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Summary record of the 1056th meeting

Topic:
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either speak from separate places or the name plate in front of him should be changed in order to identify the particular entity he is representing at a given moment."¹²

42. The very concept of representation seemed to him to be extremely ambiguous. In the memorandum he had just quoted, it appeared to comprise at least two separate functions: that of speaking and that of voting. He reserved his position on whether that legal opinion required any change in his attitude as expressed earlier in the meeting.

43. Mr. USTOR said that article 63 dealt with a very important and difficult question, about which the Commission could not remain silent. It involved two different situations: that of a delegation to an organ of an international organization and that of a delegation to a conference convened by such an organization. As Mr. Ushakov had pointed out, it was difficult to deal with both situations under the same rule. In the case of conferences, he suggested that the Commission should adopt a general rule, which would be subject to any other rules adopted by the conference itself, whereas in the case of organs of international organizations, there should, in the absence of express rules providing otherwise, be a general rule that each State must have a separate representative of its own.

44. Some provision might be included along the lines of article 9, paragraph 2, of the Convention on Special Missions,¹³ which read: "When members of a permanent diplomatic mission or of a consular post in the receiving State are included in a special mission, they shall retain their privileges and immunities as members of their permanent diplomatic mission or consular post in addition to the privileges and immunities accorded by the present Convention." It had already been pointed out during the discussion that a delegation to a conference was rather similar to a special mission; if that was so, care should be taken to use similar terminology in both sets of articles. The expression "representatives", as used in article 62, for example, had a different meaning from that given it in the Convention on Special Missions. It was desirable to eliminate that divergence.

45. Mr. AGO said that he had doubts about article 63 as a whole. Indeed, it was simply inconceivable that one and the same delegation should represent two different States; when one and the same person was charged with the duty of representing two States, there were nevertheless two separate delegations. Paragraph 1 was therefore superfluous.

46. Paragraph 2 provided that a member of a delegation of one State might represent another State, provided that he did not represent both of them simultaneously. Consequently, only a low-ranking member of the delegation of the first State could represent the second State. That might conceivably occur at a conference, but it was

out of the question in an organ such as the General Assembly of the United Nations. Paragraph 2 should therefore be deleted.

The meeting rose at 6 p.m.

1056th MEETING

Tuesday, 26 May 1970, at 10.45 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castrén, Mr. El-Erian, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Organization of work

1. The CHAIRMAN announced that, after consulting Mr. Bedjaoui, the officers of the Commission had agreed that the Commission would consider his third report on succession of States in respect of matters other than treaties (A/CN.4/226) on 29 and 30 June and 1 July. Mr. Bedjaoui had been requested to submit the remaining articles of his draft (articles 3, 4, 5 and 6) by 20 June.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1 and 2)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 63 (Appointment of a joint delegation by two or more States) (*continued*)

2. The CHAIRMAN invited the Commission to resume consideration of article 63 in the Special Rapporteur's fifth report (A/CN.4/227/Add.1).

3. Mr. USHAKOV said that article 63 really contained two completely separate provisions. Paragraph 1 dealt with the same situation as article 5 of the Convention on Special Missions.¹ It was based on the idea that two or more States could send a joint delegation to an organ of an international organization or to a conference. He would deal first with the case of an organ of an international organization. It could, of course, be assumed in theory that States, being sovereign, could decide to send a joint delegation; but in reply it could be argued that an international organization, which was

¹² See *United Nations Juridical Yearbook*, 1967 (ST/LEG/SER-C/5), pp. 319-320. (United Nations publication, Sales No.: E.69.V.2).

¹³ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 100.

¹ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 100.

also sovereign, could refuse to accept it. It might be provided that, subject to the relevant rules of the organization, two or more States could send a joint delegation to an organ of an international organization, but such a provision would be practically valueless. On the other hand, the possibility of sending joint delegations to conferences might be entertained, since there were precedents for it. The organs he had in mind were those attended by delegations representing States; organs in which persons sat in their individual capacity posed a quite different problem, and it might be asked what the term "delegation" meant, as applied to them. It was true that the Special Rapporteur accepted the use of the term in that context, but the fact remained that the situation was completely different and should be regulated in a different way. Consequently, the term "delegation" should not be used indiscriminately in the two cases.

4. Article 63, paragraph 2, dealt with persons, not delegations. The issue was not whether such persons were members of one delegation or another, but their nationality. Hence the situation was completely different. What paragraph 2 meant was that a State might appoint a national of another State as a member of its delegation. True, Mr. Yasseen had been entirely convincing when he had affirmed that a sovereign State could appoint anyone it wished as a member of its delegation to an organ of an international organization or to a conference,² but he had not taken that view with regard to the Convention on Special Missions, article 10, paragraphs 2 and 3 of which required the consent of the receiving State. The Special Rapporteur had reproduced that rule of consent in article 11 of his draft on the permanent missions of member States,³ whereas in article 63, paragraph 2, he was proposing an entirely contrary rule, for the sending State might appoint as a member of its delegation, not only any national of another State it wished, but even a national of another State who was a member of the delegation of that State.

5. Some members of the Commission had advocated the adoption of two contrary rules, one for the permanent missions of member States, and the other for delegations to organs of international organizations or to conferences, but he could not agree. In his opinion, paragraph 2 of article 63 should be divided into two separate articles, one relating to the nationality of members of delegations to organs of international organizations, the other to the nationality of members of delegations to conferences. The two articles would be based on the corresponding articles of the Convention on Special Missions and of the draft articles on the permanent missions of member States, and they would refer only to the diplomatic staff of delegations, since the sending State must be left free to employ service staff, for instance, who did not have its nationality. It would not be enough, however, merely to reproduce the second sentence of article 11 of the draft on permanent missions, because it was not a matter of bilateral relations, as in the case of those missions,

but of tripartite relations, involving the sending State, the host State and the organ of the international organization or the conference, which possessed the same right of refusal as the host State. Lastly, although paragraph 2 had some meaning when applied to organs attended by persons representing States, that was not so in the case of organs attended by persons in their individual capacity. For instance, article 2 of the Statute of the International Law Commission provided that no two members of the Commission could be nationals of the same State. The case of conferences, too, was different in that respect.

6. The draft articles on delegations to organs of international organizations and delegations to conferences should contain two articles similar to articles 8 and 9 of the draft articles on permanent missions, for it seemed obvious that a State might appoint one and the same person to represent it in several organs of an international organization.

7. The CHAIRMAN, speaking as a member of the Commission, said he shared the view of those who thought that an article on the appointment of a joint delegation was necessary, but that the form of the proposed text should be modified.

8. With regard to paragraph 1, it would be advisable to separate the question of a delegation to an organ of an organization from that of a delegation to a conference. Many of the difficulties which had arisen were due to the attempt to deal with both those questions in a single sentence. The Drafting Committee might examine that problem in conjunction with article 0 (Use of terms), in which it was proposed to give separate definitions for the two kinds of delegations.

9. He agreed with the suggestion that paragraph 1 should be qualified by some such expression as "unless allowed by the rules of the organization". He also thought it desirable to adopt a negative formulation on the lines of the second sentence of the passage from the Secretariat study quoted in paragraph (3) of the commentary.

10. The general principle that a delegation should normally represent only one State should be expressed in some form; the information supplied by the Secretariat showed that that principle was not self-evident.

11. Paragraph 2 had been rightly criticized as appearing to give a subjective right to a member of a delegation, whereas the intention was to give an objective right to the State concerned to authorize a member of another delegation to represent it. It had also been pointed out that what should be considered in paragraph 2 was not whether a member of a delegation could act simultaneously as the representative of more than one State, but whether, in the performance of his duties, he was acting on behalf of more than one State.

12. As to the wording of paragraph 2, he was in favour of introducing the element of consent, both of the sending State and of the host State. It was also necessary to refer to the rules of procedure of the organization concerned, because those rules might forbid dual or multiple representation.

² See previous meeting, para. 22.

³ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 203.

13. Reference had been made to articles 5, 6 and 10 of the Convention on Special Missions, but in his view the question whether a separate article on nationality should be introduced had better be left aside until the Commission came to consider article 64.

14. Mr. ROSENNE pointed out that the consent of the host State was relevant only in matters of privileges and immunities; it was not relevant to paragraph 2 of article 63. The consent required was rather that of the other participating States, among which the host State might be included.

15. Mr. EL-ERIAN (Special Rapporteur), summing up the discussion on article 63, said that a number of preliminary questions had been raised. The first related to the fact that article 63 dealt both with delegations to an organ and with delegations to a conference convened by an organization. At the previous session, the Commission had adopted a very reserved attitude to the whole question of conferences.⁴ He had been authorized to prepare some articles on the subject on a provisional basis, but the Commission had not given him any instructions with regard to the substance. The position in the Sixth Committee had been very similar: several representatives had reserved their positions on delegations to conferences convened by international organizations, as he had mentioned in his report (A/CN.4/227, section I, para. 8).

16. It had been rightly pointed out that there was a constitutional difference between an organ, which was a part of an organization, and a conference, which was a meeting of States. In the case of a delegation to an organ, there were relations between the sending State and the organization itself; at a conference, the relations were between the participating States.

17. He suggested that the question whether the draft should include separate provisions on the two kinds of delegation should be settled after all the articles had been considered. If it was then found that substantial differences existed, separate provisions would be drafted on representatives to conferences.

18. Reference had also been made to members of organs who did not sit as representatives of States. But article 63 was intended to deal with the general case, not with special cases of that kind. The Commission would, at some future date, examine the question of the status of international organizations themselves, and it would then have to consider the position of officials and experts of organizations. That would be the appropriate time to examine the problem of individuals who sat in a personal capacity in organs of organizations. If it were desired to include a provision on the subject in the present group of articles, that could be done by means of a separate article or by wording the definition of a "representative" so as to cover those special cases.

19. The question of defining the term "sending State" had also been raised. He had not included a definition because he had considered it unnecessary, at least so far

as permanent missions were concerned; but since some members of the Commission thought that a definition was required in view of the discussion on delegations to organs and conferences, the point could be referred to the Drafting Committee.

20. The expression "convened by an international organization" had been criticized as not being broad enough and it had been suggested that it should be replaced by some other formula, such as "under the auspices of an international organization". It had been argued that, in certain exceptional cases, a conference held under the auspices of an organization was actually convened by a State. The argument was not decisive, because special situations of that type were covered by article 3, under which the special rules of the organization concerned would prevail over the provisions of article 63. He had used the term "convened" because it appeared in the general Convention on the Privileges and Immunities of the United Nations;⁵ as it was now well established, he thought it should be adhered to, since there were no strong grounds for replacing it by something different.

21. Mr. Bartoš had drawn attention to paragraph 2 of article 62. That provision had been taken from the general Convention⁶ and it was appropriate in the context of privileges and immunities. He was prepared to drop it, however, on the understanding that the privileges and immunities of the persons mentioned would be dealt with in connexion with the privileges of members of delegations.

22. He accepted Mr. Ustor's suggestion that a provision on the lines of article 9, paragraph 2, of the Convention on Special Missions should be included in article 62.

23. With regard to the substance of article 63, he thought there was sufficient evidence to justify the inclusion of such a provision. He had mentioned in the commentary that cases of dual or multiple representation occurred in practice, and further instances had been cited during the discussion. The majority of the members favoured the inclusion of a provision on the lines of article 63, but in a modified form.

24. The majority also agreed that such a provision was not incompatible with article 7 (Full powers) and article 9 (Adoption of the text) of the Vienna Convention on the Law of Treaties.⁷ Article 63 of his draft did not deal with the representation of one State by another; it had a more modest purpose, which was to deal with cases where a State chose as its representative a person who belonged to the delegation of another State. Perhaps the wording could be amended so as to bring that point out more clearly.

25. It had been suggested during the discussion that an article on joint representation at conferences might

⁵ United Nations, *Treaty Series*, vol. 1, p. 22, article IV, sections 12 and 13.

⁶ *Ibid.*, p. 24, article IV, section 16.

⁷ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, document A/CONF.39/27 (United Nations publication, Sales No.: E.70.V.5).

⁴ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, p. 3, para. 17.

be sufficient and that it was unnecessary to provide for joint representation at meetings of organs of organizations. In point of fact, the first case of joint representation in an organ had arisen in the Interim Committee of the General Assembly, which was a subsidiary organ of the Assembly.

26. With regard to Mr. Ramangasoavina's suggestion that there should be a saving clause relating to special agreements, that matter was covered by the provisions of articles 3 and 4. The Drafting Committee might consider the advisability of including an explicit provision on the subject in article 63.

27. The useful suggestion had also been made that a special provision on persons of high rank should be included, on the lines of article 21 of the Convention on Special Missions. It should be noted that, under the provisional rules of procedure of the Security Council, Heads of State and Heads of Government were not required to produce credentials in order to appear before the Council.

28. He would prepare for the Drafting Committee an additional draft article on delegations to more than one conference.

29. It seemed to be generally agreed that the draft should include an article dealing with the faculty of a State to appoint as its representative a member of the delegation of another State, as distinct from the question of the representation of one State by another. There was also general agreement that paragraphs 1 and 2 of article 63 should be combined, that the provisions related to an objective right of States, and that there should be a reference to the element of consent.

30. The CHAIRMAN suggested that article 63 be referred to the Drafting Committee.

It was so agreed.⁸

ARTICLE 64

31.

Article 64

Appointment of the members of the delegation

Subject to the provisions of article 67, the sending State may freely appoint the members of its delegation to an organ of an international organization or to a conference convened by an international organization.

32. Mr. EL-ERIAN (Special Rapporteur) said that article 64 was based on the general principle of the freedom of choice of the sending State; it provided for one exception, which related to the size of the delegation, but there was no exception relating to nationality. In his note on the nationality of members of a delegation (A/CN.4/227/Add.1), he had mentioned that his earlier position in connexion with the draft articles on permanent missions had been to make the rule more permissive, but that the Commission had adopted a different approach. In article 64, he was reverting to his original position. It had to be borne in mind that the

number of subsidiary organs of a highly technical character was increasing; moreover, in the case of short conferences, it should not be necessary to obtain the formal consent of the host State to the appointment of one of its nationals as a member of the delegation of another State.

33. Mr. YASSEEN said he approved of both the substance and the drafting of article 64. The reservation relating to article 67 was fully justified for the reasons stated by the Special Rapporteur himself in the commentary.

34. With regard to the nationality of the members of a delegation, the Commission should take a more liberal position on delegations to an organ or a conference, which were of a temporary character, than on permanent missions, and it should provide expressly, either in a separate article or in the context of privileges and immunities, that the sending State might appoint to its delegation nationals other than its own. If no reference was made to the matter, there would be a danger of misunderstanding, since it was provided in other conventions that in principle the members of a delegation must be nationals of the sending State.

35. Mr. CASTRÉN said that article 64, which was a new article, since it was not in the draft which the Special Rapporteur had submitted to the Commission in 1968, seemed acceptable at first sight.

36. With regard to the nationality of the members of a delegation, the Special Rapporteur was quite right in saying that there was no need to make an exception in that regard; but in his opinion the main argument in favour of that opinion was not the fact that certain international organizations were of a highly technical character, as stated in the last sentence of paragraph (1) of the note, but rather that organs and conferences met temporarily and for short periods, as the Special Rapporteur said at the end of paragraph (2) of the note.

37. The Commission could revert to the matter when it was considering privileges and immunities, as the Special Rapporteur suggested. He was not sure that, as Mr. Yasseen feared, the absence of an express provision would be interpreted as prohibiting a sending State from appointing foreign nationals as members of its delegation; perhaps the Drafting Committee could consider that point.

38. Mr. ROSENNE said he was in general agreement with the text of article 64, though he thought the Drafting Committee should consider not only the exception arising under article 67, but also that which would apply if article 63 were retained.

39. During the discussion of the draft articles, objection had been made to the use of the expression "the sending State". He had not been convinced by those objections, and the use of that expression in article 64 seemed to show that it was quite appropriate in general. It applied alike to States sending delegations which participated as members of an organ or in a conference of an international organization and to States sending delegations which participated with the status of observers—that was to say, in a non-voting capacity. At the present

⁸ For resumption of the discussion, see 1073rd meeting, para. 55.

stage in the codification of international law he did not think it would be wise to introduce a definition of the expression "the sending State" into the draft articles, since there were already three international conventions based on drafts prepared by the Commission in which that expression was used. He thought that any possible doubt could be cleared up by the Drafting Committee, which might refer to the "sending State" in article 0, sub-paragraph (a).

40. On the question of nationality, he was prepared to accept the view taken by the Special Rapporteur in his note, but only in so far as article 64 was concerned. The privileges and immunities granted to members of a delegation who were nationals of the host State might well be narrower than those of nationals of the sending State, but he agreed with Mr. Castrén that there was no need to provide for that second exception in article 64.

41. The general principle of the sending State's freedom of appointment was an overriding principle, unless the constituent instrument of the organ or conference in question or some other formal text provided otherwise. There had been instances in which a mere resolution referred to the composition of a delegation. For example, operative paragraph 5 of General Assembly resolution 2166 (XXI), on an international conference of plenipotentiaries on the law of treaties, read: "Invites the States . . . to include as far as possible among their representatives experts competent in the field to be considered". He agreed with a view taken in the Sixth Committee that that phrase was exhortatory and not obligatory, but it might be useful to refer to it in the commentary.

42. Mr. AGO said that, in general, he agreed with the Special Rapporteur on the principle of the sending State's freedom to choose the members of its delegation to a session of an organ or to a conference, but the drafting of the article should take account of certain differences in situation. In the first place, it was once again necessary to take account of the fact, to which he had already drawn attention, that a reference to delegations to sessions of an organ such as a general assembly of members did not cover the situation of a representative to an organ—generally a small one—who was appointed permanently. In the second place, reference should be made to the special rules of certain organizations such as the International Monetary Fund, which required the members of some of their organs to be persons performing specific functions in their own countries, which limited the sending State's freedom of choice.

43. The third point he wished to stress was that the term "delegation" itself was ambiguous, since a delegation comprised both delegates, the number of whom was generally fixed by the rules of procedure of the organ concerned, and a number of other persons who accompanied the delegates, but did not have their status. It was conceivable that a sending State might appoint a national of another State as a technical adviser, for example, but the appointment of foreign nationals seemed less acceptable in the case of delegates in general and heads of delegation in particular. The situation might be different in the case of conferences owing to the

technical nature of some of them, which called for special qualifications. The sending State could be given the faculty to appoint delegates of another nationality more easily in the case of conferences than in the case of sessions of an organ of an organization. In any case the appointment of a national of another country as representative to a small organ of an organization should be ruled out.

44. Mr. USHAKOV repeated that it was impossible to cover two different situations by one and the same formula; the Commission was bound to fail if it continued to use an unacceptable legal technique. The same sources of difficulty as had been found in the previous articles reappeared in article 64: namely, the expression "sending State", used to denote both a State which was a member of an organ and a State participating in a conference, and the term "delegation", whose scope had not yet been defined and whose meaning varied, as other members of the Commission had pointed out, depending on whether it referred to a delegation to a conference or a delegation to an organ. There should either be a single article with two paragraphs, or two separate articles. Apart from the drafting, he supported the principle of the sending State's freedom of choice in the appointment of the members of its delegation.

45. As to the nationality of the members of a delegation, he must protest against any departure from the well-established principle of contemporary international law that the members of a delegation must be nationals of the sending State. Whether a State was represented by its own nationals or by nationals of another State was a matter of great political importance. It was unacceptable that a State should be represented by nationals of another State, even in the case of a delegation to a conference. The Commission should not lose sight of the fact that it was working in the interests of States, and it should not lay down a principle contrary to another principle of contemporary international law which it had itself established.

The meeting rose at 1 p.m.

1057th MEETING

Wednesday, 27 May 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.
