Document:-

A/CN.4/SR.1036

Summary record of the 1036th meeting

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

1969, **vol. I**

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 Commisson 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 note [6] 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.

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

[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.*

[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 Commissions'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 Commissions'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 session[19] 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. Reuter, 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 de 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