Document:-

A/CN.4/SR.1277

Summary record of the 1277th meeting

Topic:

Treaties concluded between States and international organizations or between two or more international organizations

Extract from the Yearbook of the International Law Commission:-

1974, vol. I

lifying the renewal of the international community and the transformation which had taken place in the world. He extended his heartfelt sympathy to Mrs. Bartoš.

70. Mr. RYBAKOV (Representative of the Secretary-General, Director of the Codification Division) said that during the present session of the Commission there had been two commemorative meetings, one in honour of the Commission's twenty-fifth anniversary and the other in honour of Milan Bartoš, a great jurist, a great scientist, a great diplomat, a great man and a great and highly esteemed friend of all the members of the Commission and the Secretariat. To his mind that seemed symbolical, because twenty-five years of the Commission's work at the same time represented twenty-five years of the work of Mr. Bartoš in the Commission, twenty-five years of his constant and valuable contribution to the work of the Commission on the codification and progressive development of international law.

71. Today, the Commission was paying its tribute to a man who, as had rightly been said, was one of its spiritual fathers; a man who from the very outset had been an active proponent and partisan of real progress, of real historical and noble trends in modern international law; a man whose legal philosophy had not been formed and influenced by scientific research and scholarly study alone, but who had acquired his legal convictions, his professional conscience and his human dignity through years of fighting against the plague of fascism, through his experiences in concentration camps and during the liberation, through his noble struggle for the triumph of the principles of non-aggression and peaceful co-existence, and through years of both hot and cold war, down to the political *détente* which represented the most remarkable trend in modern international relations. Mr. Bartoš would certainly be satisfied that through his words and deeds, through his contribution to the progressive development of international law, he had made his own valuable contribution to that historical trend.

72. All those now present could be satisfied, too, that it was a man like Mr. Bartoš, an active anti-fascist, internationalist and humanist, who had been the spiritual father of the International Law Commission, the teacher, colleague and friend of its members and of members of the Secretariat. He would always be remembered not only as a remarkable jurist, scientist and diplomat, but also as a remarkable man who was highly respected and esteemed by all members, both past and present, of the Commission and the Secretariat. Today's meeting served to prove the words of Mr. Ago, that Milan Bartoš was not dead, but still among them.

73. Mrs. Bartoš had asked him to thank all the members of the Commission and the Secretariat, on her behalf, for the tributes paid to her husband and for their kind invitation to her to be present on that occasion, as well as for the sincere friendship they had shown for so many years to that really remarkable man, Milan Bartoš.

74. The CHAIRMAN read out the following telegram from Sri Lanka, which he had just received from Mr. Pinto. "Very much regret inability participate in Milan Bartoš commemorative session June twelfth due commitments here. Association of Milan Bartoš with Commission as founding father, most dedicated and active member and Chairman make his contribution to international law incalculable. His prodigious knowledge sound judgement and appreciation of what was practical in the prevailing political context, together with a sympathetic understanding of human beings and values, all contributed to his stature as legislator and human being. Grateful convey my sympathy and respects to Madame Bartoš."

75. Mr. EL-ERIAN said he had received a message from Mr. Bedjaoui and Mr. Elias, who regretted their inability to be present and wished to associate themselves with the tribute paid to the memory of their beloved friend and colleague, Milan Bartoš.

76. The CHAIRMAN said that the records of the special commemorative meeting and of the opening meeting of the session would be forwarded to Mrs. Bartoš and to the Government of Yugoslavia, with an appropriate covering letter.

The meeting rose at 12.15 p.m.

1277th MEETING

Thursday, 13 June 1974, at 10.15 a.m.

Chairman: Mr. Endre USTOR

Later: Mr. José SETTE CÂMARA

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

Question of treaties concluded between States and international organizations or between two or more international organizations

(A/CN.4/277; A/CN.4/279)

[Item 7 of the agenda]

(resumed from the 1275th meeting)

ARTICLES 2, 3, 4 AND 6 (*continued*)

1. Mr. HAMBRO commended the Special Rapporteur for the fidelity with which he had sought to express the Commission's views. If that had sometimes led him to diverge from his earlier work, it was only because international law on the subject had evolved.

2. He would not comment on draft articles 2, 3 and 4, but would confine his remarks to article 6. In that connexion, it should be remembered that the Commission had two aims: the codification and the progressive development of international law. Codification of the law must be based on practice and custom; but there were gaps in the custom relating to the topic under

consideration, and if it was to fill those gaps the Commission must develop the law. Moreover, since international organizations were assuming increasing importance in international life, it was the Commission's duty to do all it could to strengthen their legal position. That was the principle which should guide the Commission in its work.

3. He was therefore prepared to accept article 6 as drafted. He was glad that the Special Rapporteur had made it clear, in paragraphs (26) and (27) of his commentary (A/CN.4/279), that it was not the law of each organization which conferred treaty-making capacity upon it, but general international law. He was also glad that the Special Rapporteur, like several other members of the Commission, had affirmed that every international organization had capacity to conclude treaties from the outset. That capacity was, of course, subject to limitations and procedures determined by the law of each organization. Consequently, the Commission was not called upon to determine those limitations and procedures or to give a precise definition of an international organization; it only had to deal with the general law of international organizations in the sphere with which it was concerned.

4. Although he could accept article 6 as it stood, he much preferred the alternative suggested by the Special Rapporteur in paragraph (20) of his commentary, for he thought it useful to affirm that the capacity of international organizations to conclude treaties was already acknowledged in principle by general international law, so as to prevent any misunderstanding in the future. He did not much like the expression "the relevant rules of each organization", however, though he realized that it might be difficult to find anything better. He would prefer the expression "law proper to each organization", though he recognized that in English the term "proper law" was used mainly in private international law. The problem might perhaps be solved by saying simply "... by the law of each organization"; that was a general formula which would cover both the practice and the relevant rules of each organization.

5. He found the Special Rapporteur's commentary to article 6 excellent, and hoped that paragraphs (13), (16) and (26)-(28), including the extracts from the opinions of the International Court of Justice, would appear in the Commission's commentary to that article.

6. Mr. MARTÍNEZ MORENO said that the Special Rapporteur's presentation of the draft articles was so clear, and the method he had followed so closely in accordance with the Vienna Convention on the Law of Treaties,[1] that it was difficult for him to make any comments, except on the question of principle raised by article 6 and on a few points of detail which could be dealt with in the commentary.

7. With regard to paragraph 1 (*a*) of article 2, he had no objection to the use of the expression "general international law", but would like the precise scope of that expression to be explained in the commentary in order to avoid confusion. In Latin America, there had been a lively debate since the beginning of the century between those who maintained that international law was universal and those who, like Judge Alejandro Alvarez, recognized the existence of regional international law. The commentary should also mention a point arising from the Special Rapporteur's proposal that the words "as a potential party to the treaty" should be included in paragraph 1 (e) of article 2. It was true that an international organization often provided assistance to States in negotiating and drafting a treaty, without indicating that it was a party itself. The same situation could arise, however, in the case of a State, which might provide facilities to two other States for the negotiation of a bilateral treaty.

8. Article 6 raised a very important question of principle. The Special Rapporteur had said that there had been two very clear positions on that question, both in the Commission and in the comments of Governments. One position was that an international organization, by the very fact of its existence, possessed capacity to conclude treaties; the other was that such capacity was determined only by the constitutional framework of the organization in question, as laid down in its constituent instrument. In the former case, the capacity to conclude treaties was derived from international law; in the latter it was derived from the will of the member States which had drawn up the constituent instrument. On the other hand, the suggestion that an international organization did not possess international personality and hence did not possess capacity to conclude treaties was belied both by practice—Mr. Tabibi had mentioned that more than six thousand treaties had been concluded by the United Nations—and by the advisory opinions of the International Court of Justice on *Reparation for injuries suffered in the service of the United Nations*,[2] the *Effect of awards of compensation made by the U.N. Administrative Tribunal*[3] and *Certain expenses of the United Nations (article 17, paragraph 2, of the Charter)*.[4]

9. He himself did not think it possible to deny that all international organizations possessed capacity to conclude treaties, although he was not sure whether that capacity could not, hypothetically, be limited by their constituent instruments. It seemed clear, at least, that all international organizations had capacity to conclude treaties concerning their privileges and immunities in the host country. After making a detailed analysis of the subject, the Special Rapporteur had found a formula which he (Mr. Martínez Moreno) was prepared to accept. The statement that the capacity of international organizations to conclude treaties was determined by the relevant rules of each organization amounted to an implicit recognition of that capacity.

10. There were some differences in the opinions expressed by Governments on that subject. His own country had not taken up a position in the Sixth Committee,

[1] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 289.

[2] I.C.J. Reports 1949, p. 174.

[3] I.C.J. Reports 1954, p. 47.

[4] I.C.J. Reports 1962, p. 151.

but had done so very clearly in the General Assembly, when its Foreign Minister had suggested, on 26 September 1973, that since the United Nations had a fundamental responsibility to preserve world peace and security and to that end had established a Military Staff Committee at Headquarters, it should ratify the various Geneva humanitarian conventions concerning such matters as the treatment of prisoners of war and civilian populations.[5] The Foreign Minister had, on that occasion, strongly affirmed the treaty-making capacity of international organizations, and he himself shared the views thus expressed on behalf of his country.

11. To sum up, he favoured a formula such as that concerning the capacity of States contained in the Vienna Convention; but in the interests of arriving at a generally acceptable text he was prepared to agree to the text proposed by the Special Rapporteur, stating that "capacity to conclude treaties is determined by the relevant rules of each organization".

12. Mr. RAMANGASOAVINA said that on the whole he approved of the draft articles proposed by the Special Rapporteur, though he had a few reservations about article 6.

13. In paragraph 1 (*a*) of article 2, he found the words "governed principally by general international law" very satisfactory. In paragraph 2 of that article, the expression "law peculiar to" an international organization seemed to him preferable to the term "internal law", which might be ambiguous.

14. He had no difficulty in accepting the principle stated in article 6. It was true that all codification work entailed some generalization, but he thought that international organizations should not be subjected to a uniform rule and confined within an unduly rigid framework, which would hamper their future development. Like Mr. Hambro, he therefore preferred the wording suggested by the Special Rapporteur in paragraph (20) of his commentary, which would preserve the organization's personality and allow its law to develop. In his view, every organization, large or small, was competent to conclude treaties unless expressly prohibited from doing so by its constituent instrument. Moreover, even if the constituent instrument did not give an organization capacity to conclude treaties at the outset, the organization could always acquire that capacity later. It must therefore be affirmed at the outset that every international organization possessed capacity to conclude treaties, subject to the provisions of its constituent instrument.

15. He did not much like the expression "relevant rules", although it appeared in article 5 of the Vienna Convention, for it did not seem to him to have quite the same meaning as the corresponding expressions in French and Spanish.

16. Mr. YASSEEN said that in principle he approved of the method adopted by the Special Rapporteur. As far as paragraph 1 (*a*) of article 2 was concerned, however, it would be easy to follow the text of the Vienna Convention more closely and say: "For the purposes of the present articles 'treaty' means an international agreement concluded..." thus avoiding a lengthy repetition.

17. He understood why the Special Rapporteur had made two additions to the text when drafting paragraph 1 (*a*). The word "principally" did not seem necessary, however, since interpretation already inclined towards the solution indicated. Moreover, as the Special Rapporteur himself had pointed out, the problem that word was intended to solve arose not only with treaties between international organizations or between States and international organizations, but also with treaties between States, which were the subject of the Vienna Convention. The proposed addition might therefore cause some misunderstanding by giving the impression that, where treaties between international organizations or between States and international organizations were concerned, the Commission had wished to specify a condition which it had not seen fit to lay down with regard to treaties between States.

18. As to the second addition proposed by the Special Rapporteur, the treaties in question were not necessarily governed by "general" international law, for, as Mr. Ushakov had rightly observed, there might be a treaty that was governed by provisions of regional international law. He agreed with the Special Rapporteur that the expression "internal law of international organizations" should be avoided, since to some extent the law of international organizations was part of international law, so that it could not be assimilated to internal law. He therefore preferred the expression "international law" without any qualification, which covered both general international law and regional international law.

19. With regard to paragraph 1 (*d*) of article 2, in his view, Mr. Ushakov's remark about ratification[6] raised a question of drafting rather than of substance; it had to be made clear that a State or an international organization could make reservations when signing or, later, when expressing its consent to be bound, whether by ratification, accession or acceptance. The Commission might reconsider that point when it had examined all the means whereby an international organization could express its consent to be bound.

20. In connexion with paragraph 1 (*i*) of article 2, he pointed out that, in a discussion at the Institute of International Law at Rome, the definition in the Vienna Convention—"'international organization' means an intergovernmental organization"—had not been found acceptable, speakers having pointed out that if an international organization was defined as an intergovernmental organization, there was no reason why the latter expression should not be employed from the outset. Personally, he thought that the wording of the Vienna Convention should nevertheless be retained, since in the present draft it was not a definition but merely a statement that was involved; the Commission was not trying to define an international organization, but merely stating that,

[5] See *Official Records of the General Assembly, Twenty-eighth Session*, 2129th plenary meeting.

[6] See 1275th meeting, para. 45.

among international organizations, it was to the intergovernmental organizations that the draft referred.

21. He thought article 6 was very well drafted, since it only stated a fact and did not prejudge the different doctrinal positions on the subject. In that respect he found it preferable to the wording suggested by the Special Rapporteur in paragraph (20) of the commentary, which was less neutral and more in the form of a doctrinal statement. He found article 6 acceptable as it stood.

22. The CHAIRMAN, speaking as a member of the Commission, said that, as Mr. Ushakov had rightly pointed out, paragraph 1 (*a*) of article 2 amounted to a revision of the corresponding provision of the Vienna Convention, which used the expression "governed by international law" rather than "governed principally by general international law".

23. He agreed with the Special Rapporteur that the question whether treaties could exist under different régimes of law had not been considered in depth at Vienna, but it was, of course, a matter of interpretation. A treaty concluded between two States was always governed by international law, because international law presumed the element of consent. On the other hand, a treaty could also be governed by national law, as, for example, when a State sold a parcel of land to another State for the building of an embassy. That would involve a simple contract by which the second State became the owner of the land, and the agreement would then be governed in many respects by national law.

24. Like other speakers, he thought that the Commission should perhaps not go beyond the Vienna Convention in paragraph 1 (*a*) of article 2; the Special Rapporteur himself had said, in paragraph (5) of his commentary, that the addition of the word "principally" was not absolutely essential, though it would be more important in inter-State treaties, since it was rare for such treaties to be governed by national law. He was inclined to think, therefore, that the Commission should adhere to the text of the Vienna Convention and include the Special Rapporteur's explanations in the commentary.

25. Article 6 was very important, for if it was admitted that there were international organizations which did not possess capacity to conclude treaties, it would be necessary to draft an article concerning the invalidity of treaties, since a situation might arise in which a treaty was concluded by an international organization which did not possess the necessary capacity. On the other hand, if it was assumed that all international organizations possessed capacity to conclude treaties, it would be necessary to provide for the possibility that organizations whose capacity was confined to certain kinds of treaty might conclude treaties *ultra vires*.

26. In his opinion, the real difficulty in article 6 was created by the seemingly harmless provision of article 2, paragraph 1 (*i*), which stated that "international organization" meant an intergovernmental organization. That would clearly exclude non-governmental organizations, but the problem was to distinguish between States as such and States which established international organizations. For example, the Conference on Security and Co-operation in Europe, which was at present meeting at Geneva, had a secretariat, but could not be called an international organization. Would it become an international organization if, at some later date, it established a permanent headquarters?

27. The basic principle of international law concerning capacity was to be found in the following statement in the advisory opinion of the International Court of Justice on *Reparation for injuries suffered in the service of the United Nations*: "Whereas a State possesses the totality of international rights and duties recognized by international law, the right and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[7]

28. When the Special Rapporteur referred to the "relevant rules of each organization" in article 6, he undoubtedly meant the organization's constitution and all other documents expressing the will of the States which had established it. He could therefore accept the text of article 6 in substance, although it might be possible to indicate more clearly what was meant by the words "relevant rules".

29. Mr. EL-ERIAN said he had no strong feelings about the position of article 2, although in conventional practice the article on the use of terms generally came first.

30. With regard to paragraph 1 (*a*) of article 2, he shared the doubts expressed by Mr. Ushakov, the Chairman and the Special Rapporteur himself. He appreciated the fact that the Special Rapporteur, in his commentary, had given the Commission a wide choice by presenting all the possible alternatives. He wished to make it clear, however, that his doubts did not proceed from a fear of departing from the provisions of the Vienna Convention, since he saw no reason why, after a few years, departures from that instrument should not be admissible if there were sufficient grounds.

31. In his opinion, the words "principally" and "general" created more problems than they were intended to solve. Obviously, the Special Rapporteur had wished to deal with the problem of contracts and other situations of international law vis-à-vis national law, but those matters could best be dealt with in the commentary. "General international law" was not an easy term, since it would seem to cover, in the present case, both the treaty-contract (*traité contrat*) and the law-making treaty (*traité loi*). It would be better, therefore, to adhere to the expression "international law" pure and simple.

32. For article 6 he preferred the alternative text suggested by the Special Rapporteur in paragraph (20) of his commentary. In the present draft articles, the Commission was dealing with international organizations of a universal character; it had no real right to deal with regional organizations, although the latter might be influenced by universal organizations, as evidenced by

[7] I.C.J. Reports 1949, p. 180.

the impact of the Charter on such regional organizations as the League of Arab States and the Organization of African Unity.

33. In view of the vast amount of practice, the capacity of international organizations of a universal character to conclude treaties could scarcely be questioned, although that capacity might be subject to certain restrictions, just as the capacity of States might be, for example, as in the case of permanent neutrality. After all, organizations were created entities; legal persons were not the same as natural persons, but could it be said that legal persons similar to international organizations did not possess legal capacity? It was difficult to see how an international organization could establish its headquarters in another State if it lacked such capacity.

34. What could be said was that the capacity to conclude treaties was subject to the law of the international organization in question. But what if the organization's constitution was silent on the question of capacity? The Charter of the United Nations specifically empowered the Security Council and the specialized agencies to conclude certain treaties because of their evident importance, but that surely did not mean that they were necessarily restricted to treaties of that particular type.

35. Mr. KEARNEY, referring to paragraph 1 (*a*) of article 2, said that after studying the Special Rapporteur's proposal, he could agree to the deletion of the words "principally" and "general". The problem of distinguishing between contracts under national law and treaties under international law was already sufficiently complicated, and an attempt to solve it by definition would only introduce additional complications.

36. With regard to paragraph 1 (*i*) of article 2, Mr. El-Erian had reopened the old problem of the definition of an international organization, but he himself did not think the Commission should introduce the idea of a universal organization into the present study. There was also the question whether he Special Rapporteur's present definition would meet the situation, when it arose, of international organizations which included other international organizations in their membership, a trend that was already apparent in the case of GATT and the European Economic Community.

37. He saw no real difficulty in paragraph 2 of article 2, though he questioned the use of the phrase "the law peculiar to any international organization".

38. Lastly, he considered article 6 essential, because it corresponded to article 6 of the Vienna Convention, though he agreed with Mr. Tammes that it was difficult to distinguish between capacity and competence. He suggested that the text should be amended to read: "An international organization has capacity to conclude treaties in accordance with its relevant rules".

Mr. Sette Câmara, First Vice-Chairman, took the Chair.

39. Mr. USHAKOV said he wished to supplement the comments he had made at the 1275th meeting.[8] The text of article 2, paragraph 2 was acceptable, excepting the words "in the law peculiar to any international organization". Those words raised the question—perhaps more theoretical than practical—of the existence of a law peculiar to international organizations. As he strongly doubted whether there was any such law, he would prefer the phrase in question to be replaced by the words "in the practice of any international organization".

40. With regard to article 3, he had entirely changed his previous view that the scope of that provision should be broadened; he now thought that it referred to certain kinds of agreement not in written form and reserved their legal force. The article covered the possibility that agreements not in written form might be concluded between States and international organizations or between international organizations. It was doubtful whether such agreements existed in practice, and it was also doubtful whether the future convention could be applied only to international organizations in the case of agreements between them and other subjects of international law. Article 3 was not easy to justify and it raised many questions. He wondered whether it was really advisable to apply rules drafted to govern the special relations between States and international organizations or between international organizations, to such exceptional situations as those to which article 3 referred.

41. In his previous statement, he had expressed doubt about the need for article 6 and had suggested that, if it was retained, it should be differently worded. Though still doubtful, he had finally come to the conclusion that the provision should be retained as it stood if the Commission decided not to delete it. The wording proposed by the Special Rapporteur was probably the most flexible that could be devised and the most acceptable, though it was not free from difficulties of interpretation. It was sometimes hard to decide whether one was dealing with a treaty or an organization. For instance, some writers maintained that the General Agreement on Tariffs and Trade (GATT) had been a treaty up to the moment when GATT had created its own organs and had become an organization. It was also a delicate matter to make the capacity of international organizations to conclude treaties dependent on contemporary international law. It was those considerations which had led him to change his views on article 6.

42. Mr. BILGE said that the subject before the Commission was a difficult one. He congratulated the Special Rapporteur on the masterly way in which he had handled it, and said that he would confine his comments to three of the provisions.

43. Paragraph 1 (*a*) of article 2 contained a definition of a "treaty" which had been drafted with the requirements of the draft articles in mind. The Special Rapporteur had made two additions to the corresponding definition in the Vienna Convention. He (Mr. Bilge) could only approve of the addition of the word "principally", since he had himself proposed it in the Sixth Committee during the discussion of the draft articles on the law of treaties. As the proposal had been rejected, however, it would perhaps be better not to include that word in the text of the provision, but merely to give an explanation

[8] Paras. 40-51.

in the commentary. The purpose of adding the word "general" before "international law" was to distinguish international law proper from the law peculiar to an international organization. That distinction was certainly necessary, but it would be enough to refer to it in the commentary.

44. As Mr. Yasseen had pointed out, paragraph 1 (*i*) of article 2 did not contain a definition of the expression "international organization", but specified that only intergovernmental organizations were covered by the draft articles. It did not seem necessary to confine the application of the draft to intergovernmental organizations with a universal mission, as Mr. El-Erian had suggested since, under the terms of the resolution adopted by the United Nations Conference on the Law of Treaties,[9] the Commission's mandate was to study the question of treaties concluded between States and international organizations or between two or more international organizations, in the sense given to the latter expression in the Vienna Convention on the Law of Treaties. It should be noted, however, that many treaties had been concluded by international organizations which did not have a universal mission, but were of a regional character, and that such treaties should not be outside the scope of the future convention. But the choice of a definition would have an effect on other articles. If the Commission did not intend to confine itself to international organizations of the United Nations system, it would have to be cautious, especially in defining the capacity of international organizations to conclude treaties.

45. Article 6, which dealt with that question, appeared to be indispensable. Moreover, the Commission had already recognized the need to include an article on the capacity of international organizations to conclude treaties, as would be seen from the commentary to draft article 5 of the draft articles on the law of treaties.[10] The issue was not the actual principle of the capacity of international organizations to conclude treaties, but the extent of that capacity. The source of the capacity could be mentioned in the article, but the main point was to define its extent. The Special Rapporteur proposed to do that by referring to the relevant rules of each organization, but it might be better to adopt a different criterion. When States set up an international organization, they did so in order to pursue a common aim which they could not achieve by themselves. They therefore gave the organization capacity to carry out the functions which would enable it to achieve that aim. The criterion of functional capacity, as identified by the International Court of Justice in two of its advisory opinions, therefore seemed preferable. The alternative text for article 6 proposed by the Special Rapporteur in paragraph (20) of his commentary also did not apply the criterion of functional capacity and was not entirely satisfactory. Since the Commission was inclined to take the term "international organization" in a broad sense, it should adopt a fairly restrictive attitude towards the capacity of an organization to conclude treaties, and limit that capacity to what was strictly necessary for the performance of its functions. He hoped the Special Rapporteur would consider the possibility of combining the wording he proposed in paragraph (20) of his commentary to article 6 with the wording submitted by Professor R.J. Dupuy to the Institute of International Law, which was reproduced in paragraph 39 of his second report (A/CN.4/271).[11]

46. Mr. QUENTIN-BAXTER said that the problems involved in article 6 were fundamental and far-reaching. He himself was one of the minority of members who doubted the value of that article in the draft, but like the Special Rapporteur and Mr. Ushakov, he recognized the duty of the Commission to be guided by the fairly general desire to include a provision on those lines. He also recognized the logic and the reasoning behind the Special Rapporteur's formulation of article 6.

47. It was not the wording of article 6 or any of the proposed changes that caused him concern. His misgivings were due to the likelihood that different people would attach quite different values to the rule embodied in that article. Some would no doubt regard it as a virtual restatement of an axiomatic truth, namely, that an international organization, which was by its nature an artificial entity, almost always had to be limited by the purposes for which it had been set up. The formula "the relevant rules of each organization" allowed room to take the fullest account of doctrine as expounded by the International Court of Justice and as embodied in the provisions of the Vienna Convention relating to the interpretation of constitutive treaties. For those reasons, although he had little objection to the adoption of article 6 as it stood, he felt inclined to make a reservation. The adoption of that article should not make the Commission suppose that it had made any significant progress towards the solution of the problems inherent in the subject. Indeed, the article might well have the opposite effect by giving the impression that those problems did not exist.

48. He was prepared to accept the position that the present draft, like the Vienna Convention on the Law of Treaties, did not deal in any way with questions of recognition. Clearly, nothing in the draft could oblige a State to deal with an international organization which it chose not to recognize. That being said, he wished to draw attention to the difference between the situations covered by the present draft and those to which the Vienna Convention applied. There was a finite number of States and that number was fairly small. In the case of international organizations, on the other hand, the possibilities were absolutely unlimited. In the circumstances, he saw no reason why a State should concern itself with recognizing the existence of a very small organization situated in a remote part of the world and engaged in activities which did not bring it into contact with that State.

[9] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E. 70.V.5) p. 285, resolution relating to article 1.

[10] See *Yearbook ... 1966*, vol. II, p. 191.

[11] Reproduced in *Yearbook ... 1973*, vol. II.

49. It was less easy to dismiss the problem of a third State, which was in theory free to ignore the existence of an international organization, but which in practice had to deal with the organization because other States had chosen to delegate important powers to it. In that connexion, the formal parallel between article 6, which was the only possible text on the question of capacity, and the corresponding provision of the Vienna Convention was less important than the inherent contrast between them. It could be said, by way of explanation, that States were sovereign whereas international organizations were not. The variety of international life, however, did not lend itself to that simple dichotomy, even at present. As far as States were concerned, it was possible to rely on their capacity to conclude treaties without considering any possible constitutional limitations. In the case of international organizations, a similar assertion could not be made in such simple and irrevocable terms. It was necessary to look at the capacity or competence of the organization concerned. In other words, States could be said to deal with an organization at their own peril. An organization possessed only what had been given to it by the States that had set it up. Whether it had formal capacity or not, it obviously could not commit those States in matters alien to its functions. Accordingly, in the very nature of things and even without a provision on the lines of article 6, the recourse and options in the matter would be limited. In a world in which States were increasingly delegating sovereign powers to regional organizations, it would seem to be placing an unduly heavy burden upon a third party to require it to construe the constituent instrument of an organization with which it dealt and to do so in the light of the practice of the organization. He doubted whether it was advisable to lay down a rule to that effect in general and absolute terms. At any rate, such a rule would not be borne out by United Nations practice. Some bodies brought together both the representatives of States and those of international organizations. At such meetings, it was often not the representatives of States who were the most powerful or who fully exercised sovereignty. The variety of international life in that respect was great and was increasing.

50. Reverting to the definition in paragraph 1 (*a*) of article 2, he therefore thought it would be preferable not to insert the word "general" before the words "international law". It was true that the internal laws of States were operative at the domestic level, while the law of an international organization was operative at the international level. But to state a rigid and absolute rule in the matter would be to impose a formal framework that was neither sufficiently sensitive nor sufficiently elaborate to reflect the complex reality of international life.

51. Mr. TABIBI said he supported article 6 as it stood. As he saw it, the difficulties involved were more psychological than legal.

52. As far as States were concerned, there was general agreement that they had an inherent legal right to conclude treaties. The same inherent right could not, of course, be recognized as belonging to international organizations. At the same time, however, it had to be acknowledged that the law of international organizations was of a practical character and served the purposes of international co-operation, peace and economic and social development. Moreover, although an international organization, as an institution, did not have sovereign powers, its constituent instrument was a manifestation of the will of the sovereign States which had signed it. It could therefore be said that the inherent right of States was reflected collectively in the preparation of the constituent instrument. The same phenomenon was to be seen in the making of decisions by the representatives of sovereign States in an organ of an international organization, such as the Security Council or the General Assembly of the United Nations.

53. It was true that there were different types of organization and that the differences could be reflected in the extent of their treaty-making capacity, which was determined by the will of the sovereign States establishing them. It was a case of delegation of powers. A similar delegation could occur even with respect to States; it was sufficient to mention the example of a federal union which conferred on one of its component units the authority to conclude certain treaties.

54. He supported the retention of article 6, which was necessary to deal with the question of capacity.

55. The CHAIRMAN* speaking as a member of the Commission, said that he would have had nothing to say about paragraph 1 (*a*) of article 2 if the Special Rapporteur had made only the changes of wording necessary to adapt the corresponding provision of the Vienna Convention. But the Special Rapporteur had suggested, although with some hesitation, two additions for which the need was doubtful.

56. The insertion of the word "principally" in the phrase "governed by international law" was intended to establish some kind of boundary line between treaties and contracts. He did not think that the Commission should engage in such minutiae. Treaties were governed by international law and contracts by the national law chosen by the parties. If any doubt remained, the problem would be one of the application of rules of law, to be solved by interpretation or by recourse to a system for the settlement of disputes. It would be going too far to try to solve the complex problem of transnational and international contracts in the present draft.

57. The addition of the word "general" before the words "international law" was not only unnecessary, but could also be misleading. Adjectives were always dangerous in legal texts. The question would arise of what constituted "general international law" and it would be necessary to introduce a definition of that term in article 2. The concept of general international law was a controversial one in legal writings. For example, the Vienna school distinguished between general international law, which, in its view, consisted of the *corpus* of international law not included in conventions between States, and particular international law, consisting of rules embodied in conventions. For the supporters of that doctrine, the Charter of the United Nations did not constitute general international law, and that was an excellent illustration of the dangers

* Mr. Sette Câmara.

involved in the use of adjectives. For those reasons, he urged the adoption of a definition which followed the wording of the Vienna Convention without the proposed additions.

58. In paragraph 1 (*i*) of article 2, he supported the Special Rapporteur's suggestion that the Vienna Convention formula should be used. There was no reason to restrict the scope of the present draft articles to certain types of organization, as had been done in the draft on relations between States and international organizations; the two situations were completely different. The application of that other draft had been restricted to organizations of a universal character, but it dealt with problems involving a host State on the one hand and sending States on the other; the rules applicable in their case to such concrete and immediate problems as immunities could hardly be extended to regional organizations having different constituent instruments and customary rules. In view of the different situation dealt with in the present draft, the Special Rapporteur had been right to adhere to the definition in the Vienna Convention.

59. In paragraph 2 of article 2, he supported the reference to the "law peculiar to any international organization", which was an adequate adaptation of the Vienna Convention phraseology and a very useful expedient to avoid any reference to the "internal law" of an organization, which might give rise to legitimate doubts and misgivings.

60. As to article 6, in the debate at a previous session he had had occasion to explain his views on the problem of the treaty-making capacity of international organizations.[12] The Commission should avoid reopening a general debate on the sources of the treaty-making power of international organizations; that would involve it in a discussion of the problem of the personality of international organizations, which was at least *sui generis*, as some writers had recognized. The principle that had emerged from the debates, both in the Commission and in the Sixth Committee of the General Assembly, was that the capacity of international organizations to conclude treaties should be governed by their constituent instruments. That basic truth was, he believed, expressed in the text of article 6 now under discussion. The alternative text put forward by the Special Rapporteur in paragraph (20) of his commentary was more in the nature of an enunciation of principles than a provision of law. The meaning of the formula "acknowledged in principle by international law" was not clear. It was also difficult to see why a statement of that recognition should be included in the text of the article when the Special Rapporteur himself had acknowledged, in paragraph (5) of his commentary, that all international organizations did not have the "same capacity" to conclude treaties.

61. He therefore proposed that the article should be retained as it stood and that all the necessary explanations should be given in the commentary.

The meeting rose at 1.05 p.m.

[12] See *Yearbook ... 1973*, vol. I, p. 202, para. 38.

1278th MEETING

Friday, 14 June 1974, at 10.15 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

State responsibility

(A/CN.4/264 and Add.1; A/9010/Rev.1; A/CN.4/L.207 and L.208)

[Item 3 of the agenda]

(resumed from the 1263rd meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the text of draft articles 7, 8 and 9 proposed by the Drafting Committee (A/CN.4/L.207).

ARTICLE 7[1]

2. Mr. HAMBRO (Chairman of the Drafting Committee) said that before introducing article 7 he wished to make a brief observation on the title of the draft articles as a whole. At the previous session, the Commission had adopted the title: "Draft articles on State responsibility". It might now wish to amend that wording in order to follow the language of paragraph 3 (*b*) of General Assembly resolution 3071 (XXVIII), namely, "Draft articles on responsibility of States for internationally wrongful acts". The Drafting Committee had considered, however, that it would be premature for it to make a proposal to that effect at the present stage.

3. The title of chapter II, as adopted by the Commission at the previous session was: "The 'act of the State' according to international law". The Drafting Committee had observed that the expression "under international law" was used in several provisions of the draft, such as articles 3 and 5 (A/9010/Rev.1, chapter II, section B); for the sake of consistency, it had therefore replaced the words "according to international law" by the words "under international law". That change affected the English version only.

4. For article 7, the Drafting Committee proposed the following title and text:

Article 7

Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity,

[1] For previous discussion see 1251st meeting, para. 14 and following meetings.