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Summary record of the 1099th meeting

Topic:
Representation of States in their relations with international organizations

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in case of armed conflict, respect and protect the premises of the mission, together with its property and archives”.

98. The words “In the discharge of its obligations”, in the second sentence of paragraph 1, referred to the obligation of the sending State to take all appropriate measures to terminate the special duty of the host State to “respect and protect the premises as well as the property and archives of the permanent mission.” However, he agreed with Mr. Ushakov and Mr. Eustathiades that the expression was ambiguous.

99. Some criticism had been made of the use of the adjective “special” in the words “special duty of the host State” in the second sentence. He could only refer to an incident before the Second World War, when an Italian general had been killed by terrorists while helping to demarcate the frontier between Greece and Albania. It had then been held that, while a State had a general duty to protect all aliens in its territory, it had a special duty to do so when an alien was engaged on a politically difficult mission.¹³

100. The CHAIRMAN suggested that article 49 be referred to the Drafting Committee.

*It was so agreed.*¹⁴

ARTICLE 39 (Exemption from laws concerning acquisition of nationality)¹⁵

101. Mr. KEARNEY said that at an earlier meeting he had said he would try to explain exactly what was provided for on the subject of the acquisition of nationality in the laws of his country.¹⁶ Article XIV of the amendments to the Constitution of the United States provided that: “All persons born and naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside . . .”. The Supreme Court, however, had never held that that amendment applied to the children of accredited diplomats.

102. In the *Slaughterhouse Cases*,¹⁷ it had been said that the phrase “subject to the jurisdiction thereof” was intended to exclude from the operation of the amendment “children of ministers, consuls and citizens or subjects of foreign States, born within the United States”. However, in the case of the *United States v. Wong Kim Ark*,¹⁸ the Supreme Court had ruled that that dictum was unsupported by any reference to authority, and that consuls, as such, and unless expressly invested with a diplomatic character in addition to their ordinary powers, were not considered as entrusted with authority to represent their sovereign in his intercourse with foreign

States, but were subject to the jurisdiction, civil and criminal, of the courts of the country in which they resided. That ruling, of course, had applied only to consular officials, and there had as yet been no Supreme Court decision concerning the technical and administrative staff of permanent missions, whose status in his country must still be considered unsettled.

103. Mr. USTOR thanked Mr. Kearney for that information and said he hoped that the Secretariat would be able to provide similar information concerning the acquisition of nationality in Switzerland, a country which had no nationality laws based on *jus soli*, but which undoubtedly experienced many problems with respect to mixed marriages.

104. Mr. USHAKOV asked what would be the legal situation of the staff of diplomatic missions in the United States who were not themselves diplomats but served in some other capacity.

105. Mr. KEARNEY replied that their status would be substantially the same as that of administrative and technical staff in permanent missions, though there had never been a ruling on that subject by the Supreme Court. The United States Department of State had on occasion made decisions to the effect that children born of members of the administrative staff of diplomatic missions did not fall within the exemption to which he had referred. Those cases, however, had never been the subject of a court decision.

The meeting rose at 1.5 p.m.

1099th MEETING

Thursday, 13 May 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Baroš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add 1-6; A/CN.4/241 and Add.1-3; A/CN.4/L.162/Rev.1; A/CN.4/L.166)

[Item 1 of the agenda]

(continued)

¹³ See *Official Journal of the League of Nations* (minutes of the Council), 5th year, No. 4, April 1924, p. 524, Question V.

¹⁴ For resumption of the discussion see 1115th meeting, para. 50.

¹⁵ For previous discussion see 1096th meeting, para. 77.

¹⁶ *Ibid.*, para. 99.

¹⁷ 16 Wallace 36 (1873).

¹⁸ 169 US 649 (1898).

ARTICLE 39 (Exemption from laws concerning acquisition of nationality) (*continued*)

1. The CHAIRMAN invited the Secretariat to reply to the question asked by Mr. Ustor concerning the legal situation with respect to the acquisition of nationality in Switzerland.¹

2. Mr. RATON (Secretariat) said that there was no exemption under Swiss law. The law applicable was the Federal Law of 29 September 1952 on the Acquisition and Loss of Swiss nationality. As Switzerland was a *jus sanguinis* country, cases were rather rare in practice, though they could arise, for women members of missions in particular. In any case, a Swiss citizen had to be directly involved. For example, if a woman member of a mission had an illegitimate child by a Swiss citizen, then the child could acquire Swiss nationality as a result of the subsequent marriage of its father and mother or of a legitimation decree. If a woman member of a mission married a Swiss citizen, she acquired nationality. The legitimate child of an alien father and a Swiss mother acquired at birth the cantonal and communal citizenship of its mother, and thereby, if it was unable to acquire another nationality at birth, Swiss nationality.

3. On the basis of the information he had obtained from the Federal Political Department, he could say that the Swiss Government encountered no serious practical difficulties. His reply should therefore be understood as indicating that there were no exceptions to the Federal Law of 1952.

4. Mr. USTOR said that the Government of Switzerland had stated that it could not agree with the views of the International Law Commission on article 39. Its comment on the article went on to say: "Switzerland approves *per se* of the rule that the child of a member of the permanent mission may not acquire the nationality of the host State by the operation of *jus soli*. However, the rule laid down in article 39 is wider in scope: it covers all provisions for the automatic acquisition of the nationality of the host State, whether or not they make such acquisition dependent on residence in that State. For the reasons which guided the Vienna Conferences of 1961 and 1963, the Swiss Government recommends that this provision should be dealt with in a separate protocol" (A/CN.4/239, section C.II).

5. It would therefore appear that under Swiss law the child of a member of a permanent mission whose wife was Swiss would become a Swiss national at birth.

6. Mr. RATON (Secretariat) replied that that was so under certain conditions. The child concerned must have been unable to acquire another nationality at birth; and the child would lose his Swiss nationality if, before his majority, he acquired the foreign nationality of his father.

7. Mr. USTOR, thanking the representative of the Secretariat for the information which he had provided,

said he hoped the Drafting Committee would take that information into consideration when considering article 39.²

QUESTION OF THE POSSIBLE EFFECTS OF EXCEPTIONAL SITUATIONS: ARTICLES 49 (*bis*), 77 (*bis*) and 116 (*bis*).

8. The CHAIRMAN invited the Commission to consider the Special Rapporteur's working paper on the question of the possible effects of exceptional situations on the representation of States in international organizations (A/CN.4/L.166).

9. Mr. EL-ERIAN (Special Rapporteur) said that his working paper gave a summary of the discussions which had taken place in the Commission in 1969 and 1970. At the twenty-first session, the discussion had arisen from the reference to armed conflict in draft articles 47 (Facilities for departure) and 48 (Protection of premises and archives), as prepared by the Drafting Committee. At the 1026th meeting, Mr. Ustor had suggested that the Commission consider the possibility of a separate article which would state that, in case of armed conflict, all the privileges and immunities accorded under the convention must be granted.³ The question had then been referred to the Drafting Committee, which had prepared the new draft article reproduced in paragraph 10 of his working paper. When that text had been submitted to the Commission at its 1035th meeting, one member had submitted an elaborate amendment, which was reproduced in paragraph 11 of his working paper, and advanced supporting arguments, which were summarized in paragraph 12, and another member had then submitted a shorter and more precise amendment, which was reproduced in paragraph 13.⁴

10. During the discussion, the view had been expressed that the situation of armed conflict was more complex in the case of permanent missions to international organizations than in that of bilateral diplomacy. The majority had doubted the desirability of dealing with that situation in the draft articles. The Commission had resumed the discussion at its twenty-second session in connexion with the draft articles on permanent observer missions, but had decided to defer consideration of the effects of exceptional situations, such as armed conflict, until the second reading.

11. His conclusions from those discussions were, first, that the Commission did not consider it appropriate to deal with exceptional situations such as armed conflict in the articles on facilities for departure and protection of premises and archives, because it was anxious not to imply that, in case of armed conflict between the host State and the sending State, members of the permanent mission of the sending State would have to leave the territory of the host State; secondly, that there was general agreement on the desirability of dealing in one or more articles with the implications of the severance

² For resumption of the discussion see 1116th meeting, para. 2.

³ See *Yearbook of the International Law Commission, 1969*, vol. I, p. 190, para. 75.

⁴ *Ibid.*, pp. 232-234.

¹ See previous meeting, para. 104.

or absence of diplomatic or consular relations between the host State and the sending State, as well as with the question of recognition; thirdly, that where armed conflict was concerned, opinion in the Commission was divided, and that the attempt to deal with the effects of armed conflict in the present draft articles would raise complex problems, owing to the great variety of situations which might arise in the context of multilateral diplomacy.

12. He had therefore submitted his proposed new articles 49 *bis*, 77 *bis* and 116 *bis*, on which the Commission could take a decision at the final stage of its work. Those articles read:

Article 49 bis

The severance or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles. The establishment or maintenance of a permanent mission by the sending State does not in itself imply recognition by that State of the host State or by the latter State of the sending State, nor does it affect the situation in regard to diplomatic or consular relations between the host State and the sending State.

Article 77 bis

The severance or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles. The establishment or maintenance of a permanent observer mission by the sending State does not in itself imply recognition by that State of the host State or by the latter State of the sending State, nor does it affect the situation in regard to diplomatic or consular relations between the host State and the sending State.

Article 116 bis

The severance or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles. The sending of a delegation to an organ or to a conference by the sending State does not in itself imply recognition by that State of the host State or by the latter State of the sending State, nor does it affect the situation in regard to diplomatic or consular relations between the host State and the sending State.

13. Mr. CASTRÉN said that the Special Rapporteur had prepared an excellent document for the Commission's resumed consideration of the question of exceptional situations.

14. It was clear that the question of armed conflict raised serious difficulties and that opinions on it differed widely, so that it would be difficult to reach agreement on a text. The most frequent case would obviously be armed conflict between the host State and one or more sending States; but there could conceivably be a conflict between the organization and one of its members, if the organization resorted to military sanctions. In theory, the obligations of the host State to a sending State should not be affected in the former case; but for reasons of security the host State might consider it necessary to place the members of the permanent mission under supervision and to limit their privileges and immunities to some extent.

15. Some members of the Commission had nevertheless proposed that the interests of the host State should be

so well protected that the work of the permanent mission and even that of the organization might suffer. It had been proposed, for example, that severe limitations should be placed on freedom of communication, which was so essential for a permanent mission, and on freedom of movement. It would therefore be better not to try to settle that question in the draft articles. The Commission could either add a reservation, as it had done in the case of the Law of Treaties, or confine itself to mentioning the question in the commentary, or refrain from mentioning it at all.

16. The other exceptional situations should be covered in the draft, and the new articles proposed seemed to be acceptable in substance. It should, incidentally, be possible to combine them in a single article.

17. Mr. KEARNEY said that the Special Rapporteur's working paper provided an excellent basis for discussion of the very difficult problems which could arise in the absence of diplomatic or consular relations between the host State and the sending State.

18. He agreed that the Commission should not attempt to deal with the problem of armed conflict in an article, but the reasons should be stated in the commentary, since that might be of assistance to the future conference.

19. In article 49 (*bis*), the second sentence should be amplified to include the possibility of recognition as a result of routine consultations and negotiations between the sending State and the host State. He proposed that the first part of that sentence be amended to read: "Neither the establishment or maintenance of a permanent mission by the sending State nor any action taken pursuant to the provisions of these articles shall imply recognition . . .". He questioned whether the last part of the sentence was really necessary.

20. As had been pointed out before, the severance or absence of diplomatic or consular relations between the sending State and the host State, or their non-recognition of each other, indicated that there were probably outstanding problems of a political nature between them; but where an actual breach or severance of such relations occurred, there was likely to be a state of considerable tension between them, which could affect public opinion and place the host State in an increasingly difficult situation with respect to its obligation to safeguard the persons and premises of the permanent mission.

21. To deal with that situation, he had suggested that the host State be empowered to place certain limitations on the movements and communications of the permanent mission,⁵ but in the light of the attachment of many members of the Commission to the principle of complete freedom of movement, he had reconsidered that suggestion and now proposed that the following sentence be added to article 49 (*bis*): "Failure by members of a permanent mission in the foregoing circumstances to comply with regulations adopted by the host State to safeguard the mission and its members shall relieve the host State of any responsibility for the consequences of such failure."

⁵ *Ibid.*, p. 233, para. 13.

22. Mr. USHAKOV said that the exceptional situations which the Commission was considering could raise many problems. Political, economic or other tensions between the host State and the sending State might, as Mr. Kearney had said, affect the protection of permanent missions. In Mr. Kearney's opinion, the absence of diplomatic or consular relations might give rise to tensions between the host State and the sending State, but in his own opinion, tensions could arise even when such relations did exist between the two States, for example, if the protection afforded by the host State was inadequate. But in cases of tension, it was for the host State alone to decide what measures should be taken; the Commission should not interfere in that matter.

23. Nor should the Commission deal with armed conflict in the draft, although it was mentioned in the Vienna Conventions on diplomatic and consular relations and in the Convention on Special Missions. Apart from armed conflict between the host State and a sending State or between the organization and a sending State, there might also be conflict between two States members of the organization or between the organization and the host State, itself a member of the organization. The question of armed conflict was more complex than the working paper implied. Since the situations he had mentioned were highly exceptional, he agreed with the Special Rapporteur that the Commission should not draft separate provisions on the subject.

24. Articles 49 *bis*, 77 *bis* and 116 *bis*, proposed by the Special Rapporteur, provided a good working basis for the Drafting Committee and for the Commission; but he wished to make some comments on them. The words "under the present articles", in the first sentence of each article, should be replaced by the words "under the present Part", since each of the three articles referred only to one part of the draft. In addition, in each case, the first sentence failed to state expressly that the rights of the States, as well as their obligations, were not affected.

25. With regard to article 116 *bis*, he wondered whether it was really possible to link the sending of a delegation to an organ or a conference with the recognition of the sending State by the host State, or *vice versa*, and the diplomatic or consular relations between the two States. The problems raised by the sending of a delegation to an organ or a conference, including the question of recognition, should be dealt with only in the rules of the organization, so the second sentence of article 116 *bis* could be deleted. The Drafting Committee might also consider the possibility of combining all three articles in a single article.

26. Mr. REUTER said he congratulated the Special Rapporteur on his working paper and, particularly on his proposed articles; allowing for a few possible improvements, the articles were very satisfactory and constituted the logical continuation of the Commission's work.

27. The Commission would probably decide not to deal with armed conflict, but it should give a detailed account of its discussions on the subject in its report. It might

some day be called upon to codify the international law concerning armed conflict, but for the time being it was for States to adopt general provisions.

28. Although it might be true that, apart from armed conflict, the exceptional circumstances contemplated by the Commission did not affect the substance of the obligations of States, it did appear that, as Mr. Kearney had indicated, the implementation of their rights and obligations was nevertheless modified. In fact, Mr. Kearney's suggestions were based on the general principles of international responsibility. The obligation of the host State to protect missions or delegations varied according to circumstances and, if the State enjoying that protection did not respect the regulations of the host State, it relieved the latter State of its responsibility. In view of that principle, it would seem that the word "affect" should be replaced by the word "modify" in the first sentence of each of the three articles proposed. For even if they did not modify the obligations of the States concerned, the circumstances envisaged did have effects on the manner of fulfilling those obligations.

29. In its commentary, the Commission should specify that exceptional circumstances other than those mentioned in the articles could arise. Natural disasters or civil war in cities housing international organizations could produce exceptional circumstances approximating to cases of *force majeure*.

30. Mr. EUSTATHIADES congratulated the Special Rapporteur on his excellent working paper. The suggestion that the three new articles should be combined in one might surprise anyone who was unaware of the circumstances of their preparation: it was because the Commission had decided to consider the various cases of exceptional situations separately that it might end by dealing with them in a single article.

31. The question of recognition was a very complex one. In his view, however, it had no connexion with the other exceptional situations contemplated and, personally, he would have included the second sentence of articles 49 (*bis*) and 77 (*bis*) in the draft article dealing with the establishment of the permanent mission, though deleting the last part, "nor does it affect the situation in regard to diplomatic or consular relations between the host State and the sending State". He agreed with Mr. Kearney that that phrase was not of much value and rather obscured the effects of recognition. Some took the view that recognition was not connected with the existence of diplomatic or consular relations.

32. He noted that there was no reference at all to armed conflict in the new articles, although the subject had come up in connexion with articles 48 and 49. If the case of armed conflict were to be studied it would take the Commission very far afield. But was it to be ignored entirely? As there were special clauses on it in other codification conventions, the subject merited attention.

33. Mr. ROSENNE said that the draft article should not be overloaded with too many separate issues, such as the severance or absence of diplomatic or consular

relations, the problem of recognition and the question of the responsibility of the host State. It would be better to deal with those various issues in separate paragraphs, if not in separate articles.

34. On the question of the absence or breach of diplomatic or consular relations, the Special Rapporteur's first sentence in article 49 *bis* was correct and followed the general line laid down in article 74 of the Vienna Convention on the Law of Treaties.⁶ The question of recognition, however, was a much more difficult one; he wondered whether, in concrete terms and as a purely pragmatic matter, it was really any different from that of diplomatic or consular relations in so far as it might affect the drafting of a convention. In fact, the text he had proposed at the Commission's 1027th meeting⁷ seemed to assume that the issue of recognition itself need not be dealt with expressly, but could be covered by the issue of diplomatic or consular relations. If the Commission decided that the two issues should be dealt with separately, the second sentence of article 49 *bis* should be limited to recognition and the reference to diplomatic or consular relations be dropped.

35. With regard to the recognition issue, it should be remembered that in 1949 the Commission had included "Recognition of States and Governments" in its provisional list of topics for codification,⁸ though it had taken no further action on that topic. In paragraph (1) of the commentary to article 60 of its draft on the law of treaties, the Commission had written: "Similarly, any problems that may arise in the sphere of treaties from the absence of recognition of a Government do not appear to be such as should be covered in a statement of the general law of treaties. It is thought more appropriate to deal with them in the context of other topics . . . [such as] recognition of States and Governments".⁹

36. In 1967 the Commission had included a sentence concerning non-recognition in article 7 of its draft articles on special missions,¹⁰ but that sentence had been rejected by a roll-call vote in the Sixth Committee; the present article 7 of the Convention on Special Missions merely stated that "The existence of diplomatic or consular relations is not necessary for the sending or reception of a special mission".

37. He hoped the Commission would keep those incidents in mind in its general work of codification and not go too far in dealing with the recognition issue. On that issue and that of the responsibility of the host State, it should adopt a prudent attitude, as it had done in connexion with the Vienna Convention on the Law of Treaties and the Convention on Special Missions, and include a general reservation in the introductory part.

⁶ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 299 (United Nations publication, Sales No.: E.70.V.5).

⁷ See *Yearbook of the International Law Commission, 1969*, vol. I, p. 191, para. 2.

⁸ *Op. cit.*, 1949, p. 281.

⁹ *Op. cit.*, 1966, vol. II, p. 260.

¹⁰ *Op. cit.*, 1967, vol. II, p. 350.

38. He was in general agreement with the other conclusions reached by the Special Rapporteur.

39. Mr. RAMANGASOAVINA said the Commission should make it clear in the commentary why it had not devoted an article to armed conflict.

40. With respect to the severance or absence of diplomatic or consular relations, the new articles fairly reflected the various views expressed in the Commission. Situations of that kind certainly ought not to modify the obligations of the host State in regard to the staff of the permanent mission or those of the sending State in regard to the behaviour of the staff of its permanent mission towards the host State. The problem of recognition was more delicate. In moral diplomatic relations, the sending of a mission implied recognition; but the sending of a mission to an organization did not imply recognition of the host State by the sending State or *vice versa*.

41. Articles 49 *bis* and 77 *bis* proposed by the Special Rapporteur were identical, except that the former related to permanent missions and the latter to permanent observer missions. The discussions which the Commission would later devote to permanent observer missions, would show whether those missions could be assimilated to permanent missions for the purposes of the new articles. Once that question had been settled, it might even be possible to combine the three articles in one.

42. The obligations referred to in the new articles were undoubtedly of a reciprocal character, and it was that which had led Mr. Kearney to submit his amendment. It was obvious that members of a permanent mission who did not respect the regulations of the host State were in the wrong; it was so obvious that he doubted whether the amendment served any real purpose. Since it touched on the international responsibility of States, which was one of the general principles of law, its content was implicit; it followed from the maxim *nemo allegans turpitudinem suam est audiendus*, the so-called "clean hands" principle.

43. Mr. USTOR said he agreed with the Special Rapporteur's conclusion that any attempt to deal with the question of armed conflict would raise very complex problems and that the Commission should not include provisions on that question in the present draft, thus following the precedents of its drafts on the law of the sea and the law of treaties.

44. The Special Rapporteur proposed to restrict the provisions on exceptional situations to the cases of severance or absence of diplomatic or consular relations and non-recognition of one State by another. Those cases were complicated, but life was even more complicated and offered a wider variety of examples; one such example was non-recognition of a government, as distinct from non-recognition of a State. But on the whole, the three draft articles proposed by the Special Rapporteur provided a good basis for further work.

45. He appreciated the idea contained in the amendment to article 49 *bis* proposed by Mr. Kearney, but it would apply to a much broader range of cases than

the exceptional situations envisaged in article 49 *bis*. Even if diplomatic and consular relations existed between the host State and the sending State, situations of tension could occur which required the adoption of special regulations. In fact, special regulations might be required even where relations were perfectly normal; for example, during the fifteenth session of the General Assembly in 1960, the presence of many heads of State had induced the host State to introduce a number of extraordinary regulations with the concurrence of the sending States concerned. Cases of that kind should be dealt with by means of the consultation procedure provided for in article 50.

46. Mr. ALCÍVAR said that he, too, agreed with the Special Rapporteur's conclusion that the draft should not deal with armed conflict.

47. He was also in favour of including provisions to the effect that the severance or absence of diplomatic or consular relations between the host State and the sending State did not affect the rights or obligations of either State. He strongly supported the view expressed by Mr. Ushakov that not only the obligations, but also the rights of the two States should be referred to.

48. The problem of non-recognition was a political reality; it played an important and sometimes decisive role in international organizations. As the representative of Ecuador on the Special Committee on the Question of Defining Aggression, set up by the General Assembly,¹¹ he had had considerable experience of that problem and was inclined to favour the inclusion of provisions dealing with it in the draft articles.

49. He welcomed the inclusion of such provisions in regard to delegations to organs and conferences in article 116 *bis*. It was precisely in connexion with conferences that the problem had taken an acute form, having regard, in particular, to the "Vienna formula" concerning participation in conferences convened by the United Nations.¹²

50. The Drafting Committee should be invited to examine the other suggestions put forward, including Mr. Kearney's proposal, regarding the practical effects of which he had some misgivings, and the proposal to delete the last part of article 49 *bis*, to which he himself was opposed.

51. Mr. ELIAS said that each of the three draft articles proposed by the Special Rapporteur dealt with three different points. All were essential, and the commentary should explain the necessity of covering them. He proposed, however, that in each article the three points be dealt with in three separate paragraphs. The first would consist of the opening sentence; the second would state the rule that the establishment or maintenance of a permanent mission by a sending State did not in itself imply recognition by that State of the host State or by

the host State of the sending State; the third would embody the concluding proviso, with suitable drafting changes.

52. When the Commission had begun its debate on the Special Rapporteur's sixth report by discussing certain preliminary issues, he himself had pointed out that one of those issues was whether the draft should include a provision on the possible effect of armed conflict on the representation of States in international organizations.¹³ He now welcomed the Special Rapporteur's analysis of the question in his working paper (A/CN.4/L.166, paras. 15-18) and endorsed his conclusion that any attempt to deal with the subject in the context of the present draft articles would be unhelpful. It was not without good reason that the problem of armed conflict had been left outside the scope of the codification of the law of the sea by the 1958 Geneva Conference and of the codification of the law of treaties by the 1968/69 Vienna Conference.

53. On a question of drafting, he thought that in the concluding proviso the words "affect the situation" were inadequate and should be replaced by more suitable language.

54. He appreciated the reasons for Mr. Kearney's proposal, but was not convinced that a provision in that form should be included in the draft. The question should be examined by the Drafting Committee with the aim of including a passage dealing with the matter either in the draft, or, preferably, in the commentary.

55. The proposal to combine the three articles 49 *bis*, 77 *bis* and 116 *bis* must await the Commission's decision on the final form of the draft articles, particularly the fate of articles 51 to 77. The Commission would have to decide whether to propose one, two or possibly three draft conventions. Meanwhile, the Drafting Committee should be invited to make every effort to improve the language of the three proposed articles.

56. Mr. AGO said that the three articles proposed by the Special Rapporteur provided an excellent working basis for the Drafting Committee. He would not repeat what other members of the Commission had already said about the advisability of combining the three articles, but would merely comment on what he thought should be explained in the commentary and on the amendment proposed by Mr. Kearney.

57. In the form proposed by the Special Rapporteur, the text of the articles would be too stringent unless it was accompanied by explanations in the commentary clarifying its meaning and its finer points. For example, the statement that the severance or absence of diplomatic relations between the host State and the sending State did not affect the obligations of either State was correct in itself, but it was possible that some of those obligations or the ways in which they were carried out would, in fact, be affected. That should be explained in the commentary.

¹¹ See General Assembly resolution 2330 (XXII).

¹² See General Assembly resolutions 1450 (XIV), 1685 (XVI) and 2166 (XXI).

¹³ See 1088th meeting, para. 23.

58. It seemed that the Commission had been right not to mention armed conflict among the exceptional situations, but in order to prevent any misunderstanding it ought to explain its decision clearly in the commentary. The reason for that decision was that it would have been very difficult to draft a provision covering all the possible cases of conflict in which the host State and the sending State might be involved, together or separately. But it must be clearly understood that the Commission's silence should not be interpreted to mean that armed conflict was a situation in which the obligations assumed under the convention ceased to exist.

59. Mr. Kearney's amendment was not, as some seemed to believe, a matter of State responsibility. It was wrong to think that the use of term "responsibility" automatically placed a matter in the sphere of international responsibility. In the case in point, failure of the sending State to comply with certain procedures laid down by the host State to ensure the enjoyment of the facilities and privileges it was obliged to grant to the sending State could have the effect of relieving, not the sending State, but the host State of responsibility for the consequences of any failure to fulfil its obligations in the matter. In other words, if the host State had provided for certain procedures to fulfil its obligations and the sending State disregarded them, the host State could consider itself relieved of the duty to observe certain clauses of the convention, without its international responsibility being involved.

60. Obviously, that led to responsibility indirectly, but the question in fact related to the law of treaties and was, moreover, covered by article 60 of the Vienna Convention on the Law of Treaties,¹⁴ which stated that the breach of a treaty by one of the parties entitled the other to invoke the breach as a ground for suspending the operation of the treaty in whole or in part. Thus, since the problem was already covered by the Vienna Convention, it was questionable whether it should be mentioned in the present draft articles with regard to the particular case of severance or absence of diplomatic relations; the provisions of article 60 of the Vienna Convention would apply not only in that case, but in all other cases where the sending State did not carry out its obligations.

61. He proposed that it be left to the Drafting Committee to settle the question.

62. Mr. ALBÓNICO said that the cases covered by articles 49 *bis*, 77 *bis* and 116 *bis* did not exhaust the list of exceptional situations which might have an effect on the representation of States in international organizations. Apart from armed conflict, there were such cases as civil war, martial law, state of emergency and other cases of *force majeure*. Perhaps the Drafting Committee could formulate a text covering all those situations.

63. He accepted the first sentence of each of the proposed draft articles, but suggested that the second sentence be deleted. It was undesirable to deal with the question of non-recognition, which involved very complex problems and called for caution.

64. On the same grounds he supported the Special Rapporteur's conclusion that the question of armed conflict should not be dealt with in the draft. He agreed with Mr. Ago, however, that total silence on the matter could lead to dangerous interpretations, especially in view of article 46, paragraph 2, of the 1969 Convention on Special Missions.¹⁵

65. The main idea in Mr. Kearney's proposal was not that of State responsibility, but that of reflecting in international law the old principle of internal law that one of the parties to a contract could refuse to carry out its obligations under the contract in retaliation for a breach by the other party, the *exceptio non adimpleti contractus*.

66. Mr. BARTOŠ said that the question of exceptional situations was both extremely delicate and essential for the instrument the Commission was preparing, as was shown by the number of contemporary cases of severance or absence of diplomatic relations, non-recognition of States and armed conflict, even between States which were members of the same organization or had permanent missions on the territory of States which were in one of those situations. It was important that the situations arising from such circumstances should be governed by legal rules.

67. The problem should be dealt with on the basis of the United Nations Charter, which was founded on the principle of universality, thanks to which the fact that some States were in an exceptional situation with regard to other States did not prevent the Organization from existing or the other States from being members. It was important that the subject should be governed by precise legal rules, not only in the interests of the universality of international organizations and their proper functioning, but also because the settlement of some conflicts might be facilitated: for example, if the representatives of State parties to a conflict with the host State, or of States with which the host State did not maintain diplomatic relations, were called upon to appear before the organization for negotiations. During the Korean war, for example, the representatives of North Korea and the People's Republic of China had been able, through the tolerance of Washington, which had understood that the conflict could not be settled without their presence, to come to New York to defend their cause before the Security Council.

68. The same problem had already arisen in other cases and it might arise again if, for example, the States parties to the present conflict between Israel and the Arab countries were to meet one day under the auspices of an international organization whose headquarters was on the territory of one of them. A State which agreed to act

¹⁴ United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, p. 297 (United Nations publication, Sales No.: E.70.V.5).

¹⁵ See General Assembly resolution 2530 (XXIV), Annex.

as host to an international organization must also accept the consequences and was not entitled to exclude from its territory the representatives of States represented in the organization—whether as members, observers or with any other status—with which it did not maintain diplomatic relations, which it did not recognize or with which it was involved in armed conflict.

69. The Commission could therefore be grateful to the Special Rapporteur for having drafted the three articles now before it. Their number might perhaps be reduced to two or, on the contrary, their scope might be widened to cover cases of armed conflict or other cases such as that of a country which, though not admitted to membership of an organization, was called upon to be represented in it provisionally. The essential point was that there should be rules of international law governing relations between the host State and States members of the organization of States which had dealings with it. The Drafting Committee would decide how far the Commission could go, but in general the three articles proposed by the Special Rapporteur already provided a solid basis for drafting the necessary rules.

70. However, it was not only a matter of regulating relations between the host State and the States represented in the organization, but also relations between the latter States and States which were in the same situation with regard to them as the host State, and would, for example, have to authorize transit through their territory.

71. Since a general rule was being drafted for the first time and it ought to be complete, the obligations of States benefiting from the rules governing exceptional situations, for example, those involving propaganda or unfriendly acts, should also be laid down.

72. Lastly, apart from the host State, rules should be drafted governing the conduct of States which, being in one of the exceptional situations provided for with respect to each other, met within the organization. For as anyone could see, in the United Nations General Assembly, for example, animosity often broke out between enemy States in international discussions. In such cases, the question arose whether it was for the host State, the Chairman of the body concerned or the other participating States to restore harmony.

73. His conception of the subject under study might perhaps be too broad, but he had wished to show that that subject was not so limited as the three articles proposed by the Special Rapporteur suggested. The Special Rapporteur had preferred to go no farther; the Drafting Committee would decide whether it was advisable to do so. But for the time being the texts proposed were acceptable.

The meeting rose at 1 p.m.

1100th MEETING

Friday, 14 May 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Ramangasoavina, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 3; A/CN.4/L.162/Rev.1; A/CN.4/L.166)

[Item 1 of the agenda]

(continued)

QUESTION OF THE POSSIBLE EFFECTS OF EXCEPTIONAL SITUATIONS: ARTICLES 49 *bis*, 77 *bis* and 116 *bis*
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the question of the possible effects of exceptional situations on the representation of States in international organizations and the Special Rapporteur's proposed articles 49 *bis*, 77 *bis* and 116 *bis* (A/CN.4/L.166).

2. Mr. KEARNEY said that, in response to the remarks of some members, he wished to explain his reasons for referring to State responsibility in the amendment he had submitted to article 49 *bis* at the previous meeting, which read: "Failure by members of a permanent mission in the foregoing circumstances to comply with regulations adopted by the host State to safeguard the mission and its members shall relieve the host State of any responsibility for the consequences of such failure". In that context, by "State responsibility" he meant State responsibility as defined by the Special Rapporteur for that topic in draft articles 1, 2 and 3 of his third report,¹ and in that context it was not possible to avoid referring to State responsibility. The draft articles now being considered contained many provisions which imposed obligations upon States. Failure to fulfil those obligations was bound to give rise to State responsibility.

3. At the same time, it was clear that some leeway was necessary to allow exceptional situations to be taken into account. For example, under article 21,² the permanent representative was entitled to use the flag of the sending

¹ See A/CN.4/246, paras. 48, 75 and 85.

² See *Yearbook of the International Law Commission, 1968*, vol. II, p. 212.