Chairman to postpone the examination of his first report until the twenty-second session, because the Commission had so little time left at its disposal. The Chairman had, however, decided otherwise and, as Special Rapporteur, he would certainly find members' comments illuminating.

35. The report was an unpretentious piece of work on a subject which was a minor one compared to that of State responsibility, but he had nevertheless found it necessary to peruse a great deal of material. The most-favoured-nation clause raised complex problems, many of which were of an economic nature. After he had thoroughly examined those problems, he expected to prepare about twelve draft articles for consideration by the Commission. He had tried to introduce the subject by dealing with the historical background up to the end of the Second World War, and had not yet covered the period since 1945.

36. In writing his report, he had been guided by the decision taken by the Commission at its twentieth session, as set out in the last three sentences of paragraph 93 of its report to the General Assembly,¹² and by the plan of work outlined in the working paper he himself had submitted at that session.¹³

37. The purpose of his first report was to set the subject in perspective, examine the authorities, assess earlier attempts at codification and provide a bibliography.

38. Chapter I contained a short history of the most-favoured-nation clause with reference to international trade. Its links with commercial treaties were much closer and more significant than those with treaties pertaining to other subjects. Many establishment and

consular treaties did not contain a most-favoured-nation clause, but such a clause appeared in most commercial treaties. The part played by the clause and the whole question of discrimination in international trade was an essential aspect of the topic. He had tried, however, and would continue to try, not to restrict himself to its application in the context of international trade.

39. Sections 11, 12 and 13 of chapter I dealt with certain other matters. In section 11, he had briefly described the practice of the USSR during the early years of its existence. That practice showed that although the application of the clause had largely developed under the capitalist system, it had also been used by the first socialist State and subsequently by others adopting the same economic system. Section 12 was mostly derived from Mr. Zourek's examination of the problem during the Commission's work on codification of the rules on consular relations.¹⁴ In section 13 he had examined the practice of the Permanent Court of International Justice, but there was relatively little material that was germane to the subject.

40. Chapter II contained an account of earlier attempts at codification, in which the League of Nations had played an important part, particularly through the work of its Committee of Experts for the Progressive Codification of International Law, which had prepared an interesting study on the topic, and through the Economic Committee of the League Assembly, as well as other bodies which had approached the matter from the economic angle. The latter bodies had concentrated on trade policy and on the role which the most-favoured-nation clause could play in it.

41. The material reproduced in the annexes showed that many of the questions raised by the most-favoured-nation clause had already been considered at the time of the League of Nations.

42. The Institute of International Law had examined the effects of the clause in matters of commerce and navigation and in 1936 had adopted a resolution on the topic, which was reproduced in annex II. The Institute had taken up the topic again in 1967 and had appointed Mr. Pierre Pescatore rapporteur. Mr. Pescatore had drafted a fairly long report, which was before the Institute and might have a bearing on the Commission's own work. He himself had made use of such material by virtue of the provision contained in article 16, sub-paragraph (e), of the Commission's Statute concerning consultation with scientific institutions.

43. At its twentieth session, the Commission had accepted his suggestion that certain specialized agencies and other organizations should be consulted regarding their practice,¹⁵ and the Legal Counsel had communicated with them in January 1969. While most of them had already replied, some had not yet done so. GATT, for example, wished to submit a detailed reply, which would take some time to prepare. The answers of the other agencies had not provided a great deal of material,

¹² See *Yearbook of the International Law Commission, 1968*, vol. II.

¹³ *Ibid.*, document A/CN.4/L.127.

¹⁴ *Op. cit.*, 1960, vol. II, pp. 19-26.

¹⁵ *Op. cit.*, 1968, vol. II, Report of the Commission to the General Assembly, chapter IV, para. 94.

with the exception of those from UNCTAD and the Economic Commission for Europe, both of which had given a very full description of their work concerning the operation of the clause.

44. As he had said in paragraph 9 of the introduction to his first report, he hoped to complete it by a second, which would contain an account of the three relevant cases heard by the International Court of Justice, namely, the *Anglo-Iranian Oil Company* case (*jurisdiction*);¹⁶ the *Case concerning rights of nationals of the United States of America in Morocco*¹⁷ and the *Ambatielos* case (*merits: obligation to arbitrate*).¹⁸ The pleadings and the Court's judgments contained the *sedes materiae* of the rules for the most-favoured-nation clause.

45. He hoped that the material he would present in his second report, together with that in the first, could provide a basis for preparing a series of draft articles stating the generally accepted rules on the operation of the clause.

46. Mr. KEARNEY said that the Special Rapporteur's first report, though mainly historical, was extremely valuable; it contained, in a relatively small compass, a thorough and learned examination of the genesis of the most-favoured-nation clause and its ramifications up to the Second World War. The material assembled on the period between the two World Wars provided a searching bird's-eye view of the operation of the clause. During that period, however, its operation had been greatly affected by the world-wide economic depression of the thirties and the national measures taken to minimize its effects, and that factor might have had a somewhat distorting effect, as the Special Rapporteur had pointed out. Thus, owing to the special economic conditions which had prevailed, the history of that period did not provide a set of precedents which could be of conclusive value for the Commission's study, and its policy regarding future work on the topic should consequently not be discussed at that stage. The Special Rapporteur's second report, which was to contain an account of developments since the Second World War, would provide the necessary basic information for that purpose.

47. Mr. ROSENNE paid a tribute to the Special Rapporteur's very useful report and said he was particularly grateful for the selected bibliography in annex III.

48. He would be interested to know why the title had been changed to "The most-favoured-nation clause" when the General Assembly, in its resolution 2272 (XXII), had endorsed the Commission's decision to place on its programme the topic of "Most-favoured-nation clauses in the law of treaties". The Commission's own decision at its nineteenth session¹⁹ indicated that it had intended to deal with the clause in the general context of the law of treaties, a view which was

confirmed by the discussions at its sixteenth and eighteenth sessions on how the clause should be handled in the draft articles on the law of treaties.

49. At the second session of the Vienna Conference on the Law of Treaties, the delegations of Hungary and the Soviet Union had jointly submitted, at the fourteenth plenary meeting, an amendment to article 32, proposing the insertion of the following new paragraph after paragraph 1: "The provisions of paragraph 1 shall not affect the rights of States which enjoy most-favoured-nation treatment". Later, at the same meeting, those two delegations had agreed not to press their amendment to a vote, on the understanding that article 32 would be interpreted in the manner described by the Soviet Union representative at that meeting.

50. Owing to the lack of time, the Special Rapporteur would not be able to answer the question whether the most-favoured-nation clause was an institution of international law in its own right or an element in a particular branch of law, such as the law of treaties.

51. He had been struck by Mr. Wickersham's conclusions regarding the effects of violations of the clause, as set out in the report submitted to the League of Nations Committee of Experts for the Progressive Codification of International Law (A/CN.4/213, paras. 90-92). It would be useful if, in due course, the Special Rapporteur could consider whether any new practices had developed that raised obstacles to the free operation of the clause.

52. The Special Rapporteur should be requested to continue his work in the manner outlined in paragraph 9 of his first report, taking into account the separate and dissenting opinions delivered in the International Court of Justice in the three cases mentioned. He hoped that the material obtained from the organizations and agencies consulted would be made available to the Commission.

53. Mr. REUTER congratulated the Special Rapporteur on the excellent report he had submitted to the Commission. He had been quite right in deciding to begin his study with a historical review of the subject, which provided a solid basis for the Commission's work. The second report would give a clearer idea of the direction which that work should take, for though there could be no doubt that its source was the law of treaties, the Commission did not yet know exactly what it would lead to.

54. All that could be done at the present stage was to consider what action should be taken. One of the first questions that arose was whether most-favoured-nation clauses should be distinguished according to what they related to. What struck one straight away was that such clauses had hitherto related mainly to economic matters and that there were wide differences between them, according to whether they concerned trade—Customs questions, movement of persons—treatment of aliens, right of establishment, or movement of capital—financial treaties, especially those concerning taxation and the unrestricted transfer of capital. But it was necessary to consider whether the clause could operate in non-economic matters. One example was

¹⁶ *I.C.J. Reports*, 1952, p. 93.

¹⁷ *Ibid.*, p. 176.

¹⁸ *Op. cit.*, 1953, p. 10.

¹⁹ See *Yearbook of the International Law Commission*, 1967, vol. II, p. 369, para. 48.

provided by consular treaties, which had their origin in trade, but went much further. It would be interesting to know whether such clauses existed outside consular relations and whether they were conceivable in such matters as assistance, which was still within the economic sphere but touched on politics, or in purely political fields. Even from the political point of view, the generalization of a system of international security could conceivably be effected by the generalization of bilateral treaties containing most-favoured-nation clauses. It was also conceivable that the clause might be applied in new areas or at least might come into general use in areas where it had seldom been applied.

55. Another approach to the problem would be to consider differences in the operation of the clause, according to whether it was applied between countries at the same or at different levels of economic development, between countries with similar or different general systems, or on a universal or a regional basis.

56. Even if those concrete ideas were taken as the starting point, it remained to be seen what the outcome of the Commission's work would be from the legal point of view. The Commission might be led to deal either with the technique of treaties in the strict sense or with the general problem of discrimination, and in his view the most-favoured-nation clause was very closely linked with the latter problem, even in non-economic areas. The Commission might perhaps also be led to formulate certain conclusions about the mechanism of the clause, according to whether it was applied within international organizations or outside them. In that connexion, it would have to bear in mind that each international organization, taken separately, had its own political and economic philosophy and its own conception of the most-favoured-nation clause, which, though very interesting in itself, was only valid for that organization.

57. Another legal point to be taken into consideration was that the most-favoured-nation clause was a factor making for uniformity of treatment, and hence for justice, but also for injustice, and that it consequently brought with it other devices known as "saving clauses". Perhaps the Commission ought later to study some of the more general problems raised by the operation of saving clauses in the constituent instruments of international organizations or in bilateral agreements.

58. Mr. CASTRÉN said he associated himself with the congratulations addressed to the Special Rapporteur on the excellent report he had submitted. The Special Rapporteur had been right to devote particular attention to the attempts at codification made at the time of the League of Nations, in view of the important part the League had played in that work. He fully approved of the Special Rapporteur's plan of work and agreed with him that once the Commission had before it the additional material that was to be embodied in his second report, it would be able to start formulating the modern rules of international law governing the most-favoured-nation clause.

59. Sir Humphrey WALDOCK thanked the Special Rapporteur for an outstanding piece of work, which

was obviously based on very careful research and gave great promise for the next report on the topic.

60. After hearing the illuminating comments of Mr. Rosenne and Mr. Reuter, he wished only to recall that there was a certain point of contact between the topic under consideration and State succession in respect of treaties. He and Mr. Ustor would consult together in regard to any overlap between State succession and the most-favoured-nation clause.

61. Mr. RUDA said that the Special Rapporteur had produced a very complete and useful first report, which not only contained a great deal of information, but was also well written and contained a lucid exposition of the issues involved which was particularly helpful to members who were not experts on the subject. He looked forward to the second report, which was to contain the material supplied by the organizations and agencies consulted, and an account of the three relevant cases heard by the International Court of Justice. When the final version of the report was issued, perhaps the bibliography in annex III could be put into alphabetical order by the Secretariat.

62. The CHAIRMAN, speaking as a member of the Commission, warmly congratulated the Special Rapporteur on his report, which would be very useful to all those who had not made a special study of the subject and which brought out its importance and complexity and its ramifications outside the purely legal sphere. He particularly thanked the Special Rapporteur for mentioning the position taken on the most-favoured-nation clause by the young Soviet Republic.

63. It was still too early for the Commission to be able to decide whether the questions raised by the topic under consideration belonged to the law of treaties or to the much wider field of contemporary international law, and whether the problems of discrimination and the application of the clause should be treated together or separately. The situation would be clearer when the Special Rapporteur had completed his second report and a first draft of articles.

64. Mr. AGO said that, being unfamiliar with the subject of the Special Rapporteur's report, he had found it most instructive; he welcomed the fact that the Commission was developing the practice of reviewing the history of a topic before beginning to examine its substance. As the most-favoured-nation clause had hitherto been discussed mainly with reference to its economic aspects, the Commission should take care not to be drawn outside the field of law, but he felt sure the Special Rapporteur's experience would enable it to avoid that danger.

65. Mr. USTOR (Special Rapporteur) thanked the members of the Commission for their constructive comments and encouragement, which would be of great value to him.

66. Briefly replying to the points raised, he said that the title he had originally intended to use was that mentioned by Mr. Rosenne but, at the twentieth session, Mr. Ago had suggested that it was too long and should be shortened. He had at once agreed, because it gave him and the Commission greater latitude in considering

the topic. For the time being, however, it would be difficult to go beyond the subject of most-favoured-nation clauses in the law of treaties, though he appreciated Mr. Reuter's view that the Commission might have to consider rules relating to non-discrimination. It would be unrealistic to enlarge the scope of the study before ascertaining whether that was feasible.

67. Where violations of the clause were concerned, there were at present practices which some parties considered to constitute violations of the clause, while other parties did not. That point could be illustrated by East-West trade. Eastern European countries believed that when western countries exercised discrimination against their trade, they were committing a violation of the most-favoured-nation clause, whereas the western countries contended that the so-called violations were inherent in the differences between the economic systems of the two groups. An important and complex problem was involved and he would consider how it could be handled.

68. Mr. Reuter had asked what the Commission was trying to do and what it expected of the study. That was still an open question and he had not yet made up his own mind.

69. The Chairman, speaking as a member of the Commission, had raised the issue of discrimination, which was a separate, but closely connected one. The obvious example that came to mind was that of Customs tariffs. For instance, the practice of the United States Government was to accord most-favoured treatment to nearly all the countries of the world with very few exceptions, and the countries excepted were inclined to regard that practice as discriminatory.

70. He agreed with Mr. Ago that the Commission should not attempt to solve economic problems or deal with trade policy. Nevertheless, it was a body of lawyers which could serve the practical needs of the international community and that consideration should always be borne in mind.

71. The CHAIRMAN suggested that the Commission should include, at the end of the section of its report on that item of the agenda, a paragraph thanking the Special Rapporteur for his first report and requesting him, before preparing any draft articles, to complete it on the lines set out in paragraph 9 of the introduction, giving an account of the decisions taken and the practice followed since the Second World War.

It was so decided.

The meeting rose at 1.10 p.m.

1037th MEETING

Tuesday, 5 August 1969, at 3.15 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Reu-

ter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

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

(A/CN.4/L.143-148 and Addenda)

Chapter II

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

1. The CHAIRMAN invited the Commission to consider the part of Chapter II of its draft report contained in document A/CN.4/L.144/Add.1.

COMMENTARY TO ARTICLE 27 (Freedom of movement)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

2. Mr. ROSENNE suggested that the fourth, fifth and sixth sentences be deleted. They began with a reference to the effect which the inclusion in the article of a provision on members of the family might have on the interpretation of article 26 of the 1961 Vienna Convention. The problem of possible effects on the interpretation of that Convention was, however, a general one, which did not arise solely with respect to article 27, but also affected one or two other articles and was mentioned in the relevant commentaries. He would therefore suggest that the subject be dealt with in a paragraph of the introduction to the whole group of articles; in that paragraph, it would be explained that the 1961 Convention had been used in preparing the present draft and that where the Commission had departed from that model, it had done so because of the special character of permanent missions. The scattered references to the problem in the various commentaries would then be dropped.

3. Mr. TSURUOKA supported Mr. Rosenne's suggestion.

4. Mr. CASTRÉN said it was hardly possible to delete the whole passage suggested by Mr. Rosenne. Where the Commission's text departed from the system of the 1961 Vienna Convention, some explanation should be given in the commentary. He himself would like to suggest that the third sentence be deleted, because it was not correct to say that the right in question "probably went without saying".

It was so agreed.

5. The CHAIRMAN suggested that the passage which Mr. Rosenne wished to have deleted should be considerably shortened, so as to refer simply to the fact that the present liberal practice with regard to members

of the family constituted the expression of a customary rule of international law.

6. Mr. YASSEEN said he agreed with the Chairman that the present practice could be regarded as reflecting a customary rule. He did not believe that any question of interpretation of the 1961 Vienna Convention arose.

7. Sir Humphrey WALDOCK said that the point raised by Mr. Rosenne was generally valid but did not apply to the particular case under discussion. The position was in fact that, during its discussion of article 27, the Commission had discovered a gap in the system applicable to diplomatic agents. It had arrived at the conclusion that the omission from the Vienna Convention of a provision relating to members of the family was inadvertent. It had therefore decided to fill the gap so far as the present draft was concerned, perhaps especially because of the absence of reciprocity in the case of permanent missions.

8. He accordingly suggested that the beginning of the fourth sentence, with its reference to the interpretation of article 26 of the Vienna Convention, be deleted, together with the reference to "a broad interpretation of that Convention" in the latter part of the sentence. The sentence as a whole would then read: "The Commission agreed that the present liberal practice with regard to the members of the families of diplomatic agents could be regarded as an expression of a customary rule but that it was preferable to insert a specific provision to that effect in the present draft articles in view, in particular, of the lack of reciprocity in multi-lateral diplomacy". The last two sentences would be deleted.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

9. Mr. ROSENNE suggested that, in the last sentence but two, the concluding words "their temporary nature" be replaced by the words "the particular character of those missions", since the temporary nature of special missions was not the only factor involved. He also suggested that, in the last sentence but one, for the sake of clarity, the words "in the case of permanent missions" be inserted after the words "if difficulties arose".

It was so agreed.

Paragraph (4), as amended, was approved.

The commentary to article 27, as amended, was approved.

COMMENTARY TO ARTICLE 28 (Freedom of communication)

Paragraphs (1), (2) and (3)

Paragraphs (1), (2) and (3) were approved.

Paragraph (4)

10. Mr. ROSENNE suggested that the Secretariat be

requested to add a reference to communications between permanent missions.

It was so agreed.

Subject to that addition, paragraph (4) was approved.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved.

Paragraph (7)

11. Mr. KEARNEY said the statement in the second sentence that the arrangements were concluded "once and for all" was too sweeping. It would be better to use some such phrase as "as a general rule".

12. The CHAIRMAN said that the use of the word "concluded" was incorrect since the arrangements were, strictly speaking, not "concluded" but simply made.

13. Sir Humphrey WALDOCK suggested that both points could be met by replacing the words "which concluded such arrangements once and for all" by the words "for which such arrangements were made on a continuing basis".

It was so agreed.

14. Mr. USTOR, referring to the last sentence, said that the right "freely" to take possession of the bag would be negated if the member of the permanent mission concerned were required to observe the "normal regulations".

15. Mr. KEARNEY said it was because that point had been raised during the discussion on article 28 that the Commission had decided to include in the commentary an explanation that the omission of the phrase "by arrangement with the appropriate authorities", which appeared in the corresponding provision on special missions, did not imply that a member of the permanent mission could disregard safety regulations when moving towards aircraft to take possession of the bag.¹

16. The CHAIRMAN suggested that some of the difficulties could be overcome by omitting all reference to the interpretation of the 1961 Vienna Convention.

17. Mr. KEARNEY said he agreed and that he would accordingly suggest the deletion of the penultimate sentence which read: "It was noted that article 27 of the Vienna Convention on Diplomatic Relations did not contain the phrase."

It was so agreed.

18. Mr. YASSEEN suggested that the concluding words of the paragraph, "normal regulations", be replaced by the words "applicable regulations". The right of free access existed and the host State had the duty to respect it. The host State could, of course, enact regulations for such purposes as ensuring the security of aircraft and of persons in an airport, but it could not make regulations which would nullify the rights of the permanent mission in the matter.

The amendment proposed by Mr. Yasseen was adopted.

¹ See 995th meeting, paras. 30-40.

Paragraph (7), as amended, was approved.

The commentary to article 28, as amended, was approved.

COMMENTARY TO ARTICLE 29 (Personal inviolability) AND TO ARTICLE 30 (Inviolability of residence and property)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

19. Mr. KEARNEY suggested that, in the second sentence, the words "the provision of a special guard" be replaced by "police protection", which was the more usual formula.

20. The CHAIRMAN said that it would be for the host State to decide whether it could make police forces available or not. In a capital where there were a large number of embassies, experience showed that it was not possible to provide police protection for all of them. He would prefer that the sentence should be deleted altogether.

21. Mr. KEARNEY said that the term "police protection" had a much broader meaning than protection by uniformed municipal police; it covered whatever official protection happened to be required in the circumstances. In the United States, for example, police protection was normally a matter for the individual States of the Union, so that, as far as United Nations Headquarters was concerned, it was the New York State forces and the New York City Police which provided the necessary protection.

22. However, if other members preferred to retain the words "the provision of a special guard", he would not press the point.

23. The CHAIRMAN said that the opening words of the second sentence, "The host State must take all necessary measures...", where perhaps too strong. It might be more correct to say: "The host State may take all the necessary measures...", since while there was an obligation to ensure protection, there was none to provide a special guard.

24. Mr. BARTOŠ said that the host State undoubtedly had a duty to take security measures. In fact, it had a duty to do so regardless of the desires of the embassy or mission concerned. It would be better that the commentary should not go into detail, since it was for the host State to decide, according to the circumstances, how it would fulfil its obligations. Whether Federal, State or municipal police forces were employed was solely for the host State to decide.

25. Mr. CASTRÉN suggested that the last part of the sentence in question be dropped altogether.

26. Sir Humphrey WALDOCK said he thought it would not be sufficient merely to say "The host State must take all necessary measures to that end." Such a commentary would not add anything to the text of the article. He therefore proposed that the last part of the sentence be reworded to read: "which may include the provision of a special guard if circumstances so require".

27. Mr. YASSEEN said that the French version already conveyed that idea, because it did not imply that the provision of a special guard was included among the "necessary measures".

28. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission agreed to approve paragraph (3) with the amendment proposed by Sir Humphrey Waldoack.

It was so agreed.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

The commentary to articles 29 and 30, as amended, was approved.

COMMENTARY TO ARTICLE 31 (Immunity from jurisdiction)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

29. Mr. ROSENNE suggested that, in the fourth sentence, the words "insurance laws" be replaced by the words "insurance laws and practices". The discussion had referred to both legislation and practices with regard to insurance.² He also suggested that, in the fifth sentence, the opening words "To the contrary" be replaced by the words "On the other hand".

It was so agreed.

30. Mr. KEARNEY said that another problem mentioned during the discussion had been that of the adequacy of insurance coverage; that problem involved such matters as the limits placed on compensation in case of death or serious injury. He accordingly suggested that the words "as well as the adequacy of the insurance coverage" be added to the end of the fourth sentence, as amended by Mr. Rosenne.

It was so agreed.

Paragraph (3), as amended, was approved.

The commentary to article 31, as amended, was approved.

COMMENTARY TO ARTICLE 32 (Waiver of immunity)

Paragraph (1)

31. Mr. ROSENNE suggested that the word "modelled" in the first sentence be replaced by the word "based". He further suggested that the Secretariat be requested to examine the commentaries to the other articles in order to ensure uniformity of wording.

It was so agreed.

32. Mr. REUTER said that the French text should be brought into line with the English by using the expression "à pour base".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

² *Ibid.*, paras. 49-71.

Paragraph (2) was approved.

Paragraph (3)

33. Mr. KEARNEY proposed the deletion of paragraph (3). The question of waiver of immunity, in so far as it might affect the obligation to give evidence, was a very complex one. A much longer commentary would be needed to deal with it adequately.

34. Mr. USTOR and Sir Humphrey WALDOCK supported Mr. Kearney's proposal.

Paragraph (3) was deleted.

The commentary to article 32, as amended, was approved.

COMMENTARY TO ARTICLE 33 (Settlement of civil claims)

The commentary to article 33 was approved.

COMMENTARY TO ARTICLE 34 (Exemption from social security legislation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

35. Mr. KEARNEY said that the first sentence was ambiguous. Permanent representatives were completely exempt from payment of employer's social security contributions. The sentence did not make it clear that what it was intended to refer to was contributions paid by the employer on behalf of the employee.

36. The CHAIRMAN suggested that paragraph (3) be deleted.

It was so agreed.

37. Mr. USTOR said that paragraph 5 of article 34, which had been taken from the corresponding provision of the 1961 Vienna Convention, was not necessary in the present draft because of the provisions of articles 4 and 5, which the Commission had adopted at the previous session.³ He would not propose, at that late stage, the deletion of paragraph 5, but he would suggest that the reasons for its retention, despite its apparent redundancy, be explained in the commentary.

38. Sir Humphrey WALDOCK said that he himself would be in favour of deleting paragraph 5 and explaining in the commentary that it had been dropped because the matter was already covered in articles 4 and 5.

39. Mr. ROSENNE suggested that the article itself be left as it stood but that a new paragraph be added to the commentary. The new paragraph, which would be numbered (3) in view of the deletion of the previous paragraph (3), would read: "The Commission intends to consider, in the light of the comments to be received from Governments, whether paragraph 5 is necessary in view of the provisions of articles 4 and 5 of the present draft."

It was so agreed.

³ See *Yearbook of the International Law Commission, 1968*, vol. I, 980th meeting, paras. 13-52.

The commentary to article 34, as amended, was approved.

COMMENTARY TO ARTICLE 35 (Exemption from dues and taxes)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were approved.

Paragraph (5)

40. Mr. KEARNEY proposed the deletion of the last sentence, which read: "The Commission draws a clear distinction between sub-paragraphs (e) and (f); the former applies only to dues and taxes granted for specific services rendered". It was not easy to draw a clear distinction between the two types of charges and the explanations given in paragraphs (5) were not of any great assistance in that respect.

Mr. Kearney's proposal was adopted.

Paragraph (5), as amended, was approved.

The commentary to article 35, as amended, was approved.

ARTICLE 35 (Exemption from dues and taxes) (*resumed from the 1020th meeting*).

Sub-paragraph (f)

41. The CHAIRMAN said that sub-paragraph (f) of article 35 had been approved provisionally at the 1020th meeting;⁴ it should now be adopted.

Sub-paragraph (f) of article 35 was adopted.

Article 35 as a whole was adopted

COMMENTARY TO ARTICLE 36 (Exemption from personal services)

The commentary to article 36 was approved.

COMMENTARY TO ARTICLE 37 (Exemption from customs duties and inspection)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

42. Mr. ROSENNE said that the reference at the end of the paragraph to "the system of taxation followed by the country in question" was not correct. At the international level, it was the relevant provisions of the headquarters agreements which were decisive in the matter, although those agreements might, of course, take local legislation into account.

43. Mr. BARTOŠ said that many important details were not settled in the international instruments but were, in fact, regulated by the legislation of the host country. The paragraph should therefore refer both to the headquarters agreements and to local taxation legislation.

44. Mr. KEARNEY said that it would be useful to retain a reference to the system of taxation in force in the host country. There might be a variety of taxation

⁴ See 1020th meeting, para. 39.

authorities in that country and the practices of the authority invested with taxation powers were highly relevant. He therefore proposed that the concluding words of the sentence be amended to read: "according to the headquarters agreements and to the system of taxation in force".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraphs (3) to (5)

45. Mr. ROSENNE said that the contents of paragraphs (3), (4) and (5) did not constitute a commentary on the text of article 37, but if the majority of the Commission wished to retain them, he would not press for their deletion.

46. Mr. BARTOŠ said that the differences explained in paragraphs (3) to (5) did exist in practice, so that the paragraphs served a useful purpose.

Paragraphs (3) to (5) were approved.

The commentary to article 37, as amended, was approved.

COMMENTARY TO ARTICLE 38 (Exemption from laws concerning acquisition of nationality)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

47. Mr. KEARNEY said that paragraph (2) reproduced the 1958 commentary to article 35 of the draft on diplomatic intercourse and immunities. But the language of the passage was ambiguous in parts and its last sentence purported to state, as an absolute legal rule, a proposition of doubtful validity. He therefore suggested that the reference to the 1958 commentary be dropped altogether.

48. The CHAIRMAN said that, at the close of the discussion on article 38, it had been decided to include in the commentary a reference to the 1958 commentary to article 35 of the draft on diplomatic intercourse and immunities.⁵

49. Mr. ROSENNE suggested that the difficulty might be overcome by a slight adjustment to the wording of the sentence which preceded the quotation. So as to emphasize that the quotation dated back to 1958, the sentence could be reworded to read: "At the time, the Commission gave the following explanation on the matter in its commentary to article 35:".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

50. Mr. KEARNEY proposed the deletion of paragraph (3). The fact that only twenty-seven States had become parties to the Optional Protocol on Acquisition of Nationality would not support the Commission's argument in favour of including article 38.

51. Mr. BARTOŠ said that, when the Commission had first discussed the question, he had suggested that the commentary should say how many States had ratified the Optional Protocol.⁶ That information had now been given and showed that the Protocol had not obtained many ratifications. He therefore supported Mr. Kearney's proposal to delete paragraph (3).

52. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission agreed to delete paragraph (3).

It was so agreed.

Paragraph (4)

53. Mr. KEARNEY said he had some misgivings concerning the wording of the third and fourth sentences of paragraph (4). The Commission seemed to be saying that, because only a small number of States were involved, their point of view could be ignored.

54. Mr. YASSEEN suggested that the difficulty might be met by deleting the fourth sentence.

55. Mr. ROSENNE said he agreed. In addition, the third sentence might refer to "the limited number of States" rather than to "a small number of States".

56. Sir Humphrey WALDOCK said that the statement made in the third sentence was simply not true. In the case of the United Nations, for example, the article envisaged the nationality of persons who might be members of a mission from virtually any State in the international community. Since such persons were in the territory of the host State not to serve the interests of the host State but in connexion with the international organization, it was wrong that they should be subjected to the nationality laws of the State concerned. He therefore suggested that the third sentence be amended to read: "The provisions of article 38 of the present draft envisage the nationality of persons whose presence in the territory of the host State is due to the membership of their State in the organization and not to bilateral relations between the States concerned."

57. Mr. YASSEEN said that, although the interest of all States might be involved, the provision related to the imposition of the nationality of only a limited number of States. The rule had been opposed at the United Nations Conference on Diplomatic Intercourse and Immunities by certain States which wished to impose their nationality.⁷

58. Sir Humphrey WALDOCK said that the Commission was not entitled to assume that the number of host States would remain limited. The provision must therefore be a general one and should not be based on such an assumption. The essential point was the difference between diplomatic and permanent missions. It was possible for a State to have no diplomatic relations with the host State but yet have a permanent mission in the territory of that State. Membership of a permanent mission was, if anything, a more accidental factor, which

⁶ See 996th meeting, para. 43.

⁷ See *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vol. I, 31st meeting, paras. 88-110, and 34th meeting, paras. 1-40.

⁵ See 1021st meeting, para. 60.

was all the more reason why members of missions should be exempted from the host State's nationality laws.

59. The CHAIRMAN suggested that Sir Humphrey Waldock be asked to prepare a revised draft to replace the third and fourth sentences of paragraph (4).⁸

It was so agreed.

On that understanding, the commentary to article 38 was approved.

The meeting rose at 6.5 p.m.

⁸ For the text, see *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10 (A/7610/Rev.1)*, paragraph (3) of the commentary to article 39.

1038th MEETING

Wednesday, 6 August 1969, at 9.55 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Sir Humphrey Waldock, Mr. Yasseen.

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

(A/CN.4/L.143-148 and Addenda)

(continued)

Chapter II

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS *(continued)*

1. The CHAIRMAN invited the Commission to continue its consideration of the part of chapter II of its draft report contained in document A/CN.4/L.144/Add.1.

COMMENTARY TO ARTICLE 39 (Privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

2. Mr. KEARNEY said that the purpose of paragraph (4) was not clear. Was it the Commission's intention to obtain the views of Governments, particularly of host States, or merely to indicate that the suggestion referred to in the second sentence had been made? It seemed evident that not many host States would be in favour of extending the privileges and immunities of

permanent missions through bilateral arrangements. They were more likely to be anxious to curtail them.

3. The CHAIRMAN suggested that paragraph (4) be deleted.

Paragraph 4 was deleted.

The commentary to article 39, as amended, was approved.

COMMENTARY TO ARTICLE 40 (Nationals of the host State and persons permanently resident in the host State)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

4. Mr. CASTRÉN said he would remind the Commission that it had been decided at its 1023rd meeting to approve the proposal of the Drafting Committee to delete from paragraph 1 of the article the reference to persons who were, or had been, representatives of the host State.¹ The reasons for that decision should be explained in the commentary and the explanations given by the Chairman of the Drafting Committee² at the 1022nd meeting should be inserted after the first sentence of paragraph (2).

5. After an exchange of views, the CHAIRMAN suggested that the second sentence in paragraph (2) be deleted, together with the footnote thereto, and replaced by the following passage: "Since the case of permanent representatives who are nationals of the host State is covered in article 40, paragraph 1, the Commission did not deem it advisable to include in this paragraph a clause concerning permanent representatives who are, or have been, representatives of that State. It considered that any such clause would refer to such an exceptional situation that there was no need to mention it. Moreover, if a person represented or had represented the host State, he was very likely to be one of its nationals and therefore subject to the limitation already imposed by the paragraph."

Mr. Ushakov's proposal was adopted.

Paragraph (2), as amended, was approved.

The commentary to article 40, as amended, was approved.

ARTICLE 41 (Duration of privileges and immunities)

6. The CHAIRMAN said that at the 1036th meeting, it had been agreed that an attempt should be made to produce a more satisfactory text for paragraph 2 of article 41. With the help of Mr. Ago he had accordingly prepared the following new text.

"2. The person in question shall normally enjoy privileges and immunities [, except in case of the waiver of one of these immunities by the sending State] as long as his functions in the permanent mission continue, and thereafter until the person in question leaves the territory of the host State or until

¹ See 1023rd meeting, para. 52.

² See 1022nd meeting, para. 48.

the expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the permanent mission, immunity shall continue to subsist.”

7. Mr. ROSENNE said that he did not understand the implication of the word “normally”.

8. The CHAIRMAN said that the word “normally” was intended to exclude cases of death and the exceptional cases in which the sending State terminated the functions of a permanent representative or a member of the diplomatic staff under article 46.

9. Mr. CASTRÉN said he supported the new text, though he did not see any point in retaining the phrase in brackets, since the proviso it contained stated something that was self-evident. On the other hand, since the words “the person in question” referred to the persons mentioned in paragraph 1, it would be better to say explicitly “the persons mentioned in paragraph 1” and put the whole paragraph in the plural. The commentary would, of course, have to be modified accordingly.

10. Mr. USTOR said that, although he was averse to introducing a new element into the discussion at that late stage, he must draw attention to the need for a provision concerning members of families, whose position was different from that of members of the permanent mission exercising official functions. The problem of the beginning and end of the privileges and immunities of members of families was dealt with in a detailed and somewhat casuistical manner in article 53, paragraphs 2 and 3, of the Vienna Convention on Consular Relations. He held no particular brief for that wording but considered that some mention of the problem should be made in the commentary to article 41, since Governments would otherwise notice the omission.

11. According to article 53, paragraph 2, of the Convention on Consular Relations, members of the family and members of the private staff received the privileges and immunities from the date of their entry into the territory of the receiving State or from the date of their becoming a member of such family or private staff, whichever was the later. The cessation of their privileges and immunities was dealt with in paragraph 3 of the same article. The problem of members of the private staff was a minor one and could be left aside, but the problem of members of the families of members of a permanent mission was a genuine problem and should be taken into account.

12. Mr. BARTOŠ said that both he and Mr. Castrén had several times drawn attention to the fact that an appropriate form of words ought to be found covering the situation of members of the family of persons entitled to privileges and immunities.

13. Sir Humphrey WALDOCK said he had not yet been convinced that there was any need to alter the opening phrase of the Drafting Committee’s text³ for paragraph 2 “When the functions of a person enjoying privileges and immunities have come to an end,” which

had been modelled on an analogous provision in article 39, paragraph 2, of the Vienna Convention on Diplomatic Relations. The wording proposed in the new text might give rise to speculation about the Commission’s reasons for departing from the Convention.

14. Article 39, paragraph 2, and article 53, paragraph 3, of the Conventions on Diplomatic Relations and on Consular Relations respectively were clearly not intended to be exhaustive and had deliberately been framed in general terms so as to make that clear. There were various ways in which the functions of the member of a permanent mission could come to an end and it was not necessarily the consequence of his being declared *persona non grata* by the government of the host State. The argument set out in paragraph (3) of the commentary to article 41 did not affect the issue. Ideally, the Chairman’s text was perhaps more satisfactory, but no strong case had yet been made for departing from the traditional formula.

15. Mr. USTOR said he agreed with Sir Humphrey WaldoCK that the wording of the two Vienna Conventions should be followed as closely as possible.

16. After some further discussion, the CHAIRMAN suggested that the Commission adopt the Drafting Committee’s text for paragraph 2, with the deletion of the words “but shall subsist until that time, even in case of armed conflict” at the end of the first sentence. In the French version, the latter part of that sentence would read: “ou à l’expiration d’un délai raisonnable pour ce faire.”

It was so agreed.

Article 41, as thus amended, was adopted.

COMMENTARY TO ARTICLE 41 (Duration of privileges and immunities)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

17. Mr. KEARNEY said that there was nothing in article 41 to justify the statement in the second sentence of paragraph (2) of the commentary. The article completely ignored the question of the dates applicable to the beginning and end of privileges and immunities for members of the family of members of permanent missions. If the Commission thought it preferable not to insert a provision on that question but to leave it to the practice of States, then it should not be mentioned in the commentary at all.

18. The CHAIRMAN said that paragraph 2 of the article was modelled on the corresponding article in the Vienna Convention on Diplomatic Relations, which had been article 38 of the Commission’s draft, and paragraph (2) of the commentary was based on the commentary which the Commission had drafted at the time to article 38. Therefore it should preferably not be amended for the time being. If the Commission decided at the second reading to bring article 41 into line with the corresponding article of the Vienna Convention on Consular Relations, the commentary would be amended accordingly.

³ See 1023rd meeting, para. 54.

19. Sir Humphrey WALDOCK suggested that a further passage be added to the end of paragraph (2), reading: "The Commission noted that the Vienna Convention on Diplomatic Relations did not contain any specific provisions on the question, whereas the Vienna Convention on Consular Relations did so in article 53. The Commission wished to invite the views of Governments as to whether it is desirable to include a provision on these lines".

It was so agreed.

20. Mr. KEARNEY suggested that the words "in their official capacity" be substituted for the words "in their own right" in the first and second sentences of paragraph (2).

It was so agreed.

Paragraph (2), as thus amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

21. Mr. ROSENNE said that, in his view, paragraph (4) should be deleted altogether. It was clear from paragraph 89 of the study prepared by the Secretariat of the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities⁴ that, in the *Case of B.v.M.* mentioned in the footnote to paragraph (4) of the commentary, the contention in question had not been made by the Swiss Government but by a federal tribunal in Lausanne. Accordingly, the words "gave rise to differences", in the first sentence of paragraph (4), were inaccurate. There was nothing in the Secretariat's study to substantiate the contention that there had been any difference between the United Nations and the Swiss authorities.

22. In the *Santiesteban Case*,⁵ which was also mentioned in the footnote to paragraph (4), the study by the Secretariat showed that some discussion had arisen between the United Nations and the United States Government. It was stated in paragraph 60 of the study by the Secretariat that on 31 July 1964 the Secretary-General had sent a note to permanent missions which contained the following sentence: "The United States authorities informed the Secretary-General that it is proposed to put into effect a new procedure to reduce or eliminate the delay which presently arises between the arrival in the United States of members of the staff of Permanent Missions and the recognition by the host Government of the privileges and immunities accorded to such members under the Headquarters Agreement."

23. Paragraph (4) was not illuminating and in fact was too lapidary a statement on an extremely complicated matter. It ought therefore to be dropped.

24. The CHAIRMAN said he agreed with Mr. Rosenne, particularly as the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies respectively did not contain a pro-

vision concerning notification on the lines of that included in article 17 of the present draft.

Paragraph (4) was deleted.

Paragraph (5)

Paragraph (5) was approved.

The commentary to article 41, as amended, was approved.

COMMENTARY TO ARTICLE 42 (Transit through the territory of a third State)

The commentary to article 42 was approved.

COMMENTARY TO ARTICLE 43 (Non-discrimination)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were approved.

Paragraph (5)

25. Mr. KEARNEY said that the last part of the second sentence of paragraph (5) did not correctly reflect the relationship between the host State, the sending State and the Organization. He therefore suggested that the word "among" be substituted for the word "between".

It was so agreed.

26. The CHAIRMAN said that if the word "exclusively" were inserted after the word "belongs", that would make the text even clearer.

It was so agreed.

27. Mr. ROSENNE suggested that the word "framework" be substituted for the word "orbit" in the first sentence.

It was so agreed.

Paragraph (5), as thus amended, was approved.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were approved.

The commentary to article 43, as amended, was approved.

28. The CHAIRMAN invited the Commission to consider the part of chapter II of its draft report contained in document A/CN.4/L.144.

Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were approved.

Paragraph 3

29. Mr. BARTOŠ said that, since the Commission had not considered the sections of the Special Rapporteur's report concerning observers for non-member States to international organizations and delegations to organs of international organizations and to conferences convened by international organizations, they should either not be mentioned at all, or else it should be stated that the Commission had not considered them.

30. Mr. ROSENNE added that the documents relating to those subjects had not even been distributed officially.

⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 176.

⁵ *Ibid.*, p. 172, paras. 56-59.

31. Mr. CASTRÉN said that paragraph 3 dealt with the contents of the Special Rapporteur's report, not with the Commission's work.

32. Mr. AGO said that it would be better to mention only those sections of the Special Rapporteur's report which had actually been before the Commission during its session.

33. Mr. EUSTATHIADES said it was clear from paragraph 5 that the Commission had considered only part II, sections II, III and IV, of the Special Rapporteur's report.

34. The CHAIRMAN suggested that the Secretariat be asked to list in paragraph 3 only the documents it had received from the Special Rapporteur.

It was so agreed.

On that understanding, paragraph 3 was approved.

Paragraph 4

35. Mr. BARTOŠ said that it was going too far to state that the discussions in the Sixth Committee "had touched on a number of questions which relate to representatives of States to international organizations and conferences."

36. Mr. EUSTATHIADES suggested that a better wording might be "had touched on certain questions which may present some interest as regards representatives of States to international organizations and conferences."

It was so agreed.

37. Mr. ROSENNE suggested that, in order to make the paragraph clearer, the Secretariat be asked to add two footnotes giving the references to the relevant General Assembly documents.

It was so agreed.

Paragraph 4, as amended, was approved.

Paragraph 5

38. Mr. ROSENNE suggested that a further sentence be added at the end of the paragraph, reading: "For the sake of convenience, the articles of the present group are numbered consecutively after the last article of the previous group. Accordingly, the first article of the present group is numbered 22.", and that, in accordance with the usual practice, articles with a "bis" number be renumbered appropriately.

It was so agreed.

39. The CHAIRMAN suggested that the titles of sections II, III and IV of part II be included in brackets.

It was so agreed.

Paragraph 5, as amended, was approved.

Paragraph 6

40. Mr. BARTOŠ said that the Commission had not considered either the question of permanent observers for non-member States to international organizations or that of delegations to organs of international organizations; the wording of the paragraph should therefore be changed. It would be enough to state that the Commission had decided to defer those questions to its next

session. Paragraph 6 would then have to be placed after paragraph 8 and paragraphs 7 and 8 renumbered accordingly.

41. After an exchange of views, the CHAIRMAN suggested that the following text be substituted for the existing text of paragraph 6, and placed after paragraph 8: "At this session, the Commission again considered the question referred to in paragraph 28 of its report on the work of its twentieth session. At its 992nd meeting, it reached the conclusion that its draft should also include articles dealing with permanent observers of non-member States to international organizations and with delegations to sessions of organs of international organizations.⁶ Opinions were divided on whether the draft should, in addition, include articles on delegations to conferences convened by international organizations or whether that question ought to be considered in connexion with another topic. At its 993rd meeting, the Commission took a provisional decision on the subject,⁷ leaving the final decision to be taken at a later stage. The Commission intends to consider, at its twenty-second session, draft articles on permanent observers of non-member States and on delegations to sessions of organs of international organizations and to conferences convened by such organizations."

It was so agreed.

Paragraph 6, as amended, was approved.

New paragraph

42. Mr. AGO said that, as requested by the Commission,⁸ and with the help of Mr. Reuter and Sir Humphrey Waldock, he had drafted an additional paragraph concerning the proposed new article⁹ dealing with cases of armed conflict and the absence of diplomatic and consular relations. That paragraph, which he proposed should be inserted between paragraphs 6 and 7, read as follows: "the Commission also briefly considered the desirability of dealing, in separate articles, with the possible effects of abnormal situations—such as absence of recognition, absence or severance of diplomatic and consular relations, or armed conflict—on the representation of States in international organizations. In view of the extremely delicate and complex nature of those questions, the Commission decided to resume their examination at a future session and to postpone any decision on the matter for the time being."

43. Mr. CASTRÉN suggested that the word "extremely" be deleted.

It was so agreed.

44. Mr. BARTOŠ said that the only relations between some States were either diplomatic or consular. The expression "absence or severance of diplomatic and consular relations" was not, therefore, adequate.

⁶ See 992nd meeting, para. 55.

⁷ See 993rd meeting, para. 26.

⁸ See 1035th meeting, para. 85.

⁹ See 1035th meeting, para. 9; also 1026th meeting, para. 50; 1027th meeting, para. 46, and 1034th meeting, para. 50.

45. The CHAIRMAN suggested that the words "and consular" be deleted.

It was so agreed.

46. Mr. REUTER said that the word "abnormal" had a critical connotation, which, though appropriate to armed conflict, hardly applied to the absence of diplomatic relations. He suggested that it be replaced by the word "exceptional".

It was so agreed.

The new paragraph, as amended, was approved.

Paragraph 7

47. Mr. ROSENNE proposed that a sentence on the following lines be inserted in the paragraph: "The explanations for the terms used contained in article 1 of part I are also applicable to part II. At the same time, as is explained in paragraph (5) of the commentary to article 24, it was found necessary to add a further explanation, for the purpose of this part, of the term 'the premises of the permanent mission'. This explanation is provisionally numbered 1 (k) (bis)." That additional sentence was similar to the passage which the Commission had included in the introduction to its 1963 draft of part II of the articles on the law of treaties.¹⁰

48. He also proposed that a new paragraph, a purely technical addition, be inserted between paragraphs 7 and 8, reading:

"In preparing these draft articles, the Commission has sought to codify the modern rules of international law concerning permanent representatives to international organizations, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law."

It was the Commission's standard practice to include a paragraph on those lines in the introduction to its drafts, and its omission from the present draft could give rise to difficulties.

49. Sir Humphrey WALDOCK said he supported both Mr. Rosenne's proposals.

Mr. Rosenne's amendments were adopted.

Paragraph 7, as amended, was approved, subject to correction by the Secretariat of the numbering of the sections.

Paragraph 8

Paragraph 8 was approved.

Paragraph 9

50. Mr. ROSENNE asked that paragraph 9 should be redrafted by the Secretariat in order to make it clear first, that the draft articles were being submitted to the Government of Switzerland at its request; and secondly, that not only the draft articles adopted at the present session but also those already adopted at the last session, would be transmitted to that Government.

It was so agreed.

On that understanding, paragraph 9 was approved.
Paragraph 10

Paragraph 10 was approved.

The introduction, as amended, was approved.

General comments

Paragraph 1

51. The CHAIRMAN suggested that the opening words of the English and French versions be amended to read "As a general rule . . ." and "*En règle générale*" respectively.

It was so agreed.

52. Mr. ROSENNE suggested that, in the first sentence, the words "of foreign States" be added after the words "permanent representatives". Some of the draft articles applied to the permanent representative of the host State as well, but the position was different with regard to privileges and immunities.

Mr. Rosenne's amendment was adopted.

Paragraph 1, as amended, was approved.

Paragraphs 2, 3 and 4

Paragraphs 2, 3 and 4 were approved.

Paragraph 5

53. Mr. USTOR said that the third sentence was unduly restrictive since the permanent representative did occasionally enter into direct relationship with the host State. Perhaps the statement should be clarified by inserting the word "normally" at the appropriate point.

54. Mr. ROSENNE said that, even with that change, the sentence would still be too restrictive. He suggested that the whole of the sentence be dropped.

55. Mr. KEARNEY suggested that the second and third sentences be merged into a single sentence reading: "The representative of a State to an international organization is not the representative of his State to the host State, as in the case of the diplomat accredited to that State."

It was so agreed.

56. Mr. EUSTATHIADES suggested that the sixth sentence be deleted, as it drew over-elaborate distinctions.

57. Mr. ROSENNE suggested that the concluding words of the fifth sentence and the rest of the paragraph be deleted so that it would end with the words "represents his State before the organization". It would be inappropriate for the Commission to include in the commentary references to the extremely controversial ideas of the separate identity and personality of the organization; those ideas had been put forward by the Special Rapporteur but had not been accepted by the Commission.

Mr. Rosenne's amendment was adopted.

Paragraph 5, as amended, was approved.

The general comments, as amended, were approved.

¹⁰ See Yearbook of the International Law Commission, 1963, vol. II, p. 189, para. 16.

COMMENTARY TO ARTICLE 22 (General facilities)

*Paragraph (1)**Paragraph (1) was approved.**Paragraph (2)*

58. Mr. KEARNEY suggested that paragraph (2) be deleted; its contents were too elementary to be of interest.

*Paragraph (2) was deleted**Paragraph (3)*

59. Mr. ROSENNE suggested that paragraph (3) be deleted for the same reason.

*Paragraph (3) was deleted.**Paragraph (4)*

60. Mr. ROSENNE suggested that, in the first sentence, the words "intended to be signed and ratified by the organizations themselves" be replaced by a reference to the organizations becoming parties, and that in the third sentence, the words "would accede to" be replaced by the words "would become parties to".

61. He further suggested that the whole of the fourth and fifth sentences, relating to the recommendation by the United Nations Conference on the Law of Treaties to the General Assembly that it refer to the Commission the study of the question of treaties concluded between States and international organizations or between two or more international organizations, be deleted, as they were quite irrelevant. The Commission's decision on whether to recommend that organizations in one form or another should be parties to the Convention when it was completed was going to have nothing to do with any resolution which might be adopted by the General Assembly. He also did not think that the Commission at that stage ought to anticipate what that resolution was going to say, because he would recall that, on one of the test votes at Vienna on one of the amendments¹¹ to the draft resolution relating to article 1, there had been no fewer than 30 abstentions.¹²

Mr. Rosenne's amendments were adopted.

62. Mr. KEARNEY suggested the deletion from the second sentence of the words "merely concerned with stating general principles and was".

*It was so agreed.**Paragraph (4), as amended, was approved.**Paragraph (5)*

63. Mr. KEARNEY suggested that the words "are designed to emphasize that the granting of facilities to a permanent mission . . ." be replaced by the words "are designed to emphasize both that the facilities which an organization is able to grant are limited and that the granting of the facilities to a permanent mission . . .".

*It was so agreed.**Paragraph (5), as amended, was approved.*

¹¹ Sweden: Amendment to the draft resolution relating to article 1 recommended by the Committee of the Whole (A/CONF.39/L.46).

¹² See *United Nations Conference on the Law of Treaties, second session, Official Records, thirty-second plenary meeting.*

The commentary to article 22, as amended, was approved.

COMMENTARY TO ARTICLE 23 (Accommodation of the permanent mission and its members)

Paragraph (1)

64. Mr. KEARNEY suggested that the words "that provision", in the second sentence, be replaced by the words "article 23".

*It was so agreed.**Paragraph (1), as amended, was approved.**Paragraph (2)**Paragraph (2) was approved.**Paragraph (3)*

65. Mr. KEARNEY said he objected to the idea, contained in paragraph (3), that the Organization could be called on to give legal advice to permanent missions. He suggested that the paragraph be reworded to read: "The assistance which the Organization may give to the members of the mission in obtaining suitable accommodation under paragraph 2 would be very useful, among other reasons, because the Organization itself would have a vast experience of the real estate market and the conditions governing it".

It was so agreed.

The commentary to article 23, as amended, was approved.

The meeting rose at 1.5 p.m.

1039th MEETING

Thursday, 7 August 1969, at 10.20 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

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

(A/CN.4/L.143-148 and Addenda)

(continued)

Chapter II**RELATIONS BETWEEN STATES
AND INTERNATIONAL ORGANIZATIONS (continued)**

1. The CHAIRMAN invited the Commission to continue its consideration of the part of chapter II of its draft report contained in document A/CN.4/L.144.

COMMENTARY TO ARTICLE 23 *bis* (Assistance by the Organization in respect of privileges and immunities)

2. Mr. ROSENNE suggested that, in the second sentence, the words "the organization itself" be replaced by the words "the United Nations", since the discussion in the Sixth Committee had related only to the privileges and immunities of the United Nations.

It was so agreed.

The commentary to article 23 bis, as amended, was approved.

COMMENTARY TO ARTICLE 24 (Inviolability of the premises of the permanent mission)

Paragraph (1)

3. Mr. KEARNEY suggested that the words "in practice" be added at the end of the first sentence.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) and (3)

4. Mr. KEARNEY suggested that the Secretariat be asked to modify the language of paragraphs (2) and (3), if necessary, after verifying that the clauses of the international instruments mentioned did in fact provide for the inviolability of the premises and not just the immunity of the property's assets.

It was so agreed.

On that understanding, paragraphs (2) and (3) were approved.

Paragraph (4)

5. Mr. ROSENNE suggested that paragraph (4) be deleted, since it dealt with a special case, that of the International Civil Aviation Organization, which was a rather limited example.

Paragraph (4) was deleted.

Paragraph (5)

Paragraph (5) was approved.

Paragraph (6)

6. Mr. KEARNEY proposed that the following additional sentences should be inserted after the first sentence of the paragraph: "Further, the permanent mission's premises could be located within the premises occupied by the diplomatic mission of the sending State or possibly by a consular mission. The question would then arise as to which representative of the sending State was responsible for the premises concerned."

7. Mr. ROSENNE said that the question of the definition of "permanent representative" arose in connexion with a number of articles, in particular articles 24 and 46. The question was sufficiently important to warrant its being dealt with in the introduction to the whole section. He therefore proposed that an additional paragraph be inserted in the introduction, referring to the definition of the term "permanent representative" given in article 1, and going on to state that, in the course of its examination of the draft articles at the present session, and more particularly of articles 24 and

46, the Commission had noted that it might be necessary to re-examine that definition of the term "permanent representative".

8. The CHAIRMAN said that, if there were no objection, he would take it that the Commission approved paragraph (6) with the addition proposed by Mr. Kearney and subject to the insertion in the introduction of a paragraph on the lines proposed by Mr. Rosenne.

It was so agreed.

On that understanding, paragraph (6) was approved.

Paragraph (7)

Paragraph (7) was approved.

The commentary to article 24, as amended, was approved.

COMMENTARY TO ARTICLE 25 (Exemption of the premises of the permanent mission from taxation)

The commentary to article 25 was approved.

COMMENTARY TO ARTICLE 26 (Inviolability of archives and documents)

The commentary to article 26 was approved.

9. The CHAIRMAN invited the Commission to consider the part of chapter II of its draft report contained in document A/CN.4/L.144/Add.2.

COMMENTARY TO ARTICLE 44 (Respect for the laws and regulations of the host State)

Paragraph (1)

Paragraph (1) was approved.

Paragraphs (2) and (3)

10. Mr. JIMÉNEZ DE ARÉCHAGA said that paragraphs (2) and (3) contained interpretations which were too categorical and which in any case it was undesirable that the Commission should include in its commentaries. He had, for example, doubts regarding the statement in paragraph (2) that the duty to respect the laws and regulations of the host State "does not apply when the member's privileges and immunities exempt him from it".

11. Sir Humphrey WALDOCK said that he shared the same doubts.

12. The CHAIRMAN suggested that both paragraphs be deleted.

Paragraphs (2) and (3) were deleted.

Paragraph (4)

13. Mr. JIMÉNEZ DE ARÉCHAGA suggested that the words "the latter", in the concluding phrase, be deleted.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

14. Mr. KEARNEY suggested that, in the third sub-

paragraph, the words "are to be understood as covering the cases where the person concerned is respectively a national . . ." be replaced by the words "are intended to include the cases where the person concerned is a national . . .".

15. Mr. CASTRÉN said that the distinction between the persons concerned should be drawn in accordance not with their nationality but with their functions, as was plain from the Commission's discussion of article 44. The three alternatives offered to the sending State covered the permanent representative, the members of the diplomatic staff and the members of their families.

16. The CHAIRMAN suggested that the third sub-paragraph be amended to read: "The three alternatives offered to the sending State for the discharge of the obligation imposed on it by paragraph 2 are to be understood as covering the cases of the permanent representative or a member of the diplomatic staff, a member of one of the other categories in the permanent mission and the members of their families".

It was so agreed.

17. Mr. JIMÉNEZ DE ARÉCHAGA, supported by Sir Humphrey WALDOCK, proposed that, in the last sub-paragraph, the phrase "to guarantee the unimpaired expression of opinions on behalf of their Governments by the persons carrying out the functions of the permanent mission" be replaced by the phrase "to safeguard the independent exercise of the functions of the members of the permanent mission, while keeping within the rule grave crimes committed outside the Organization or the premises of permanent missions, including grave traffic violations".

It was so agreed.

Paragraph (5), as amended, was approved.

The commentary to article 44, as amended, was approved.

COMMENTARY TO ARTICLE 45 (Professional activity)

The commentary to article 45 was approved.

COMMENTARY TO ARTICLE 46 (End of the functions of the permanent representative or of a member of the diplomatic staff)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

18. Mr. JIMÉNEZ DE ARÉCHAGA said he had doubts regarding the whole of paragraph (2), but in particular the long passage dealing with the case of Indonesia.

19. Mr. CASTRÉN said that he shared those doubts; different views had been expressed in the Commission regarding that case.

20. Mr. KEARNEY suggested that only the first three sentences of the paragraph be retained, so as to eliminate all reference to the Indonesian case.

21. The CHAIRMAN suggested that only the first sentence be retained.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

22. Mr. KEARNEY said that paragraph (4) referred to representatives at meetings convened by specialized agencies, a matter which was not relevant to article 46, and so should be deleted.

Paragraph (4) was deleted.

The commentary to article 46, as amended, was approved.

COMMENTARY TO ARTICLE 49 (Consultations between the sending State, the host State and the Organization)

Paragraph (1)

23. Mr. KEARNEY suggested that the second sentence be reworded on the following lines: "The purpose of the consultations in question would be to seek solutions for any difficulties which may arise between the host State and the sending State in connexion with the activities of the permanent mission. The need for such consultations is underlined by certain difficulties arising as a result of the non-application, between State . . .".

24. Mr. AGO said that paragraph (1) as it stood merely reflected a concern to facilitate the settlement of disputes between the host State and the sending State; it did not adequately express the essential idea that the organization should have an opportunity of participating in the consultations, if only to prevent an agreement being made between the host State and the sending State concerned that might be detrimental to the interests of other sending States and consequently of the organization itself. He therefore suggested that the second sentence be replaced by a sentence reading: "The purpose of the consultations in question would be to facilitate the solution of any difficulty between the host State and the sending State in connexion with the activities of the permanent mission and also to ensure that such solutions are not adopted without giving the Organization the opportunity of expressing its views thereon."

25. Mr. REUTER said that Mr. Ago's suggestion was unacceptable because it introduced an idea about which he had the gravest doubts, namely, that the organization should be entitled to participate in all consultations between a host State and a sending State.

26. Mr. ROSENNE and Mr. CASTRÉN said they supported Mr. Reuter's view.

27. Sir Humphrey WALDOCK said that Mr. Ago's preoccupation might be met if the words "remedies in particular for difficulties" in the second sentence were replaced by the words "a means of solving difficulties". He himself had not been satisfied with the word "remedies" in the context. The Commission had been trying to find a substitute for the procedure of declaring

an individual *persona non grata*, which operated in diplomatic relations, by providing for consultations as a means of solving difficulties and of affording some measure of protection to the host State.

28. Mr. YASSEEN said he thought it would be more correct to speak of "the establishment and the activities of the permanent mission", instead of just "the activities of the permanent mission", in order to cover also any difficulties which might arise before the mission began to perform its activities.

29. Mr. ROSENNE said that some misunderstanding had evidently occurred over the content of paragraph (1), which referred to the examination of twenty-one draft articles and certain suggestions made at the twentieth session. On that occasion the Commission had realized the need for a provision concerning consultations between the sending State, the host State and the organization¹ for purposes of protecting the host State and in connexion with its bilateral relations with sending States. The remaining paragraphs in the commentary dealt with other issues that had arisen at the present session in the course of the discussion on the Special Rapporteur's text of article 49.

30. Sir Humphrey WALDOCK said he agreed with Mr. Rosenne that paragraph (1) was concerned with the origins of the suggestions made in the Commission at its twentieth session. If the point made by Mr. Ago was to be covered at all, it should be in paragraph (2).

31. Mr. TSURUOKA said that the emphasis in article 49 was not on the possibility of the organization having its say; on the contrary, the organization was merely invited to participate in the settlement of disputes. The emphasis should therefore be laid on the assistance the organization could give, not on any possibility or entitlement it might have to intervene.

32. Mr. AGO suggested that, bearing in mind that paragraph (1) expressed only the Special Rapporteur's opinion, an appropriate solution would be to insert the following sentence after the first sentence in paragraph (2): "Moreover, the article provides that these consultations shall be held not only upon the request of the States concerned, but also upon the request of the Organization itself".

It was so agreed.

33. Mr. ROSENNE suggested that the footnote to paragraph (1) be amplified so as to refer also to paragraph (8) of the commentary to article 16, as approved at the previous session.²

It was so agreed.

34. After some further discussion, the CHAIRMAN suggested that the second sentence of paragraph (1) be reworded to read: "The purpose of the consultations in question would be to seek solutions for any difficulties

between the host State and the sending State in connexion with the establishment and the activities of the permanent mission. The need for such consultations is underlined by the difficulties which may arise as a result of the non-applicability between States members of international organizations . . .".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

35. Mr. ROSENNE said it was by no means certain that the article was "drafted in such a flexible manner" as to have the effect described in the first sentence. He suggested that the opening words of the sentence be amended to read: "The article is intended to be sufficiently flexible to envisage the holding . . .".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

36. Mr. ROSENNE suggested the deletion of paragraph (3), since it did not accurately reflect the position.

37. Mr. CASTRÉN said that article 23 *bis* did refer to the duty of the organization regarding the application of the provisions of the draft.

38. The CHAIRMAN said that Mr. Rosenne's point might be met by replacing the words "the interest of the Organization in the application" by the words "the duty of the Organization to ensure the application", and by replacing the words "the Commission refers to its commentary on article 23 *bis*" by the words "the Commission refers to article 23 *bis*".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

39. Sir Humphrey WALDOCK said it was hardly true to say that an organization was always represented by its principal executive official; in certain circumstances, the President of the General Assembly, or of the corresponding body, might act for the organisation.

40. Mr. REUTER said that paragraph (4) was completely unacceptable. Every organization was free to designate whichever of its organs was competent to conduct consultations; it would be contrary to the essence and practice of law to seek to alter the constituent texts of international organizations by means of a treaty.

41. The CHAIRMAN suggested that paragraph (4) be deleted.

Paragraph (4) was deleted.

Paragraph (5)

42. Mr. JIMÉNEZ DE ARÉCHAGA suggested that the reference to the Treaty of Brussels in the second sentence be deleted.

It was so agreed.

Paragraph (5), as amended, was approved.

¹ See *Yearbook of the International Law Commission, 1968*, vol. I, 984th meeting, para. 93; see also 958th meeting, para. 53 and 959th meeting, para. 8.

² *Op. cit.*, vol. II, Report of the Commission to the General Assembly, chapter II, section E, part II.

Paragraph (6)

43. Mr. JIMÉNEZ DE ARÉCHAGA suggested that the last two sentences be deleted.

It was so agreed.

44. Mr. REUTER said that he was quite unable to accept the first sentence which contrasted difficulties of a practical character with disputes of a more formal character, whereas in fact the former contrasted with difficulties of principle and the latter with disputes of a non-formal character. Article 49 provided for a first stage in the settlement of disputes by what might be called the exhaustion of the diplomatic channel. It was not possible to draw any distinction between practical and theoretical difficulties.

45. Mr. ROSENNE said that there was nothing in paragraph (6) concerning the problem which the Special Rapporteur had sought to cover in his proposed paragraph 2 for article 49.³ The Commission had decided not to include that paragraph on the ground that the matter was dealt with in articles 3, 4 and 5. Some explanation of the fact was needed in paragraph (6) to indicate that article 49 was without prejudice to provisions concerning the settlement of disputes in other international agreements or in the relevant rules of an organization.

46. Mr. JIMÉNEZ DE ARÉCHAGA said that paragraph (6) of the commentary also failed to mention the Commission's decision to consider at a later stage the possibility of including provisions on the settlement of disputes in the draft articles.

47. After some further discussion, the CHAIRMAN suggested that paragraph (6) be redrafted as follows:

"In his fourth report, the Special Rapporteur had proposed the addition to article 49 of a second paragraph drafted as follows:

"The present paragraph is without prejudice to provisions concerning settlement of disputes contained in the present articles or other international agreements in force between States or between States and international organizations or to any relevant rules of the Organization".

"The Commission did not consider it advisable to add this paragraph in view of the terms of articles 3, 4 and 5 concerning the application of the relevant rules of international organizations and of international agreements. It also reserved the possibility of including at the end of the draft articles a provision concerning the settlement of disputes which might arise from the application of the articles."

It was so agreed.

Paragraph (6), as amended, was approved.

The commentary to article 49, as amended, was approved.

48. The CHAIRMAN invited the Commission to consider the part of chapter II of its draft report contained in document A/CN.4/L.144/Add.3.

COMMENTARY TO ARTICLE 47 (Facilities for departure)

The commentary to article 47 was approved.

COMMENTARY TO ARTICLE 48 (Protection of premises and archives)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

49. The CHAIRMAN, speaking as a member of the Commission, said that the statement in the first sentence seemed to him to be quite wrong; the contrary was the case.

50. Mr. ROSENNE said he agreed with the Chairman. The first sentence should be dropped altogether and the second sentence should be redrafted to start: "The second sentence of paragraph 1 differs from the corresponding provision of the draft on special missions in that . . ."; the text of the provision in the draft on special missions should not be inserted at all.

51. To turn to a different point, which he thought had been raised at an earlier meeting,⁴ another way in which the obligation of the host State could be terminated would be if the sending State decided to put its property and archives in the charge of a third State representing its interests, in the case perhaps of the suspension of diplomatic relations. That point did not have to be mentioned in the article but it could be mentioned in a few words in the commentary.

52. The CHAIRMAN, speaking as a member of the Commission, said he thought it ought to be explained in the commentary why the article differed from that in the Convention on Diplomatic Relations and even from the corresponding article of the draft on special missions and whether the Commission intended that the host State should be legally released from the special duty to protect the premises and the property and archives of the permanent mission, even when they remained in the host State.

53. Mr. USTOR said he agreed with the Chairman. It should be explained that the meaning of the special duty provision was that if, after the expiry of a reasonable period, the premises still remained in the ownership of the sending State, and it had made no arrangements for their disposal, then the special duty would be transformed into the ordinary duty under general international law to respect and protect the property of a foreign State.

54. With regard to the second question raised by the Chairman, examples might be given in the commentary to illustrate what the Commission had in mind. One had already been mentioned, namely, that the sending State might transmit the property and archives of the permanent mission to its diplomatic mission; another, which Mr. Rosenne had just mentioned, was that it might ask a third State to look after them.

55. Mr. KEARNEY said he did not think it was at all necessary to explain in the commentary what the

³ See 999th meeting, para. 25.

⁴ See 1026th meeting, para. 8.

legal consequences of failure to comply with the special duty were.

56. Mr. BARTOŠ said that, since the Commission had taken the novel decision contained in the second sentence of paragraph 1 of the article, it was bound to give a brief explanation of its reasons. Paragraph (2) of the commentary should be deleted and it should be stated instead that the Commission had been concerned to express, in the second sentence of paragraph 1 of the article, the obligation of the sending State to take the necessary steps to relieve the host State of its special duty of protection within a reasonable time. A short explanation of the meaning of that provision should then be given, because there was none as yet in international law, to indicate how the host State could be released from its special duty. A few words would suffice to explain that the sending State must do its utmost either to transfer its property and archives to its diplomatic mission, or to entrust them to the mission of some other State.

57. Mr. REUTER said he agreed with Mr. Bartoš that it should be stated in the commentary that the sending State was bound either to withdraw its property and its archives or to entrust them to its diplomatic mission, if any, or to entrust them to a friendly diplomatic mission, and then a short sentence should be added explaining that after the expiry of a reasonable time, if the sending State had failed to discharge its obligation, the host State was still bound by any obligations that might be imposed on it by municipal law, by general international law or by any special agreement with the sending State. That would express the general view which had emerged in the Commission's discussions.

58. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the proposal by Mr. Bartoš and Mr. Reuter. It should also be explained why it was necessary to relieve the host State of its special duty even when a permanent mission was withdrawn temporarily.

59. Speaking as Chairman, he suggested that the General Rapporteur be asked to prepare a new text for paragraph (2) with the help of Mr. Kearney and Mr. Reuter.⁵

It was so agreed.

Paragraph (3)

Paragraph (3) was approved.

The meeting rose at 1.5 p.m.

⁵ For the continuation of the discussion on the commentary to article 48, see 1041st meeting, paras. 46-55.

1040th MEETING

Thursday, 7 August 1969, at 3.15 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney,

Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

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

(A/CN.4/L.143-148 and Addenda)

(continued)

Chapter III

SUCCESSION OF STATES AND GOVERNMENTS

1. The CHAIRMAN invited the Commission to consider the part of chapter III of its draft report contained in document A/CN.4/L.145.

A. Historical background (Paragraphs 1-15)

Paragraphs 1-15

2. Mr. ROSENNE said he noted that paragraphs 1-8 were reproduced from the report on the Commission's twentieth session. It seemed unnecessary to preface a summary of its discussions at the present session with a long introduction consisting largely of material drawn from the previous year's report. As chapter II contained a footnote referring to historical background information given in the report on the twentieth session, it might be sufficient if chapter III included a similar reference to the relevant passages in that report.

3. Mr. AGO, supported by Mr. EUSTATHIADES and Sir Humphrey WALDOCK, said he was in favour of retaining the historical background, since it helped to place the rest of the chapter in perspective, and especially since delegations might not have the Commission's previous report before them when the subject was discussed in the Sixth Committee.

Paragraphs 1-15 were approved.

4. The CHAIRMAN invited the Commission to consider the part of chapter III of its draft report contained in document A/CN.4/L.145/Add.1.

B. Succession in respect of matters other than treaties (Paragraphs 16-44)

Paragraph 16

Paragraph 16 was approved.

Paragraph 17

5. Mr. AGO said that some of the wording used was inconsistent with the views expressed by the Special Rapporteur. He suggested that the beginning of the second sentence be amended to read "Even if a special status were to be accorded to the successor States, account would nevertheless have to be taken . . .".

It was so agreed.

6. Mr. KEARNEY said that the reference to the relevant General Assembly resolutions in the second sentence of paragraph 17 was sufficient without the qualifying phrase at the end of the sentence, which was unnecessary and might be confusing. He therefore suggested that either the phrase "which recognized that

all peoples are entitled to decide freely their political and economic system” or the two phrases in brackets be deleted.

7. The CHAIRMAN suggested that the two phrases in brackets be deleted.

It was so agreed.

Paragraph 17, as amended, was approved.

Paragraphs 18 and 19

Paragraphs 18 and 19 were approved.

Paragraph 20

8. Mr. AGO suggested that the words “in principle” be inserted after the word “supported” in the first sentence.

It was so agreed.

9. Mr. CASTRÉN suggested that the word “other” be replaced by the word “some” in the second sentence.

It was so agreed.

10. Mr. KEARNEY suggested that, in the third sentence, the words “some other rule of international law” be replaced by the words “the application of a rule of general international law”, since a treaty was not a rule of international law. He also suggested that, in the fourth sentence, the word “approach” be replaced by the word “content” and the words “placed in an appropriate perspective” by the words “adequately developed”, and, in the fifth sentence, the words “on a number of legal interpretations” by the words “as to the legal analysis of a number of issues.”

It was so agreed.

11. Sir Humphrey WALDOCK suggested that, in the fourth sentence, the word “Finally” be deleted and the word “however” be inserted after the word “members”, in order to avoid giving the impression that only a small minority of members had dissented. He also suggested that the phrase “and somewhat lacking in balance” be added at the end of the sentence.

It was so agreed.

Paragraph 20, as amended, was approved.

Paragraph 21

12. Mr. AGO suggested that the phrase “that State succession implied a substitution and not a transfer of sovereignty” in the first sentence be deleted, as it was a purely theoretical concept and had not received general approval, as was stated.

13. Mr. BARTOŠ said he agreed. A substitution of sovereignty was very different from a transfer of sovereignty from the point of view of acquired rights.

14. Mr. CASTRÉN said that the concept was accepted by all modern writers.

15. The CHAIRMAN, speaking as a member of the Commission, suggested that the words “received general approval” be replaced by the words “were shared by several members”.

It was so agreed.

16. Mr. KEARNEY said that he and other members had disagreed with the Special Rapporteur’s interpreta-

tion of General Assembly resolution 1803 (XVII). He therefore suggested that the phrase “and their interpretation was controversial” be added to the last sentence.

It was so agreed.

Paragraph 21, as amended, was approved.

Paragraph 22

17. Mr. ROSENNE said that the paragraph seemed to confuse the causes of succession with its origins and types. The two subjects were quite different and it would be unwise to group them together for the purposes of study. Moreover, the chapter was primarily concerned with succession and not with decolonization. It would therefore be clearer if the word “decolonization” in the fourth sentence were replaced by the phrase “the process of succession arising from decolonization”. He also suggested that the words “It was also argued” at the beginning of the same sentence be replaced by the words “Other members thought”.

Mr. Rosenne’s proposals were adopted.

18. Sir Humphrey WALDOCK said that decolonization could in fact give rise to different types of succession. He therefore suggested that the following sentence be inserted after the fourth sentence: “Some members were of the opinion that decolonization was more a cause than a type of succession”.

It was so agreed.

19. Mr. EUSTATHIADES said that the final sentence of the paragraph might be clearer if it were amended to read: “Lastly, some members emphasized that the circumstances surrounding certain cases of succession, in particular cases of independence resulting from a freely accepted agreement, should not be overlooked.”.

Mr. Eustathiades’s proposal was adopted.

Paragraph 22, as amended, was approved.

Paragraph 23

20. Mr. ROSENNE said that, although the paragraph summed up the views expressed by the Special Rapporteur in paragraph 107 of his report (A/CN.4/216/Rev.1), no mention was made of the dissenting opinions expressed in the subsequent debate on the subject. Moreover, the presentation of the Special Rapporteur’s views at the end of the summary of general comments on his report gave the impression that they were intended as a reply to those comments. If those views, which were the basis of the Special Rapporteur’s thesis concerning the antinomy between acquired rights and decolonization and had given rise to considerable controversy, were to be reproduced in the report, the dissenting opinions should also be recorded.

21. Mr. KEARNEY said that the second sentence had nothing to do with the arguments adduced in the first and third sentences. Nor was the existence of States at different levels of economic development a “new problem”. The sentence would have to be either redrafted or deleted.

22. Mr. AGO suggested that the second and third sentences be replaced by the sentence: “This view was

shared by some members of the Commission, while others took a different view".

It was so agreed.

23. Mr. ROSENNE suggested that the words "explained that" in the first sentence be replaced by the word "stated that, in his view".

It was so agreed.

Paragraph 23, as amended, was approved.

Paragraph 24

24. Mr. USTOR suggested that, to avoid confusion, the word "neither" and the phrase "nor with regard to States" be deleted from the first sentence, since acquired rights with regard to States and private persons respectively were very different concepts.

It was so agreed.

25. Mr. KEARNEY said it was not clear which members held the view expressed in the third sentence: many believed that public property and public debts deserved protection even in cases of succession resulting from decolonization.

26. Sir Humphrey WALDOCK said he also found the paragraph confusing in its present form.

27. Mr. ROSENNE suggested that the third and fourth sentences be transposed; the first three sentences would then deal with private rights and the fourth with the rights of States.

It was so agreed.

Paragraph 24, as amended, was approved.

Paragraph 25

28. Mr. KEARNEY said it would be easier to distinguish between the different points of view if the second and fourth sentences were deleted and redrafted to form a new paragraph.

29. Mr. CASTRÉN and Mr. USTOR said they were opposed to that suggestion, since the paragraph clearly stated one point of view.

30. Sir Humphrey WALDOCK said that the second sentence might be more generally acceptable if it were less emphatic. He suggested that it be amended to read: "Such rights might not be absolute, their concept might be somewhat imprecise, and they could be limited, but it was not possible to accept their outright suppression".

It was so agreed.

31. Mr. ROSENNE said he thought that the question of remedies ought to be introduced into the third sentence, since even those who recognized the concept of acquired rights also recognized that, in certain circumstances, if the successor State did not recognize the acquired rights, it must pay compensation. It was therefore an obligation and not a right which was involved.

32. The CHAIRMAN, speaking as a member of the Commission, suggested that the third sentence might end with the words "... including certain acquired rights; where appropriate, international law endorses such respect of acquired rights by imposing an obligation

to pay compensation", and the fourth sentence begin with the words "Exceptions to that principle were only admitted where the predecessor State had granted the rights in bad faith ...".

It was so agreed.

Paragraph 25, as amended, was approved.

Paragraph 26

33. Mr. AGO suggested that, in the fourth sentence, the phrase "but to try to find the most generally acceptable basis to safeguard the rights of aliens" be replaced by the wording "but to consider whether or not it was essential that, even in the case of State succession, aliens should be granted the treatment accorded to them by international law".

It was so agreed.

Paragraph 26, as amended, was approved.

Paragraph 27

34. Mr. AGO suggested that, in the phrase "subject to the rules of international law relating to State responsibility" at the end of the paragraph, the words "any limits laid down by" be inserted after the words "subject to".

It was so agreed.

35. Mr. ROSENNE said he did not understand the implications of the phrase "in the name of an abstract concept" in the first sentence.

36. Mr. AGO suggested that the phrase be deleted.

It was so agreed.

Paragraph 27, as amended, was approved.

Paragraph 28

37. Mr. KEARNEY suggested that the second sentence be amended to read: "Among the reasons advanced were the principles of unjust enrichment and equity".

It was so agreed.

38. The CHAIRMAN speaking as a member of the Commission, suggested that in the third sentence the words "rights which had the character of" be inserted after the word "property".

It was so agreed.

Paragraph 28, as amended, was approved.

Paragraph 29

39. Mr. KEARNEY suggested that the word "adjusted" in the first sentence be replaced by the word "equitable".

It was so agreed.

40. Mr. ROSENNE suggested that the word "humble" in the second sentence be replaced by the word "modest".

It was so agreed.

Paragraph 29, as amended, was approved.

Paragraph 30

41. Mr. KEARNEY suggested that the paragraph be divided into two sentences, the first ending with the words "arrangements or agreements" and the second

beginning with the words "It was also suggested that the problem of compensation ...".

It was so agreed.

Paragraph 30, as amended, was approved.

Paragraph 31

42. Sir Humphrey WALDOCK suggested that paragraphs 31 and 32 be included in section 2 and that the title "3. Legal basis for the protection of existing rights other than the concept of acquired rights", which appeared before paragraph 31, be deleted.

It was so agreed.

43. Sir Humphrey WALDOCK suggested that the words "existing rights", at the end of the first sentence, be replaced by the words "rights existing prior to the succession".

It was so agreed.

Paragraph 31, as amended, was approved.

Paragraph 32

44. Sir Humphrey WALDOCK suggested that the words "in this respect" in the first sentence be deleted and the words "for his part" inserted after the words "Special Rapporteur", and that the words "pointed out" in the second sentence be replaced by the words "voiced the opinion".

It was so agreed.

45. The CHAIRMAN, speaking as a member of the Commission, suggested that a sentence be added at the end of the paragraph reading: "These opinions of the Special Rapporteur were not shared by some members of the Commission".

46. Mr. ROSENNE said that the Commission ought not to accept the paragraph in its present form. It would be unwise for it to include in its report a statement to the effect that both such a well-established concept of international law as good faith and United Nations jurisprudence on human rights were unsatisfactory. The Commission had itself given prominence to the concept of good faith in the articles on the law of treaties recently adopted at the Vienna Conference. Special Rapporteurs were free to express their individual views, but the Commission was responsible for the contents of its own report. He therefore suggested that paragraph 32 be deleted and the following sentence added to paragraph 31: "Replying in the debate on this point, the Special Rapporteur considered that these notions were insufficient in the case of State succession arising out of decolonization, if only because they could give rise to difficult international controversies which would not serve the cause of good relations between the predecessor and successor States".

47. Mr. REUTER said he felt that, if the Special Rapporteur's views were to be included in the report, they should be recorded as he had expressed them. He accordingly suggested that the following sentence be added at the end of the paragraph: "The Special Rapporteur's position on these points was the subject of lively controversy in the Commission".

48. Sir Humphrey WALDOCK and Mr. TSURUOKA said they both supported that suggestion.

Mr. Reuter's proposal was adopted.

Paragraph 32, as amended, was approved.

Paragraph 33

49. Mr. AGO suggested that the words "and developing countries" be deleted from the title before paragraph 33, where they were redundant, and that in the second sentence they be replaced by the words "as of all other States", since the right in question was not confined to new States.

It was so agreed.

Paragraph 33, as amended, was approved.

Paragraph 34

50. Mr. EUSTATHIADES suggested that in the first sentence the words "it is an exaggeration to say" be deleted and that the words "not necessarily" be inserted before the word "contradictory".

It was so agreed.

51. Mr. AGO suggested that the words "In their view" be inserted at the beginning of the second sentence.

It was so agreed.

Paragraph 34, as amended, was approved.

Paragraph 35

52. Mr. KEARNEY said he could not accept paragraph 35 in its present form. The wording of the first sentence was offensive while the rest of the paragraph repeated a point already made in paragraph 33. He therefore suggested that the paragraph be replaced by the following text:

"Other members shared the view that compensation and terms of payment for expropriation of property could be calculated so as to take into account losses suffered by the former colony in connexion with that property. Benefits derived in the past under the colonial régime would have to be taken into consideration to avoid unjust enrichment."

It was so agreed.

Paragraph 35, as amended, was approved.

Paragraph 36

53. Mr. AGO suggested that the first sentence be amended to read: "Stress was laid on the difficulties which might arise in cases of decolonization where an enormous volume of rights became aliens' rights overnight".

It was so agreed.

Paragraph 36, as amended, was approved.

Paragraph 37

54. Mr. KEARNEY suggested that the phrase "Regardless of past exploitation of developing countries by foreign interests", in the last sentence, be deleted.

It was so agreed.

Paragraph 37, as amended, was approved.

Paragraph 38

55. Mr. AGO suggested that, since the legal situations mentioned in the first sentence had not always been

established by the predecessor State, the phrase "which the predecessor State had legally established" be replaced by the words "lawfully constituted on the basis of the legal order of the predecessor State". He also suggested that the word "eventual" be inserted between the words "the" and "exceptions" in the third sentence.

Mr. Ago's proposals were adopted.

Paragraph 38, as amended, was approved.

Paragraph 39

56. Mr. ROSENNE suggested that the words "outside it" in the first sentence be replaced by the words "in other contexts".

It was so agreed.

57. Mr. KEARNEY suggested that the word "feared" in the third sentence be replaced by the word "considered".

It was so agreed.

Paragraph 39, as amended, was approved.

Paragraph 40

58. Mr. KEARNEY said he did not understand the meaning of the phrase "to the different nature of the diplomatic protection and the old capitulation régime".

59. Sir Humphrey WALDOCK suggested that the phrase be deleted. He also suggested that the word "delicate" in the preceding phrase "delicate questions of nationality" be replaced by the word "difficult".

It was so agreed.

Paragraph 40, as amended, was approved.

Paragraph 41

60. Mr. ROSENNE, referring to the first sentence, said it was the violation of acquired rights and not acquired rights as such that belonged to the topic of State responsibility.

61. Sir Humphrey WALDOCK said he agreed. He suggested that the words "the study of" be inserted before the words "acquired rights".

It was so agreed.

62. Mr. KEARNEY suggested that the third sentence be deleted and the words "The Special Rapporteur stated that" inserted at the beginning of the fourth sentence.

It was so agreed.

63. Mr. ROSENNE suggested that, in order to avoid confusion, the words "for the topic of succession of States in respect of matters other than treaties" be inserted after the words "The Special Rapporteur", at the beginning of the sentence, since the paragraph referred to two topics as well as the current study.

It was so agreed.

Paragraph 41, as amended, was approved.¹

¹ For the continuation of the discussion on chapter III of the draft report, see 1041st meeting, paras. 29-45.

Other business

(Item 8 of the agenda)

INDEX OF THE COMMISSION'S DOCUMENTS

64. Mr. TESLENKO (Deputy Secretary to the Commission) said he had been asked to inform the Commission that the United Nations Library at Geneva had begun the preparation of an index of all the documents issued by the Commission.

65. The CHAIRMAN suggested that, in its report, the Commission should record its appreciation of that undertaking by the United Nations Library at Geneva.

It was so agreed.

The meeting rose at 8 p.m.

1041st MEETING

Friday, 8 August 1969, at 9.45 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Reuter, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldoack, Mr. Yasseen.

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

(A/CN.4/L.143-148 and Addenda)

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of its draft report.

Chapter I

ORGANIZATION OF THE SESSION (A/CN.4/L.143)

Paragraphs 1 to 6

Paragraphs 1 to 6 were approved.

Paragraph 7

2. Mr. CASTRÉN said that the words "and the most-favoured-nation clause" at the end of the paragraph were no longer applicable, as the Commission had in fact considered Mr. Ustor's report, and so should be deleted.

It was so agreed.

Chapter I, as amended, was approved.

Chapter VI

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION (A/CN.4/L.147 and Corr.1)

3. The CHAIRMAN pointed out that, since the part of the Commission's report dealing with the most-

favoured-nation clause was now contained in document A/CN.4/L.148, which would be considered later, and since sections A and B of chapter VI had been approved at a closed meeting, only sections C to G of chapter VI remained to be approved.

C. Relations with the International Court of Justice

Section C was approved.

D. Co-operation with other bodies

4. Mr. CASTRÉN said that the words "of that Committee" should be added after the words "President of the tenth session", in the second line of the second paragraph.

It was so agreed.

Section D, as amended, was approved.

E. Date and place of the twenty-second session

Section E was approved

F. Representation at the Twenty-fourth Session of the General Assembly

Section F was approved

G. Seminar on International Law

5. Mr. BARTOŠ said he thought that Section G ought to contain a recommendation that the General Assembly should provide increased financial assistance for the Seminar.

6. Mr. RATON (Director of the Seminar on International Law), after thanking Mr. Bartoš for his suggestion, said that the Seminar needed a larger number of scholarships rather than funds from the General Assembly. What was important was to express the hope that the countries which had offered scholarships for the Seminar which had just been held would do the same for the Seminar to be held next year, that other countries would also offer scholarships and that, in response to the wish expressed by one member of the Commission, scholarships would be offered to candidates from countries other than developing countries.

7. Mr. KEARNEY asked whether twenty-two was the largest number of students for which the Seminar could usefully be organized.

8. Mr. RATON (Director of the Seminar on International Law) said that experience had shown that the ideal number of participants to ensure both equitable geographical distribution and maximum benefit was between twenty-two and twenty-five.

9. Mr. KEARNEY said that a figure of twenty-two to twenty-four students was a reasonable one but it was undesirable that the great majority should come from developing countries, since that would mean that the advantages of the interplay of different systems of law and teaching methods were lost. A roughly equal divi-

sion of students from the developing and developed countries would be preferable.

Section G was approved

Chapter VI, as amended, was approved.

Chapter V

THE MOST-FAVOURLED-NATION CLAUSE (A/CN.4/L.148)

Paragraphs 1 to 4

Paragraphs 1 to 4 were approved.

Paragraph 5

10. Mr. EUSTATHIADES said that the word "*essentiellement*" in the French version of the second sentence gave the impression that the Special Rapporteur had been invited to base his report on the sources mentioned in that sentence, whereas he had referred to many other sources when he had described his plan of work. The word "*essentiellement*" should therefore be replaced by the words "*dans une large mesure*", which were a better translation of the corresponding English word "largely".

11. Sir Humphrey WALDOCK said he doubted whether that was quite enough. The text as it stood rather gave the impression that the rest of the Special Rapporteur's work on the most-favoured-nation clause would be based on the replies from the organizations and interested agencies consulted by the Secretary-General and on the jurisprudence of the International Court of Justice in the three cases mentioned in footnote 5, whereas he presumed that the basis of the Special Rapporteur's next study would be a much broader one. What the Commission had asked the Special Rapporteur to do was to prepare next a study based largely on that material and he accordingly suggested that the phrase "prepare next a study based primarily" be substituted for the phrase "continue his preparatory work largely on the basis".

It was so agreed.

12. Mr. KEARNEY suggested that the phrase "and of the effects of the economic depression of the 1930s upon the clause" might be included in the first sentence, as considerable attention had been given to that aspect of the historical background during the discussion on the Special Rapporteur's first report. He would not, however, press his suggestion.

13. Mr. USTOR, Special Rapporteur, said that the suggested insertion, though acceptable in itself, should perhaps not be incorporated because at a later stage he would need to restrict his study and draft articles to the purely legal aspects of the most-favoured-nation clause and such an addition might give the impression that the Commission was more interested in economic considerations than was really the case.

Paragraph 5, as amended, was approved.

Chapter V, as amended, was approved.

Chapter IV

STATE RESPONSIBILITY (A/CN.4/L.146)

Paragraphs 1 to 15

Paragraphs 1 to 15 were approved.

Paragraph 16

14. Mr. EUSTATHIADES said he felt that paragraph 16 neither gave the Special Rapporteur the credit which he deserved nor fully reflected the discussions in the Commission. He therefore proposed that it be completed by the addition of a passage congratulating the Special Rapporteur on having laid the foundation for its future work, then going on to state that there was general agreement on the main lines of the programme to be undertaken at future sessions, and that, after a detailed exchange of views, the Special Rapporteur had summed up the discussion and announced a plan of work which had been approved by the Commission.

15. Sir Humphrey WALDOCK said that, although he would like to congratulate Mr. Ago on his work, it was not usual to include in the Commission's report statements of the kind proposed by Mr. Eustathiades. It would also look a little conspicuous if a similar tribute to Mr. Ustor's report were not included in chapter V.

16. Mr. AGO said that congratulations should certainly not be included, but the other ideas contained in the additional passage proposed by Mr. Eustathiades, the General Rapporteur, could usefully be inserted. He therefore suggested that the following sentences be added to the end of the paragraph: "The Special Rapporteur, in summing up the debate, gave an account of the views of members of the Commission and announced his future plan of work. There was general agreement on the main lines of the programme to be undertaken on the subject during the next sessions."

It was so agreed.

Paragraph 16, as amended, was approved.

Paragraph 17

17. Mr. KEARNEY said that if the first sentence was intended as a definition of a primary rule of international law, it was much too narrow. Either the definition should be modified or some qualification should be inserted to indicate what type of rule was meant.

18. Mr. AGO explained that the rules referred to were the primary or substantive rules establishing rights and obligations. However, the word "primary" could be placed within quotation marks in order to indicate exactly what was meant.

19. Mr. KEARNEY said that such rules also established other legal relationships. He did not, however, wish to press the point.

20. Mr. TSURUOKA said he agreed with Mr. Kearney that the word "primary" was not clear. It was hard to tell whether it was to be understood in relation to rules governing State responsibility or in relation to other rules.

21. Mr. USTOR suggested that the word "primary" be dropped from the first sentence, since no mention

was made of secondary rules of international law which would help to explain the distinction. Instead of speaking of "the primary rules of international law: i.e. those laying obligations upon States", it might be better to say "those rules of international law which laid obligations upon States".

Mr. Ustor's proposal was adopted.

22. Sir Humphrey WALDOCK said that, whereas he found the distinction between primary and secondary rules of international law comprehensible, the somewhat technical jurisprudential concept introduced in article 17 might not have the support of all members. Moreover, it might cause confusion because of the other ways in which the term "primary rule" was sometimes used by lawyers. Mr. Ustor's amendment to the first sentence had been accepted, so the word "substantive" might perhaps be substituted for the word "primary" in the second sentence in order to satisfy Mr. Ago.

23. Mr. AGO said it was not easy to find the appropriate term to describe the rules which laid down rights and obligations in relation to those which made provision for the consequences of their violation and which were not simple rules of procedure. In view of the difficulties raised by the word "primary", he would suggest that it be dropped from the second sentence also.

It was so agreed.

Paragraph 17, as amended, was approved.

Paragraph 18

24. Mr. EUSTATHIADES suggested that the last words of the paragraph "or even between that State and the entire international community", be deleted. Although there could be a legal relationship between a guilty State and a group of States by virtue of a collective treaty guarantee, such a relationship could not exist between a guilty State and the entire international community.

25. Mr. REUTER, supported by Mr. AGO, suggested that, instead of deleting that phrase, the words "may also give rise", in the last sentence, be replaced by the word "might also give rise", and that the word "even", in the last line, be replaced by the word "eventually".

It was so agreed.

Paragraph 18, as amended, was approved.

Paragraph 19

26. Mr. EUSTATHIADES suggested that the word "putative" in the first line be deleted.

It was so agreed.

Paragraph 19, as amended, was approved.

Paragraph 20

27. Mr. KEARNEY suggested that, at the end of the first sentence, a phrase in brackets be inserted giving a few examples of lawful activities which could give rise to international responsibility; space activities could be mentioned. Such examples would be useful to many readers of the report.

28. Mr. AGO, supporting Mr. Kearney's suggestion,

said that the phrase should also refer to nuclear activities.

Mr. Kearney's proposal and Mr. Ago's proposal were adopted.

Paragraph 20, as amended, was approved.

Paragraph 21

Paragraph 21 was approved.

Chapter IV, as amended, was approved.

Chapter III

SUCCESION OF STATES AND GOVERNMENTS (resumed from the previous meeting)

29. The CHAIRMAN invited the Commission to continue its consideration of the part of chapter III of its draft report contained in document A/CN.4/L.145/Add.1.

Paragraph 42

30. The CHAIRMAN, speaking as a member of the Commission, suggested that the opening words of the first sentence, "In conclusion, the members of the Commission", be replaced by the words "At the end of the debate, most members of the Commission", and that in the fifth sentence, the words "the Commission decided and the Special Rapporteur agreed" be replaced by the words "most members of the Commission considered, and the Special Rapporteur agreed".

It was so agreed.

31. Mr. KEARNEY said that the second sentence should be toned down; the statement that "the theoretical views were too controversial and the acquired rights involved vague and imprecise aspects" was too strong.

32. Sir Humphrey WALDOCK suggested that the second and third sentences be merged, so as to eliminate that passage. The combined sentence would then read: "The topic of acquired rights was extremely controversial and its study at a premature stage could only delay the Commission's work on the topic as a whole".

It was so agreed.

33. Mr. CASTRÉN suggested that the word "common" be deleted from the phrase "a common firm foundation" in the fourth sentence.

It was so agreed.

34. The CHAIRMAN suggested that, to avoid giving the impression that the Commission had imposed the subject of his next report on the Special Rapporteur, the word "preferably" be inserted after the word "commencing" in the fifth sentence.

It was so agreed.

35. Mr. YASSEEN suggested that the word "completely", before the word "empirical" in the fifth sentence, be deleted.

It was so agreed.

36. Mr. KEARNEY said he saw no need to include the words "and the Special Rapporteur agreed" in the

fifth sentence. The paragraph was intended to reflect the views of the Commission and it was not customary to refer in such a context to the approval which the Special Rapporteur might give to those views.

37. Sir Humphrey WALDOCK said that, in that particular case, there was some value in mentioning the concurrence of the Special Rapporteur. The Commission had examined at the present session a report on acquired rights which the Special Rapporteur had decided to submit on his own initiative. Following the Commission's discussion, the Special Rapporteur had accepted the view of the majority of the members on the manner of dealing with the question of acquired rights.

38. Mr. YASSEEN said that he would prefer to drop the reference to the Special Rapporteur. It was for the Commission to take decisions and for the Special Rapporteur to carry them out.

39. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed that the words referred to by Mr. Kearney should be deleted.

It was so agreed.

40. Mr. REUTER suggested that the last sentence be reworded to read: "Not until the Commission had made sufficient progress, or perhaps had even exhausted the entire topic, would it be in a position to deal directly with the problem of acquired rights".

It was so agreed.

Paragraph 42, as amended, was approved.

Paragraph 43

41. The CHAIRMAN said that paragraph 43, as it stood, did not accurately reflect the outcome of the Commission's discussion and should be based more closely on the provisional decision taken by the Commission at its 1009th meeting.¹ The first sentence should be deleted and the second sentence amended in the light of that provisional decision, which gave the Special Rapporteur a greater freedom of choice regarding the subject of his next report. In order to remove any misunderstanding, however, reference would have to be made to the paragraph of the Commission's report setting out its later decisions also to give priority to the reports of other Special Rapporteurs.

42. Mr. CASTRÉN said the Special Rapporteur should also be requested to take account of the comments made by the Commission at its twentieth session.

43. Mr. KEARNEY said that, as he understood it, paragraph 43 expressed the substantial agreement in the Commission that work on the topic should begin with a report containing a set of draft articles on "public property and public debts". He would therefore urge that those words be retained and not be replaced by a reference to succession in respect of economic and financial matters.

¹ See 1009th meeting, paras. 54-62.

44. Mr. BARTOŠ said that, in order to avoid giving the Special Rapporteur a false impression, it would be preferable to make no reference in the report to the Commission's provisional decision but simply to say that the Commission had requested the Special Rapporteur to submit another report to it, without specifying for which session.

45. After a further exchange of views the CHAIRMAN suggested that paragraph 43 be worded as follows:

"Referring to the provisional decision adopted at its 1009th meeting and to paragraph 93 of this report, the Commission requested the Special Rapporteur to prepare another report containing draft articles on succession of States in respect of economic and financial matters, taking into account the comments of members of the Commission on the reports he had already submitted at the Commission's twentieth and twenty-first sessions. The Commission took note of the Special Rapporteur's intention to devote his next report to public property and public debts. It thanked the Special Rapporteur for his second report on succession of States in respect of matters other than treaties, and confirmed its decision to give that topic priority at its twenty-second session, in 1970."

It was so agreed.

Paragraph 44

Paragraph 44 was approved

Chapter III, as amended, was approved.

Chapter II

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

(resumed from the 1039th meeting)

COMMENTARY TO ARTICLE 48 (Protection of premises and archives) *(continued)*

Paragraph (2)

46. The CHAIRMAN said that, in accordance with the Commission's request, the General Rapporteur, with the help of Mr. Reuter and Mr. Kearney, had prepared a new text to replace paragraph (2) of the commentary to article 48 (A/CN.4/L.144/Add.3). The new text read:

"The second sentence of paragraph 1 differs from the corresponding provision of article 47, paragraph 1, of the draft articles on special missions, which reads: 'The sending State must withdraw that property and those archives within a reasonable time'. The Commission considered that this provision was required because of the difference in character between a permanent mission and a diplomatic mission. Following a breach, diplomatic relations are normally resumed after a reasonable period. Withdrawal from an international organization, on the other hand, may be due to a wide variety of causes, ranging from the application of the organization's own rules to a decision by the sending State to reduce its expenditure. The host State is not directly involved in the factors which may determine such a recall or its

duration. It would, therefore, mean imposing an unjustified burden on that State to require it to provide special guarantees concerning the premises, archives and property of a permanent mission for an unlimited period. It was therefore decided in article 48 that, in case of the recall of its permanent mission, the sending State must relieve the host State of its special duty within a reasonable time. This means that the sending State must withdraw its property and archives within such a time. It is, however, free to discharge its obligation in various ways, for instance, by removing its property and archives from the territory of the host State, or by entrusting them to its diplomatic mission or to the diplomatic mission of another State. The second sentence of paragraph 1 of article 48 has been drafted in the most general terms in order to cover all these possibilities. The premises similarly cease to enjoy special protection from the time the property and archives situated in them have been withdrawn or, after the expiry of a reasonable period, have ceased to enjoy special protection. Where the sending State has failed to discharge its obligation within a reasonable period, the host State ceases to be bound by the special duty laid down in article 48, but, with respect to the property, archives and premises, remains bound by any obligations which may be imposed upon it by its municipal law, by general international law or by special agreements."

47. He said he noticed that the first sentence of the new text drew attention to the difference from the draft on special missions, but the provision in question also differed from the corresponding provision of the Vienna Convention on Diplomatic Relations.

48. Mr. KEARNEY suggested that, in the second sentence of the new text, the words "this provision" be replaced by the words "this addition".

It was so agreed.

49. Mr. KEARNEY said that the opening words of the fourth sentence "Withdrawal from an international organization" were not accurate; it was the permanent mission that was withdrawn. The words "of a permanent mission" should be inserted after the word "withdrawal".

It was so agreed.

50. Mr. AGO said that, in the same sentence, the use of the term "on the other hand" made it necessary to specify that the withdrawal of a permanent mission could be final. He accordingly suggested that the examples of causes be deleted and that after the words "a wide variety of causes" the phrase "and may even be final" be added.

It was so agreed.

51. Mr. USTOR suggested that in the sixth sentence the words "which has been recalled" be inserted after the words "permanent mission" in order to make the meaning clearer.

It was so agreed.

52. Mr. REUTER suggested that the words "even on a temporary basis" be added at the end of the same sentence which would then read: "It would, therefore, mean imposing an unjustified burden on that State to require it to provide, for an unlimited period, special guarantees concerning the premises, archives and property of a permanent mission which has been recalled, even on a temporary basis".

It was so agreed.

53. Mr. AGO said that the eighth sentence was too vague. It would be better to combine it with the following sentence, to read: "This means that the sending State must either withdraw its property and archives within a reasonable time by removing them from the territory of the host State, or entrust them to its diplomatic mission or to the diplomatic mission of another State."

54. Mr. YASSEEN said it was important that the means of relieving the host State of its obligations should not be limited. The property and archives of the sending State might not only be removed by the sending State, they might conceivably be sold or destroyed.

55. Sir Humphrey WALDOCK suggested that the simple solution would be to delete the whole of the eighth sentence and the word "however" in the following sentence, which would then read: "It is free to discharge that obligation in various ways . . .".

Sir Humphrey Waldock's proposals were adopted.

The new text for paragraph (2) of the commentary to article 48, as amended, was approved.

The commentary to article 48, as amended, was approved.

Chapter II of the draft report as a whole, as amended, was approved

The draft report of the Commission on the work of its twenty-first session as a whole, as amended, was adopted

Closure of the session

56. Mr. AGO said he wished to pay a tribute to the competence, courtesy and firmness with which the Chairman had conducted the Commission's deliberations. He also wished to express his thanks to the Chairman of the Drafting Committee, the First Vice-Chairman, the General Rapporteur and the members of the Secretariat.

57. Mr. BARTOŠ said he wished to compliment the Chairman on his grasp of the topics that had been before the Commission. He was certain that the Chairman's eminent qualities would make him an excellent representative of the Commission to the Sixth Committee of the General Assembly.

58. Mr. YASSEEN, Mr. USTOR, Mr. CASTRÉN, Sir Humphrey WALDOCK, Mr. REUTER and Mr. KEARNEY associated themselves with the tributes paid by the previous speakers.

59. Mr. EUSTATHIADES (Rapporteur) said he wished to thank the members of the Commission for their kind words and to associate himself with the tribute they had paid to the Chairman, the two Vice-Chairmen, and the Secretariat.

60. The CHAIRMAN said it was a great honour for him to have presided over the twenty-first session of the Commission, and he was grateful to the Commission for its kindness.

61. It had been suggested to him that a telegram should be sent to Mr. Amado, who had been unable to attend the Commission's session, expressing the sympathy of members. He took it that that suggestion was unanimously approved.

62. He wished to thank the two Vice-Chairmen and the Rapporteur for their help and support. He had greatly appreciated the work of the Secretariat and its competent staff and wished to thank all those who had assisted the Commission in its work.

63. He declared the twenty-first session of the International Law Commission closed.

The meeting rose at 2 p.m.

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