Document:-
A/CN.4/SR.1081

Summary record of the 1081st meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1970, vol. I

from territory under its control, innocent villages in a neighbouring African country. It would not be enough just to state the law of State responsibility, because the African State concerned would not be able to enforce that responsibility.

81. The Special Rapporteur had been right in saying that there were situations which could lead to the establishment of the concept of an international crime. He was glad to note that the Special Rapporteur had not shied away from the concept of modern international law which had been accepted at the Vienna Conference on the Law of Treaties. Traditional international law had regarded treaties concluded under duress as valid, but the Vienna Conference had acknowledged that error or fraud could vitiate consent and invalidate treaties. It had even gone so far as to accept the notion of peremptory norms of international law from which no derogation was possible by treaty. It was therefore appropriate to think, not of an international society, but of an international community which would evolve concepts of public policy.

82. The notion of abuse of rights was not viewed with much favour by lawyers from the common law countries; the concept of unjust enrichment, however, was known to the common law. Even in the civil law countries, it was significant that there existed few judicial decisions relating to the abuse of rights. As far as international law was concerned, there was a paucity of State practice and judicial precedent in the matter, but it was not justified to exclude the important concept of abuse of rights from the Commission's study, especially in view of the acceptance of rules of *jus cogens*. He therefore urged that the question of the abuse of rights should engage the Commission's attention at an early stage.

83. With regard to injury, it seemed unduly subtle to ask whether it should be considered as a third constituent element of an international illicit act. In any event, it would be difficult to formulate practical rules of international law on State responsibility without reference to injury. There was a logical relationship between reparation and damage.

84. It seemed to him that there was a danger that the articles might be too abstract and might draw distinctions which could be understood by legal minds, but were not suitable for the international community.

85. He would find it very difficult to support the provisions of article III, paragraph 1, on the capacity to commit international illicit acts. The analogy with the law of treaties was not very apt. The question of the capacity to conclude treaties had served to emphasize the equality of States. In the present instance, there was no need to stress the notion of capacity in connexion with the commission of wrongs. The emphasis should be placed on liability for wrongdoing rather than on the power to commit wrongs. A provision such as article III, paragraph 1, would be unnecessary if the notion of liability were fully stressed, possibly by a provision to the effect that no State should be free from responsibility.

86. With regard to the limitation of capacity specified in article III, paragraph 2, it was undesirable to single out the particular case of military occupation. It would be better to reserve the question of exceptions to responsibility until the Commission had proceeded further in its work.

87. With regard to article II, he agreed with the other English-speaking members of the Commission in finding the expression "international illicit act" unsuitable. The term "illicit" was a synonym of "illegal", but it had also a moral connotation. In the present context, he preferred the expression "wrongful act".

88. The subtle distinction made in the two sub-paragraphs of article II could no doubt be perceived intellectually, but it must be remembered that the Commission was drafting a convention for persons who would not be able to appreciate such a level of abstraction.

89. Article I was a very difficult provision. For the reasons he had already stated, he would suggest that the opening words be amended to read: "Every wrongful act of a State . . .". As for the rest of the sentence, he had serious doubts about the use of the words "gives rise to" and would prefer a statement to the effect that every wrongful act of a State engaged that State's international responsibility.

90. He had no doubt that, in his next report, the Special Rapporteur would clear up many of the doubts which had been expressed by members during the present discussion and would broaden some of the concepts which appeared in the first three articles so as to relate them more closely to the facts of international life.

91. The wealth of literature, legal decisions and State practice which had been examined by the Special Rapporteur was apparent from the fact that the footnotes exceeded in length the text of his report. The report showed the range of his scholarship and his ability to put together often disparate ideas. He hoped that, under the leadership of the Special Rapporteur, it would be possible for the Commission to prepare a set of draft articles which would gain general if not unanimous acceptance.

The meeting rose at 1 p.m.

1081st MEETING

Thursday, 2 July 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Kearney, Mr. Nagendra Singh, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

State responsibility

(A/CN.4/233)

[Item 4 of the agenda]

(continued)

1. The CHAIRMAN invited the Special Rapporteur on State responsibility to reply to the points raised during the discussion on his second report (A/CN.4/233).

2. Mr. AGO (Special Rapporteur) said he was most grateful to the Commission for having devoted more meetings to his report than originally planned. In spite of that, the time available had, of course, been too short for a detailed analysis, so that members had been obliged to review the report generally and give only their provisional views. Before dealing with the replies to his questionnaire,[1] he would like to touch on some of the general observations and the comments on questions of method that had been made.

3. At the 1076th meeting, Mr. Reuter had expressed approval of his method of proceeding from the general to the particular. At the 1080th meeting, Mr. Kearney had described his method as proceeding from the abstract to the concrete and Mr. Rosenne had even quoted one of his (the Special Rapporteur's) early works, of which, incidentally, he would not wish to withdraw a single line. He had naturally tried to lay down the most general rules first, as was only normal, but it could happen that some general rules would be found later in the body of the draft. That had been so in the draft on the law of treaties, particularly in the case of the most general rule, namely, *pacta sunt servanda.*

4. The adjectives "abstract" and "concrete" were perhaps misleading, because they did not have exactly the same meaning in English as in French. Every legal rule was necessarily formulated in abstract terms: for instance, to state that theft was punishable with imprisonment involved recourse to a concept, "theft", which had only been arrived at by a logical process of abstraction. The purpose of using that concept was to express synthetically an indefinite number of concrete situations. But it was only the formulation of the rule that was abstract; the rule itself had a very concrete content. Nothing could be more concrete than the statement that a State was internationally answerable for any illicit act it committed. The same was true of the statement that, for it to be possible to accuse a State of having committed an internationally illicit act, two conditions must be fulfilled: the conduct in question must appear in international law as conduct of the State and it must constitute failure to fulfil an international obligation.

5. Mr. Kearney had also mentioned the deductive and the inductive methods. He himself relied mainly on the inductive method. Of course, in his exposition of the doctrine, he had had to refer to the views of writers who relied largely on the deductive method. For example, he had pointed out that, for certain writers, the fundamental principle of responsibility was based on the very existence of the international order as a legal order, or on the notion of sovereignty. But his intention in doing so had been merely to indicate some of the deductive arguments to be found in the literature. Personally, when he stated a rule it was always because it derived from the practice of States and from international jurisprudence, not because it followed logically from *a priori* premises.

6. He agreed with several members of the Commission, in particular Mr. Ustor, that State responsibility was a topic on which the Commission would have to introduce a large measure of progressive development of international law. For the time being, however, it did not seem possible to go further than he had done or to decide what should be the respective shares of progressive development and codification. The proportion would be found pragmatically when the work was completed.

7. He had departed from the method of formulating articles followed by commentaries, and some members had perhaps regretted it. He had thought it better, at that stage, for the Commission to have before it all the relevant data, considerations and arguments which had led him, as Special Rapporteur, to the final result concentrated in each of the articles proposed.

8. Some members of the Commission had said that they could only express their views on various points very provisionally, because they did not know what was going to follow. He fully understood that position, but would remind the Commission that in 1963 the Sub-Committee on State Responsibility had submitted a detailed plan of work on the topic.[2] Then, in 1967, after the membership of the Commission had changed, he himself had prepared a note which included that plan.[3] Finally, the same plan had been referred to again in his first report, which he had submitted to the Commission at its previous session.[4] The various points in that plan indicated quite clearly the course he intended to follow.

9. Sometimes, in the course of his reasoning, he had intentionally gone rather beyond the strict limits of the topic under study, which now had to be settled. For instance, in dealing with the fundamental rule of responsibility, he had thought it desirable to indicate the main schools of thought concerning the content of responsibility, though that was not strictly necessary, because it was a point which would naturally have to be examined at length later on. But he had done so for two reasons: first, because it seemed to him essential not to prejudge, by adopting a particular formula, the position which the Commision might take at a later stage on the question of the content of responsibility; and secondly, because he wished the Commission to be aware from the outset of the essential aspects of his point of view on the content of responsibility. It was now clear that, in that matter, he was prepared to depart from the traditional concept and to accept a large measure of progressive development.

[1] See 1074th meeting, para. 1.

[2] See *Yearbook of the International Law Commission, 1963*, vol. II, p. 228, para. 6.

[3] Op. cit., *1967*, vol. II, p. 325.

[4] Op. cit., *1969*, vol. II, Document A/CN.4/217, para. 91.

10. The problems arising from the use of different languages were particularly acute where responsibility was concerned. The difficulties were largely due to the fact that every language had its own genius and sometimes attached a different meaning to terms which had the same etymological origin. Misunderstandings due to language were among the most serious obstacles to the conduct of a fruitful discussion. That was why he asked members of the Commission who used a language other than French to be good enough to refer if possible to the French text, which was the original of his reports, whenever any doubt arose.

11. He did not think it would be possible to draft a preliminary article containing definitions immediately. The articles he had drafted so far were substantive articles and not definitions. It would be better for the Commission to await the conclusion of his work before deciding whether it was necessary to draft articles containing definitions or setting out the points not dealt with in the report, rather than lose time at the start in discussing those questions. In any case, he preferred the positive method of stating what the report dealt with, to the negative method of stating what was excluded.

12. With regard to sources, a substantial number of cases were cited in the report and he was indebted to the Secretariat for the valuable assistance it had given him in that respect. If a great many cases were noted on certain points and only a few on others, it was simply because that was, in fact, the position.

13. Similarly, with regard to practice, there were some replies by governments to the questionnaire sent to them in 1928 by the Preparatory Committee for the Codification Conference of 1930. Those replies provided a great deal of information on the views of governments on certain problems; but naturally governments had not taken a position on questions which had not been put to them.

14. As to writers, the notes in the report might seem to take up a lot of space, but it had not been for pleasure that he had undertaken the considerable amount of personal work they had involved; it was because it was essential not only to give a picture of the doctrinal views followed in the different legal systems, but also to show the trend of thought of the majority of writers. And there were few writers on international law who had not expressed their views on the subject of responsibility.

15. To come to the replies to his questionnaire, in regard to question I (*a*) he noted that the majority of members favoured the adoption, for the general basic rule, of a synthetic formula which did not prejudge the content of responsibility. Some members, of course, anticipated that the Commission would run into difficulties regarding the content. But the Commission would have to surmount each fresh obstacle as it appeared; at the present stage it should only consider the obstacles immediately before it. He would not dwell, therefore, on the comments made by members concerning the content of responsibility, except to mention a remark by Mr. Alcívar, who had aptly observed that the conclusion as to the existence of criminal responsibility would emerge spontaneously once the Commission had determined the positive consequences of an internationally illicit act.[5] That statement was correct and was a useful application of the inductive method.

16. In reply to question I (*b*), several members had stressed the advisability of studying the question of responsibility for acts that were not illicit. He agreed in principle but, in the first place, he did not think there should be an opening article stating that the responsibility of a State could be engaged either for a lawful act or for an illicit act. Those two forms of responsibility had, in fact, hardly anything in common but the word "responsibility". In the one case there was a rule intended to lay down the consequences of the violation of an obligation established by another rule. In the other case, there was a rule which merely provided for the possible consequences of a lawful activity.

17. In addition, as Mr. Ushakov had pointed out, the content of those two types of responsibility was not the same.[6] Mr. Ushakov had observed that an illicit act involved both an economic responsibility and what Soviet writers called a "political" responsibility, whereas a lawful act could only have economic consequences. To deal with those two kinds of responsibility together would therefore cause confusion. On the other hand, there was nothing against making a separate study of responsibility for lawful acts, though it would be rather difficult to determine in what matters such responsibility existed and he doubted whether the question was really quite ripe for codification.

18. Several members had said that the concept of vicarious responsibility should be retained. Mr. Thiam, however, had suggested that it might be an importation from municipal law and should therefore be avoided.[7] He did not share that view, because cases in which the responsibility of a State could be engaged in respect of an act materially committed by another State were quite real. As Max Huber had once said, when there was freedom there was responsibility. Consequently, whenever the action of a State in a particular sector was not really free, but subject to pressure or control by another State, it was the State which restricted the other's freedom which must be held responsible for any illicit act committed in the controlled sector of activity. That principle had to be safeguarded. But to do so, it was not perhaps essential to keep the formula provisionally proposed in article I, and he would be quite prepared to insert the word "its" before "international responsibility". It would be sufficient to make the appropriate reservation in the commentary; the exception would be dealt with later in the draft articles.

19. With regard to terminology, he was particularly glad that Mr. Reuter, who was one of the French writers who had hitherto used the word "*acte*", should have said that he had been convinced by the arguments advanced in the report that the word "*fait*" should be adopted.[8]

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[5] See previous meeting, para. 21.

[6] See 1076th meeting, para. 17.

[7] See 1079th meeting, para. 36.

[8] See 1076th meeting, para. 7.

20. For the Spanish version, Mr. Ruda and Mr. Castañeda had expressed a preference for the term "*hecho*", but Mr. Alcívar favoured the word "*acto*". He had the feeling, however, that even in Spanish the word "*acto*" denoted rather an expression of the will to which the law attached a result corresponding to the will expressed. The word "*hecho*", like the word "*fait*", was derived from the Latin verb "*facere*", which denoted any human conduct, whether an act or an omission. On the other hand, the word "*acto*" came from the Latin verb "*agere*", which meant to act in a positive manner. For that reason, the terms "*fait*" and "*hecho*" seemed more appropriate than the terms "*acte*" and "*acto*", if it were desired also to cover acts of omission.

21. With regard to the Russian version, if Mr. Ushakov had any doubts about the terminology used, he (Mr. Ago) would willingly trust him to propose what was appropriate.

22. In English, he himself had proposed the expression "wrongful act" and regretted that in the translation the expression "*fait illicite*" had been rendered by "illicit act". Moreover, in French, the two expressions "*fait illicite international*" and "*fait internationalement illicite*" had the same meaning; they meant that the act in question was illicit in international law. In English, on the other hand, the expressions "international wrongful act" and "internationally wrongful act" were not synonymous, since the term "wrongful" had to be qualified by indicating that what was involved was wrongful in international law. Hence the second formula was the one to be preferred.

23. It had also been suggested that the reference to the international character of the wrongful act should be omitted from all those expressions. He hoped that it would be retained, however, since it was important to prevent any attempt by States to evade their responsibility by claiming that their act was not unlawful under their internal law. Since the purpose was to attach responsibility to any act which was wrongful on the international plane, it was necessary to say so.

24. The expression "guilty State" might perhaps occur in the report, but certainly not in the text of the articles, and it had always been his intention to use a common expression to indicate the State to which the wrongful act was attributed.

25. With regard to question II (*a*), concerning the existence of two elements in the wrongful act, the majority of the members of the Commission had agreed that they recognized the existence of an objective element and a subjective element, but some had pointed out that the two elements were closely linked. He hoped, however, that the distinction would be clearly maintained for the time being, since, in logic, the two elements were distinct and, according to the method followed in the draft, they should be analysed separately one after the other.

26. With regard to question II (*b*), all the members agreed that the subjective element could be an act or an omission, but Mr. Ushakov had criticized the notion of imputation and imputability.[9] His criticism, however, had been the result of a misunderstanding, which had now fortunately been cleared up. He (Mr. Ago) entirely agreed that, if the word "imputation" were taken in the sense it had in internal criminal law, the notion could not be accepted in international law. The writers who had introduced that notion into international law had been careful to point out that the meaning of the term was by no means the same as in internal criminal law. What was meant, and Mr. Ushakov had himself made that clear at the previous meeting,[10] was only that it must be possible to consider the act in question as an act of the State; in other words, when confronted with a given conduct it was necessary to know by what criteria that conduct could be attributed to the State, rather than to the person or persons who had physically engaged in it. He was therefore willing to use the term "attribution", where appropriate, instead of the term "imputation", if that would help to remove any misunderstanding.

27. Again, if he had on one occasion referred to the State as an abstract entity, it was because that expression was the one used by most writers. He himself regarded the State as a completely real entity. All that was meant was that the State was a legal person which was only able to act in a physical sense through the acts of natural persons who were its organs.

28. Question II (*c*), concerning the international character of imputation to the State of a given conduct, arose mainly because States sometimes sought to evade international responsibility by claiming that the act or omission in question was not within the competence of the organ which had committed it, or was not in conformity with the intructions given to that organ, and hence could not be attached to the State. To say that attribution to the State took place under international law meant, therefore, that even in such cases the act or omission in question was an act or an omission of the State. Within the same category came cases in which the act was committed by a public institution distinct from the State under internal law, or by private persons employed by the State.

29. He was very pleased at the favourable response to question II (*d*), concerning the objective element in an internationally wrongful act. Mr. Tammes had suggested referring to a violation of international law rather than of an international obligation.[11] To speak of a violation of the law certainly avoided the error which was implicit in the expression "breach of a rule", but he (the Special Rapporteur) found the expression too vague. He thought that, as Mr. Ushakov had said, by "obligation" should also be understood any international duty of the State.[12] The intention was to say in the clearest possible way that responsibility must be attributed to a State which had not done what it ought to have done or which had done what it ought not to have done. As to terminology, although the writers used various expressions, practice

[9] *Ibid.*, paras. 21-23.

[10] See para. 72 *et seq.*

[11] See 1075th meeting, para. 39.

[12] See previous meeting, para. 75.

and jurisprudence were unanimous in speaking of the violation or non-fulfilment of an obligation.

30. Mr. Tabibi had suggested that, besides breaches of international legal obligations, express reference should be made to acts which were prohibited by the United Nations Charter.[13] Without denying that certain principles of the Charter held a paramount position, he was afraid that such a formula might give the strange impression that in the Commission's opinion the principles of the Charter did not impose legal obligations. In any case, when the content of responsibility was examined, it would become apparent that violations of certain principles of the Charter constituted particularly serious internationally wrongful acts.

31. With regard to abuse of rights, he had not wished to take a position on that notion itself. Nevertheless, he believed that in international law there were cases in which the exercise of a subjective right came up against the limits of "reasonable" exercise—to adopt a criterion dear to English jurists. His idea, however, was that to maintain that there were limits to the exercise of certain rights in international law was to recognize the existence of an obligation: the obligation not to exercise a right beyond the limits of what was reasonable. There was therefore no reason to consider inadequate the general formula by which responsibility derived from failure to fulfil an international legal obligation. Even if the Commission were later to define the notion of abuse of rights, it would still not conflict with that basic rule.

32. As to the distinction between wrongful conduct or behaviour and an illicit event, in paragraph 51 of his report he had not meant to cite as an example the case of an act committed deliberately or on instructions, but the case in which a State failed to exercise due diligence. It was precisely in that case that negligent conduct alone did not in itself constitute an internationally wrongful act unless some subsequent external element was added as a direct or indirect consequence of that conduct. That was true, for example, in all cases in which the State was under an obligation to prevent possible action by a private person. A specific example was the disturbance of the work of an embassy staff, referred to by Sir Humphrey Waldock, which might be caused by the presence of a hostile crowd outside the premises, even if it did not commit acts of violence. That was an important distinction which would have to be taken into account and to which the Commission might revert at its next session.

33. He had used the term "*événement*", which was familiar in criminal law, but it was probably the same notion that Mr. Nagendra Singh had had in mind when he had said, in English, that he was in favour of taking the element of injury into consideration.[14] Several members had agreed that the idea of injury *(dommage)* as a necessary additional element of an internationally wrongful act should be rejected. The principal reservations to that view had been made by the English-speaking members, who considered that the presence of the element of injury was necessary.

34. It was important, however, to reach a clear understanding on what was meant by that term. Nobody denied that, except where it was the actual content of the violated obligation which imposed the necessity of protecting foreign private persons from injury, the term "injury" was used only when referring to infringement of the subjective right of another, which was exactly equivalent to failure to fulfil a legal obligation to another. But the "injury" of English writers and the French *"dommage"* were not the same thing. The point which had to be decided was whether, for there to be an internationally wrongful act, it was or was not necessary that, in addition to infringement of the subjective right of another State, there should be the further element of economic injury. An examination of State practice showed that it was the settled view of States that whenever the subjective right of another State was infringed there was an act giving rise to responsibility; no State could escape the responsibility arising out of that act by alleging that, in a specific case, there had been no "economic injury". That element was only taken into account for the purpose of determining the amount of the reparation.

35. With regard to question III (*a*), on the idea of "capacity" to commit internationally wrongful acts, he had attempted in his report to show how illogical it was to present "delictual capacity" as something analogous to the capacity to act or the capacity to conclude treaties, and that it should be understood only as the physical possibility of committing, in a certain sector of activity, a breach of an international obligation. In order to avoid any misunderstanding it might perhaps be possible to use a negative formula and say, for example, that no State could claim to lack the possibility of committing an internationally wrongful act and thus avoid responsibility.

36. As Mr. Thiam had rightly said, responsibility was the counterpart of sovereignty[15] and even new States could not take advantage of the temporary weakness of their internal organization to evade responsibility. In that connexion, it might be useful to point out that the notion of a "minor" State not possessing delictual capacity was not accepted in international law.

37. Lastly, the question of possible limits to "delictual capacity" in certain cases was perhaps more delicate than might appear. There were cases in which it was not sufficient merely to say that it was another State which had committed a wrongful act and bore the responsibility for it. If a State was in military occupation of the territory of another State and replaced the police of that other State by its own police, the problems which might arise if the occupying police acted in breach of an international obligation of the occupied State were twofold. As to the occupying State, it would have to be decided whether it was specifically bound to respect an international obligation of the occupied State towards a third State;

[13] See 1075th meeting, para. 24.

[14] See 1079th meeting, para. 19 *et seq.*

[15] See 1079th meeting, para. 38.

but as to the occupied State, it would have to be established whether or not, in the sector in which the act had occurred, it had been physically possible for it to commit a breach, seeing that its organization in that sector had been replaced by the organization of another State. Of course, the Commission did not necessarily have to solve problems of that kind at the start, but it was necessary to keep them in mind, because such situations could arise.

38. In conclusion, he thanked the members of the Commission for the thoroughness with which they had examined his report. Their observations as a whole had given him a feeling of encouragement to pursue his analysis. He now intended to resume work on the articles he had already drafted, to revise them and to fit them back into the more comprehensive report he proposed to submit to the Commission at its next session, which would include the parts relating to the detailed determination of the subjective and objective conditions for the existence of an internationally wrongful act.

Draft report of the Commission on the work of its twenty-second session

(A/CN.4/L.156-160 and Addenda)

Chapter I

ORGANIZATION OF THE SESSION

39. The CHAIRMAN invited the Commission to consider chapter I of the draft report (A/CN.4/L.156) paragraph by paragraph.

Paragraphs 1 to 3

Paragraphs 1 to 3 were approved.

Paragraph 4

40. Mr. BARTOŠ (Rapporteur) said that he had used the phrasing "All members attended meetings of the 22nd session of the Commission" because it was the accepted practice. It was not, however, a practice that he favoured, because it did not reflect the true situation, which was that some members had only attended part of the session. That point should be made clear in the Commission's report and not merely in the summary records.

Paragraph 4 was approved.

Paragraphs 5 and 6

Paragraphs 5 and 6 were approved.

Paragraph 7

41. Mr. ROSENNE said he must point out that the Director of the Codification Division of the Office of Legal Affairs had been away from Geneva for part of the session, and had not therefore represented the Secretary-General during that period, as was suggested by the words "represented the Secretary-General at the other meetings of the session".

42. Mr. KEARNEY suggested that the difficulty be overcome by replacing the words "at the other meetings" by the words "at other meetings".

It was so agreed.

Paragraph 7, as amended, was approved.

Paragraph 8

43. Mr. USHAKOV said that the Commission had decided two years ago that the words "and Governments" be deleted from the title of item 3 of the agenda, but they still appeared; they should now be dropped.

It was so agreed.

44. Mr. BARTOŠ suggested that a sub-paragraph be included in paragraph 8 recording that, in addition to the items on its agenda, the Commission had also considered the question of treaties concluded between States and international organizations or between two or more international organizations, had appointed a sub-committee to study the question, and had adopted the proposals contained in the sub-committee's report (A/CN.4/L.155).

45. Mr. USHAKOV, Mr. AGO and Mr. THIAM supported Mr. Bartoš' suggestion.

46. Mr. ROSENNE said he too supported the suggestion to add a reference to the Commission's action on the question of treaties concluded between States and international organizations or between two or more international organizations.

47. Another matter to which reference should be made was the Commission's discussion on its contribution to the commemoration of the twenty-fifth anniversary of the United Nations. Both those matters had arisen from resolutions adopted by the General Assembly, the first directed specifically to the International Law Commission and the other to all United Nations bodies.

48. The best method of making such reference might be to insert in chapter I of the report, immediately after paragraph 8, a new paragraph stating that the Commission had discussed those questions in connexion with item 8 of the agenda.

49. Mr. MOVCHAN (Secretary to the Commission) said the Secretariat had intended to include a reference to those questions in chapter V, in accordance with the usual practice.

50. Sir Humphrey WALDOCK said he agreed that chapter V was the appropriate place for such a reference.

51. The CHAIRMAN said that, if there were no objection, he would take it that the Commission approved paragraph 8 with the deletion of the words "and Governments" from the title of item 3 of the agenda and on the understanding that the other matters mentioned in the discussion would be dealt with in chapter V.

It was so agreed.

Paragraph 8, as amended, was approved.

Paragraph 9

52. Mr. ROSENNE suggested that some indication be given in paragraph 9 of the number of meetings held by the officers of the Commission and by the Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations.

53. Mr. BARTOŠ said he supported Mr. Rosenne's suggestion in principle, but felt that such an indication was perhaps unnecessary, since the officers of the Commission had only met once.

54. The CHAIRMAN said that, if there were no objection, he would take it that the Commission approved paragraph 9 on the understanding that the Secretariat would include a mention of the meetings of the officers and of the Sub-Committee.

It was so agreed.

Paragraph 9, as amended, was approved.

Paragraph 10

55. Mr. TABIBI said that paragraph 10, recording the Commission's tribute to the memory of the late Gilberto Amado, should be placed much earlier in the report, immediately after paragraph 2.

56. Mr. YASSEEN said he supported that suggestion.

57. Mr. ROSENNE proposed that the words "paid tribute to the memory of its former member and dean, Mr. Gilberto Amado" be replaced by the words "paid tribute to the memory of the late Mr. Gilberto Amado, who had served continuously as a member of the Commission since he was first elected in 1948".

It was so agreed.

58. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to move paragraph 10, as thus amended, from its present position and combine it with paragraph 3.

It was so agreed.

Paragraph 10, as amended, was approved.

Paragraph 11

59. Mr. ROSENNE proposed that the full texts of both the letter from the President of the Security Council of 14 May 1970 (A/CN.4/235) and the reply of the Chairman of the Commission of 12 June 1970 (A/CN.4/236) be given in the paragraph.

It was so agreed.

Paragraph 11, as amended, was approved.

Chapter I, as amended, was approved.

Draft resolution in connexion with the celebration of the twenty-fifth anniversary of the United Nations

60. The CHAIRMAN said that certain proposals with regard to the forthcoming celebration of the twenty-fifth anniversary of the United Nations had been mentioned during the discussion on the organization of future work,[16] and he now submitted the following draft resolution for the consideration of the Commission:

"The International Law Commission, considering the forthcoming celebration of the twenty-fifth anniversary of the United Nations,

"(a) *Recommends* that the General Assembly should appeal to States to expedite the process of ratification of or accession to the Vienna Convention on the Law of Treaties of 1969 and other codification conventions adopted on the basis of the draft articles prepared by the International Law Commission—such as the four Conventions on the law of the sea, adopted at Geneva in 1958, the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, and the Convention on Special Missions of 1969—in order to shorten the final stage of the codification of international law and place the codified international law upon the widest and most secure foundations.

"(b) *Asks* the Secretary-General to up-date as soon as possible the publication entitled "The Work of the International Law Commission" with a view to summarizing the work of the Commission during the whole period of its existence and presenting texts of the Commission's drafts and codification conventions adopted on this basis."

61. Mr. ROSENNE said that paragraph (*b*) dealt with a rather secondary matter. He therefore suggested that it be removed from the draft resolution and turned into a paragraph of the report.

62. Mr. USHAKOV suggested that the opening words of paragraph (*b*) be modified so as to request the Secretary-General to recommend to the Office of Public Information that it bring the publication[17] up to date.

63. Mr. AGO said he was in favour of separating paragraph (*b*) from the remainder of the resolution. It dealt with an entirely different matter from paragraph (*a*) and would detract from the importance of paragraph (*a*) if it were left in its present place.

64. Mr. ROSENNE suggested that the point raised by Mr. Ushakov be dealt with by mentioning that the publication had been issued by the Office of Public Information. He also suggested that the expression "up-date" should be replaced by more suitable wording.

65. The CHAIRMAN said that, if there were no further comments on that point, he would consider that the Commission agreed to detach paragraph (*b*) from the draft resolution and to turn it into a paragraph of the report, with the appropriate drafting changes.

It was so agreed.

66. Mr. ROSENNE said he did not think that the Commission should produce a resolution for submission to the General Assembly. It should rather suggest something to the General Assembly in order to give delegations an

[16] See 1066th meeting.

[17] United Nations publication, Sales No.: 67.V.4.

opportunity to raise the matter in the Assembly. He accordingly proposed that the opening words "Recommends that the General Assembly should appeal ..." in paragraph (*a*) be replaced by the words "Suggests that the General Assembly might wish to adopt a resolution appealing ...".

67. He also proposed the introduction of two preambular paragraphs. The first would recall that, under Article 13, paragraph 1*a* of the United Nations Charter, the General Assembly was called upon to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification and that the Statute of the International Law Commission had been adopted in pursuance of that charge of the General Assembly under Article 13, paragraph 1*a* of the Charter. The second would recall that a whole series of codification conferences had been convened and that, on the basis of the Commission's work, a number of conventions had been adopted.

68. Mr. USTOR said that the purpose of paragraph (*a*) was to try to ensure that the codification conventions were accepted on as wide a basis as possible. That purpose could be achieved in two different ways: either by urging those States which could become parties thereto to ratify or accede to the various codification conventions; or by the General Assembly adopting a resolution in line with the Declaration on Universal Participation in the Vienna Convention on the Law of Treaties adopted by the Conference as part of its Final Act,[18] calling upon the General Assembly to invite as many governments as possible to participate in the codification conventions.

69. Mr. ROSENNE said that the Commission should confine itself to drawing attention to its own work and should not get involved in other items on the agenda of the General Assembly.

70. That being said, he would urge that the words "the codified international law", which were used in the draft of paragraph (*a*), be subjected to careful scrutiny. Codified international law comprised more than just the codification conventions adopted as a result of the Commission's work.

71. Mr. USHAKOV said he supported Mr. Ustor's proposal, which was in conformity with the principle of universality.

72. Mr. YASSEEN said that the wording "*Recommends* that the General Assembly should appeal ..." was too strong, coming from the Commission, which was a subsidiary organ of the Assembly. He suggested that it be replaced by the wording: "*Recommends* that the General Assembly appeal ...".

73. Mr. TABIBI said that the Declaration on Universal Participation in the Vienna Convention on the Law of Treaties was not the only declaration adopted by the Vienna Conference. It had also adopted a Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties.[19] He therefore suggested that a suitable reference to that Declaration be included in the Commission's resolution as well.

74. Mr. KEARNEY said it seemed to him that some of the suggestions now being made were leading the Commission away from its functions as a group of independent experts and taking it into the political sphere.

75. The CHAIRMAN said he noted that there was general support for the introduction of the two preambular paragraphs suggested by Mr. Rosenne and for the change in the opening words suggested by Mr. Yasseen. Perhaps the Commission would wish to adopt the draft resolution with only those changes and leave controversial issues aside.

76. Mr. USTOR said that the Declaration on Universal Participation had been adopted unanimously by the Vienna Conference. There were a number of treaties codifying general international law and it was desired that those treaties should be adopted as widely as possible. Even if they were to be ratified or acceded to by all the States that were eligible to sign them, however, they would not become general, because they were not open to signature by all States.

77. He suggested that further discussion should be postponed and, at a future meeting, he would submit a proposal in writing on the lines he had indicated.[20]

It was so agreed.

78. Mr. ALCÍVAR said he wished to have it placed on record that he was opposed to paragraph (*a*).

The meeting rose at 1 p.m.

[18] *United Nations Conference on the Law of Treaties, Official Records*, Documents of the Conference, document A/CONF.39/26 (United Nations publication, Sales No.: E.70.V.5).

[19] *Ibid.*

[20] For the resumption of the discussion, see 1083rd meeting, para. 63.

1082nd MEETING

Friday, 3 July 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Kearney, Mr. Nagendra Singh, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.