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Summary record of the 1279th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1974, vol. I

success of that session had been due to the untiring efforts of the Committee's President, Mr. Nishimura, who had been a distinguished jurist since the time of the League of Nations and one of the chief architects of his country's peace treaty.

66. He (Mr. Tabibi) had attended many sessions of the Committee and had always admired the interest shown by its members in promoting international law and in developing co-operation with the rest of the world in an atmosphere of mutual understanding. Since half the Members of the United Nations were Asian and African States with a rich historical, legal and cultural heritage, the Commission could benefit greatly by the Committee's experience. He also wished to pay a tribute to the Committee's secretariat, which not only provided practical advice to the Governments of member States, but also carried out studies in which the Commission itself was interested. For example, it had contributed to the success of the United Nations Conference on the Law of Treaties and was now preparing for the conference at Caracas. There were also some subjects in which the Committee was in advance of the Commission, such as the non-navigational uses of international watercourses.

67. He wished to express his thanks to Mr. Nishimura and to Mr. Sen, the Committee's Secretary-General, for the hospitality extended to him during the Tokyo session.

68. Mr. ŠAHOVIĆ said he had listened with great interest to Mr. Nishimura's statement on the work of the Asian-African Legal Consultative Committee. That statement had given the Commission an insight into the activities of African and Asian lawyers in the field of international law, and had shown that the major concerns of African and Asian countries in that sphere were those of the international community in general and of the United Nations in particular.

69. Yugoslavia had always attached very great importance to the Committee's proceedings and had consistently found new horizons for the development of international law in its reports. As a member of the Sub-Committee on the Law of Non-Navigational Uses of International Watercourses,[5] he was at present studying the reports of the Asian-African Legal Consultative Committee, which he found indispensable for the current development of international law. He wished the Committee every success in its future work.

70. Mr. TSURUOKA, after congratulating Mr. Nishimura on his statement, said that, as Director of United Nations Affairs in the Japanese Ministry of Foreign Affairs, he had participated in the establishment of the Asian-African Legal Consultative Committee. Co-operation between the Committee and the Commission had proved very fruitful, because of the similarity of the topics studied by the two bodies and the close relations they maintained. The Commission often drew inspiration from the results of the Committee's deliberations and the Committee, in turn, kept its members informed of what the Commission had done. Mr. Nishimura had made a great contribution to the progress of the Asian-African Legal Consultative Committee and he hoped that the links between the Committee and the Commission would be further strengthened.

71. The CHAIRMAN, speaking as a member of the Commission, thanked the observer for the Asian-African Legal Consultative Committee for his excellent account of the Committee's work. He himself attached very great importance to co-operation between the Commission and regional bodies working in the legal field.

72. The Committee was distinguished from other regional bodies by the fact that, under its Statute, one of its tasks was to study and comment on the drafts prepared by the International Law Commission. Conversely, the Committee's own ideas were of great importance to the Commission, which was attempting to draft legislation of universal scope and therefore needed to familiarize itself with the thinking of the new countries of Asia and Africa. The Committee undoubtedly had an important role to play in promoting the progressive development of international law throughout the world, and it was useful for its views to be available to the Commission at as early a stage as possible.

73. He thanked the observer for the Asian-African Legal Consultative Committee for his kind invitation to attend the Committee's session at Teheran, which he would be very glad to accept if his commitments so permitted.

The meeting rose at 1 p.m.

1279th MEETING

Monday, 17 June 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR

Present: Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/275 and Add. 1 and 2; A/CN.4/278 and Add. 1-5; A/8710/Rev.1)

[Item 4 of the agenda]

(resumed from the 1273rd meeting)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 19

1. The CHAIRMAN invited the Special Rapporteur to introduce article 19, which read:

[5] See 1256th meeting, para. 1.

Article 19

Conditions under which a treaty is considered as being in force

1. A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent State and the other State party in conformity with the provisions of the treaty when:

(*a*) they expressly so agree; or

(*b*) by reason of their conduct they are to be considered as having so agreed.

2. A treaty considered as being in force under paragraph 1 applies in the relations between the successor State and the other State party from the date of the succession of States, unless a different intention appears from their agreement or is otherwise established.

2. Sir Francis VALLAT (Special Rapporteur) said that article 19 stated the basic principle that a bilateral treaty did not automatically continue to be in force between a successor State and the other State party, although it might continue to be in force by virtue of agreement. Paragraph 1 (*a*) and (*b*) provided that that agreement might be either express or tacit.

3. The Netherlands Government had expressed some doubts about the desirability of providing for tacit agreement, and had considered it "preferable that both the new State and the treaty-partner of the predecessor State *expressly* state their willingness to apply the treaty in the relations between them" (A/CN.4/275/Add.1). The Byelorussian delegation had adopted a similar position (A/CN.4/278/Add.4, para. 320).

4. If the Commission agreed with that view, it would be necessary to amend article 19 by deleting paragraph 1 (*b*) and introducing a provision requiring a notification of succession by the successor State, as suggested by the Byelorussian delegation, followed by the conclusion of an express agreement with the treaty-partner of the predecessor State. He continued to believe, however, as stated in his observations (*ibid.*, para. 324), that "practice and convenience are in favour of the continuation of bilateral treaties by agreement made either expressly or by conduct" and that consequently sub-paragraphs (*a*) and (*b*) of paragraph 1 should be retained.

5. The United Kingdom Government had said that the purpose of the words "in conformity with the provisions of the treaty" in paragraph 1 of article 19 was not clear (*ibid.*, para. 321) and he thought that those words added nothing to the text.

6. The Finnish delegation had suggested that paragraph 2 should specify the exact date on which succession took effect (*ibid.*, para. 326), but he believed that paragraph 2 was already sufficiently explicit, since the date of the succession of States, if not certain, could always be made certain.

7. Lastly, he noted that the Swedish Government had raised the questions whether a time-limit should be provided for article 19, for the reasons adduced with respect to article 12 (*ibid.*, para. 323). He could not agree that those reasons applied to article 19.

8. Mr. BEDJAOUI said that article 19, as adopted by the Commission in 1972, seemed to him to express a correct rule, which was certainly better than that adopted by the International Law Association, according to which there was, on the contrary, a general presumption of the maintenance in force of a bilateral treaty by a newly independent State.[1] For unlike the case of multilateral treaties, in the case of bilateral treaties the legal nexus which had existed between the territory and the treaty created neither a right nor an obligation to maintain the treaty in force. In his commentary to article 13,[2] contained in his fourth report, Sir Humphrey Waldock had clearly shown the full specificity of bilateral treaties. The personal equation played a greater part in bilateral treaties than in multilateral treaties, and it was not obligatory to maintain a bilateral treaty in force between the predecessor State and the successor State—that would be stipulated in article 20—or, indeed, between the predecessor State and the other State party to the treaty. For accession to independence was more than a fundamental change of circumstances: it brought a change in the parties to a bilateral treaty, especially if the treaty applied exclusively to the territory which had become independent.

9. In that connexion, he noted that there were, in fact, two kinds of bilateral treaty concluded by the predecessor State which might concern the newly independent State. There were bilateral treaties concluded between a State A and a State B, the application of which was extended by State A, State B or both States to their colonial possessions, in a final provision of the treaty. But there were also bilateral treaties concluded between States A and B in which one of the two States or both entered into an undertaking exclusively in respect of their colonial territories. For instance, in 1927, Belgium and Portugal had concluded, in respect of the Congo (now Zaire) and Angola, a bilateral treaty relating to the right of transit of persons and goods, which regulated transit traffic between Katanga and the Angolan port of Lobito, carried by the Benguela railway.[3] That example, like that of the treaty concluded between the United Kingdom and Portugal concerning Rhodesian copper traffic to the port of Lourenço Marques on the coast of Mozambique, showed, first of all, that two predecessor States could conclude a bilateral treaty on behalf of two territories which would subsequently become independent. It also showed that the hypothesis of article 20 was undoubtedly correct, but also somewhat outdated, since it was clear that a localized agreement on rail or road traffic in a colonial territory could no longer concern the metropolitan State when that territory became independent. Lastly, it showed that the personal equation played a smaller part in multilateral treaties than in the two kinds of bilateral treaty he had referred to, namely, those whose application had been extended to the colonial territory by a final provision and those concluded exclusively for the colonial territory in question.

10. The personal equation came into operation in particular when, in the second kind of treaty, only one of

[1] See *The International Law Association, Report of the Fifty-third Session (1968)*, pp. 596 *et seq.*

[2] See *Yearbook ... 1971*, vol. II, Part One, pp. 145 *et seq.*

[3] *British and Foreign State Papers*, vol. CXXVII, p. 121.

the two colonies became independent. Thus, in the first example, it was impossible to conclude that there was continuity of the treaty régime for traffic and transit between Zaire, which had become independent, and Portugal, which was still master of Angola. The personal equation was also very marked when two States were bound by agreement by themselves, and mainly for themselves, and decided to extend the application of the treaty to their colonial territories by a final provision. The predecessor State, the newly independent State and the other State party to the treaty each had the right to reappraise the situation. Their consent—whether express, as provided for in paragraph 1 (*a*), or tacit, as provided for in paragraph 1 (*b*)—was therefore necessary.

11. In the commentary to article 13, Sir Humphrey Waldock had, in his opinion, over-emphasized the concept of continuity, which had led the International Law Association to adopt a general presumption of the maintenance of the treaty. It was true that practice seemed to be moving in that direction, and reference had been made to tax conventions, conventions relating to consular powers and visas, bilateral economic or technical assistance agreements, trade treaties, and so on. Reference had also been made to the Secretariat studies on trade treaties and treaties relating to air transport. But in his own view that continuity was only apparent. The treaties involved were, in fact, treaties which the newly independent State knew it could not terminate immediately without causing a sudden breakdown in its economic relations. But there were many other bilateral treaties, such as extradition and establishment treaties, and treaties relating to the exploitation of natural resources, coastal fishing, and so on, which were the subject of express negotiations and for which there was no presumption of continuity. The fact that States soon contacted one another in order to exchange notes concerning the fate of such bilateral treaties showed that there was no automatic continuity, and such an exchange constituted the manifestation of consent by both parties which formed the basis of article 19.

12. Moreover, consent was often given on a provisional basis—both by the successor State and by the other State party to the treaty—for renewal of the treaty pending negotiation of a new agreement. The continuity, when it was observed, was only apparent and resulted, not from the application of a customary rule, but from the will of the newly independent State and the other State party. What was involved, therefore, was mainly a voluntary succession. Hence the idea expressed in article 19 was entirely valid and should be retained. The manifestation of consent seemed to him to be a necessary condition for the maintenance in force of a bilateral treaty, whether the consent was express or tacit.

13. With regard to the problem dealt with in paragraph 2, he thought the date of the succession of States should be adopted.

14. On the question of a time-limit, raised by the Swedish Government, he, like the Special Rapporteur, saw no reason to raise that problem in the context of article 19, since the treaty was considered as being in force when there was express or tacit agreement. It was therefore unnecessary to fix a time-limit, since neither of the two States—the newly independent State or the other State party to the treaty—would passively await a unilateral manifestation of will by the other.

15. As far as the duration of the bilateral treaty was concerned, he reminded the Commission that in his fourth report, Sir Humphrey Waldock had proposed an article on that question,[4] which would have followed article 19. While recognizing that the provisions of the treaty concluded between the predecessor State and the other State party could remain valid, he believed it was the new expression of will by the successor State and the other State party to the treaty that should settle the matter. The reference to the problem of duration made in the commentary should therefore be sufficient, and should enable the Commission to dispense with the article on duration proposed by Sir Humphrey Waldock.

16. Mr. TABIBI said that the question of succession to multilateral treaties was less complicated than succession to bilateral treaties, since the element of invalidity seldom arose. Most bilateral treaties which raised the question of succession dated from the colonial era and involved elements of invalidity, since they had often been concluded between a strong nation and a weak one. It was most important that succession to such treaties should not be automatic, but should be subject to the express agreement of the parties.

17. He therefore supported the position taken by the Governments of the Netherlands and the Byelorussian Soviet Socialist Republic. He hoped the Special Rapporteur would give further consideration to that point of view, especially as one eminent authority, Sir Gerald Fitzmaurice, had repeatedly pointed out that succession to bilateral treaties always gave rise to very complex problems which called for the most careful consideration.

18. Mr. USHAKOV said he could not agree to the deletion of the phrase "in conformity with the provisions of the treaty" in paragraph 1, proposed by the Special Rapporteur, since the provisions in question might be special provisions applicable to the territory covered by the treaty.

19. Mr. KEARNEY said that Mr. Bedjaoui had been quite right in saying it was the express or tacit consent of the parties which provided the effectiveness of a treaty; but the fact that there was a legal nexus with the original treaty did have the effect of permitting simplified modes of entry into force, such as the declaration of succession, instead of repetition of the constitutional procedures. In his opinion, there was a distinct advantage in retaining the idea of that legal nexus.

20. With regard to paragraph 1 (*b*), he wished to say, in reply to Mr. Tabibi, that the volume of available practice seemed to be sufficient to call for the inclusion of a rule of that kind. As to the period of time which

[4] See *Yearbook ... 1971*, vol. II, Part One, p. 151, article 14.

would be necessary to establish the "conduct" of the parties, that would always be a question of fact, depending on the circumstances of each individual case. It would seem obvious, for example, that a special agreement concerning air transport should be considered as being in force after being observed for a relatively short time, whereas other agreements, such as extradition treaties, would require longer.

21. The CHAIRMAN, speaking as a member of the Commission, said that on the whole he could accept the text of article 19 proposed by the Special Rapporteur. However, in the case of treaties which had three parties, but which regulated local problems and were by their nature similar to bilateral treaties, he thought it was not article 19, but rather article 12, paragraph 3, or article 13, paragraph 3, that would apply. To his mind, the word "consent" in paragraph 3 of articles 12 and 13 meant the same thing as the word "agree" in paragraph 1 (*a*) and (*b*) of article 19, since the consent in question could be either express or implied. As a matter of drafting, therefore, he wondered why it should not be possible to use the same expression in all three articles.

22. Mr. EL-ERIAN said he supported the Chairman's view.

23. Mr. TSURUOKA said he had little to add to the discussion except to draw the Commission's attention to the fact that article 19 should be read in conjunction with part V of the draft articles, on boundary régimes or other territorial régimes established by a treaty. He fully supported the idea of tacit agreement provided for in paragraph 1 (*b*) of article 19 and reminded the Commission that on a previous occasion he had cited the example of the treaty concluded between Australia and Japan on 6 February 1974, concerning migratory birds, for which the prior consent of Papua had been necessary, although that country was not yet completely independent.[5]

24. Mr. BILGE said he endorsed the principle stated in article 19, but wished to draw the Special Rapporteur's attention to a rather complex case. There were multilateral treaties to which were annexed bilateral declarations forming an integral part of those treaties. For example, the Lausanne Peace Treaty[6] was a multilateral treaty which contained bilateral declarations. He wondered whether it could not be indicated, in the commentary, that such bilateral declarations would be governed by article 19.

25. Sir Francis VALLAT (Special Rapporteur) said that, in general, he did not think the present draft articles should try to deal with the classification of individual treaties in any greater depth than had been done in the Vienna Convention on the Law of Treaties.[7] If specific examples were mentioned, especially in connexion with peace treaties, the Commission might find itself in serious difficulties.

26. Concerning the Chairman's question as to how to handle what were in form trilateral and in substance bilateral treaties, he thought it would be necessary to consider each case and classify it as falling under either one or the other heading. However, the difference between article 19 and article 12, paragraph 3, did call for careful consideration in drafting, since in a way paragraph 3 of articles 12 and 13 reflected article 20, paragraph 2, of the Vienna Convention, although the latter used the word "acceptance", while the present draft used the word "consent". In the case of a group of States, it was for them to decide how consent was to be expressed, but in the case of bilateral treaties, where it had been made clear that agreement could be either express or implied by the conduct of the parties, the situation was not the same and there was some reason for a different wording.

27. He sympathized with Mr. Tabibi's view that some treaties ought to be agreed upon expressly, though he agreed with Mr. Kearney that most practice showed that conduct was sufficient. While not sharing the view expressed by Mr. Tabibi, he could see some echo of his thought in articles 29 and 30, which would call for further consideration. Nevertheless, the Commission should not allow what was right or wrong in article 30 to distort the basic principle of article 19.

28. He would reflect further on Mr. Ushakov's observation regarding the phrase "in conformity with the provisions of the treaty" in paragraph 1.

29. The CHAIRMAN suggested that article 19 should be referred to the Drafting Committee.

It was so agreed.[8]

30. The CHAIRMAN invited the Special Rapporteur to introduce article 20, which read:

Article 20

The position as between the predecessor and the successor State

A treaty which under article 19 is considered as being in force between a newly independent State and the other State party is not by reason only of the fact to be considered as in force also in the relations between the predecessor and the successor State.

31. Sir Francis VALLAT (Special Rapporteur) said that article 20 stated an obvious principle and was, in his opinion, a pivotal article. It should remain in the draft articles in spite of the adverse opinion of the Government of Finland (A/CN.4/278/Add.4, para.327).

32. Mr. USHAKOV said he wondered whether the language used in article 20, particularly the expression "not by reason only of the fact", would permit of a situation in which a treaty could be considered as being in force in the relations between the predecessor and the successor State.

33. Mr. ŠAHOVIĆ said he had at first shared the doubts expressed by the Finnish delegation, but had subsequently understood why the Commission had included article 19 in the draft. It was, in fact, a clarification of a point on which the Commission had felt concern. He wondered, however, whether the specific

[5] See 1269th meeting, para. 18.

[6] League of Nations, *Treaty Series*, vol.XXVIII, p. 13.

[7] 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.

[8] For resumption of the discussion see 1294th meeting, para. 35.

reasons which had prompted the inclusion of the article should not be stated in the commentary, which seemed to him to be too abstract and too theoretical.

34. He also thought the wording of the article, which was drafted in very general terms, should be revised. The words "by reason only of the fact" did not seem very clear in the context of such a general formulation.

35. Mr. BEDJAOUI said he thought that article 20 should be kept in the draft, since it must be read in conjunction with article 19, which the Commission had just decided to retain. He noted, however, that the situation differed slightly, according to the nature of the bilateral treaty in question.

36. Where a treaty was localized—in other words, where it related only to a territory which subsequently became independent—it was obvious, not only that article 20 dealt with a proved hypothesis, but that it was even outdated. There were two kinds of bilateral treaties involved: those concluded between the predecessor State and the other State party to the treaty, which agreed in the original treaty itself to extend its application to their colonial possessions; and those concluded between two States in respect of a colonial territory which would subsequently become independent. In the first case, the colonial territory had only indirectly become subject to a treaty primarily intended to govern relations between the predecessor State and the other State party. Hence article 20 applied perfectly to that kind of treaty, for it was obvious that the express consent of the successor State and the other State party to be bound by the treaty should not automatically mean that the predecessor State and the newly independent State were also bound. In the second case, however, the hypothesis of article 20 was more than proved, it was outdated, since the treaty clearly had no further significance for the predecessor State, which was the former colonial Power.

37. He also drew attention to the title of article 20, which suggested that the article would govern the future position as between the predecessor and the successor State. Article 20 did not deal with that position: it simply provided that the newly independent State's express or tacit agreement with the other State party to the treaty did not affect the relations between the predecessor State and the successor State with respect to the treaty. A provision indicating what would happen to the treaty should therefore be added to the article if it was to fulfil the promise of its title.

38. Article 20 laid down an excellent rule, but it should be expanded to define the relationship between the predecessor State and the successor State with respect to the treaty.

39. Mr. PINTO said that, like Mr. Ushakov, he wondered whether the words "not by reason only of the fact" did not create a certain confusion. In the case of former colonial countries, it would seem unreasonable to assume that there was some legal nexus between them and the former metropolitan State with respect to extradition treaties, though in the case of other treaties, such as those concerning air communications, which had been in force between the former metropolitan State and a third State, there might be a possible connexion between the predecessor State and the successor State.

40. He agreed that article 20 should be clarified by adding another paragraph.

41. Mr. KEARNEY said he agreed with Mr. Bedjaoui that the title of article 20 suggested that the article dealt in its entirety with a problem which the text really covered only in part. The difficulty arose, perhaps, from the form in which the text of the article was cast. The combination of the negative verb "is not" with the words "by reason only of the fact" gave rise to doubts about the interpretation of the provision.

42. He did not believe that the problem could be adequately solved by introducing an additional paragraph. The draft articles as a whole did not really attempt to deal with the relationship between the predecessor State and the successor State, and he thought it would be going too far to try to cover that exclusion in article 20. The only solution would be to find a form of words which did not have an inferrable negative effect, as did the phrase "by reason only of the fact". He had no specific proposal to make; he hoped the Special Rapporteur would submit suitable wording to the Drafting Committee.

43. Mr. YASSEEN said he thought the Finnish delegation's comment was justified, since the rule laid down in article 20 was self-evident, and the article was not concerned with relations between the predecessor State and the successor State. But in view of the initial unity of the two entities which the succession had separated, it might be thought necessary to specify that there would be no treaty relations between the predecessor State and the successor State.

44. The words "by reason only of the fact" expressed a valid reservation, since in the matter of consent the will of States could do anything. It was, indeed, conceivable that the predecessor State and the successor State might agree to maintain the treaty in force between them, however unlikely that might be. He was therefore in favour of retaining article 20, even though the rule laid down in it might seem too obvious.

45. Sir Francis VALLAT (Special Rapporteur), summing up the discussion on article 20, said that a central point which had been raised was the effect of special cases in which some future relationship might be necessary between the predecessor State and the successor State. As he saw it, that particular kind of case was not, strictly speaking, a matter of succession at all. If initially no treaty had existed between those two States, there was no treaty relationship to which the successor State could succeed. That situation had been stressed by Mr. Ushakov.

46. He agreed, in principle, on the impossibility of succession in that type of case. There might well be a treaty relationship between the successor State and the predecessor State, but that relationship would arise from a new bilateral treaty between them. It was essential that the Commission should be perfectly clear on that central issue, on which much light had been shed by the present discussion.

47. Those considerations did not appear to call for the introduction of a second paragraph, but, rather, a close examination of the wording of article 20 with a view to clarity. He believed that the words "only" and "also" had been introduced into the present text precisely in order to make it clear that article 20 would not have the effect of creating some kind of treaty relationship between the successor State and the predecessor State, even though such a relationship was outside the scope of the present draft articles.

48. In conclusion, he suggested that article 20 should be referred to the Drafting Committee.

49. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 20 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[9]

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 1277th meeting)

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

50. The CHAIRMAN invited the Special Rapporteur to reply to the comments made on his draft articles 2, 3, 4 and 6.

51. Mr. REUTER (Special Rapporteur) said he thought the articles under consideration should be referred as a whole to the Drafting Committee, together with the amended texts he had drafted in the light of the comments made on their form or substance.

52. In the case of articles 2 and 3, it was necessary to distinguish between two aims, only one of which seemed to be of interest to the Commission at present, though he had intended to pursue them both at once. The Commission considered that the draft articles should be regarded as an independent whole capable of becoming a convention, which should enter into force without raising any problems due to the existence of the Vienna Convention on the Law of Treaties. Keeping that aim in view, he had hoped to prepare a draft convention which took those problems into consideration, but also had an additional aim. It should be noted, however, that if it had been decided at the United Nations Conference on the Law of Treaties to extend the scope of the draft articles then under consideration to include treaties involving international organizations, there would now be a single text: the present articles would have been embodied in the Vienna Convention. It might perhaps be decided some day to try to combine the two sets of articles, so that governments could bring them into force simultaneously, as a whole. For the present, it seemed that the Commission had abandoned that second aim and would prefer to draft clear, simple articles and to defer consideration of any adjustments which the existence of two conventions might necessitate. Obviously, if the second aim was provisionally set aside, many of the criticisms made during the discussion would be pointless.

53. Reviewing the sub-paragraphs of article 2, paragraph 1, he said that in sub-paragraph (*a*) the term "treaty" should be defined "for the purposes of the present articles", so that it would not be necessary to repeat, throughout the draft, the words "treaty concluded between States and international organizations or between two or more international organizations". Moreover, in order to adhere to the letter of the Vienna Convention, it would be better to delete the words "principally" and "general" qualifying the phrase "governed by international law". Those words were not indispensable and they might not even be quite correct, since it could be argued that some international agreements were governed entirely either by international law or by internal law.

54. The statement that the application of the draft articles was subject to *jus cogens* should not be put in the commentary only, as Mr. Ushakov had suggested, but in a separate provision of the draft, corresponding to the relevant provision of the Vienna Convention.

55. It had been suggested that consideration of sub-paragraph (*d*), which closely followed the equivalent provision of the Vienna Convention, should be deferred, because the notions of ratification, approval and acceptance might perhaps be meaningless in the case of treaties to which international organizations were parties. He suggested that the Commission should refer the matter to the Drafting Committee without taking any decision on postponement.

56. At the Vienna Conference, a provision which had never been considered by the Commission had been adopted on the proposal of two delegations. In article 11, which dealt with the means of expressing consent to be bound by a treaty, the words "or by any other means if so agreed" had been added to the words "signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession".[10] That revolutionary addition meant that henceforth no formalism or specific designation would be required for the act by which a State expressed its consent to be bound by a treaty. The Vienna Conference seemed to have omitted to make a consequential amendment to article 2, paragraph 1 (*d*) of the Convention on the Law of Treaties. The idea it had introduced now seemed to be widely accepted, however, and in the provision under consideration it would probably be possible to refer to the time of signature or the time of final expression of consent to be bound by a treaty, whatever the form or designation of the consent might be. That would solve an important problem in a way that would be most welcome

[9] For resumption of the discussion see 1294th meeting, para. 37.

[10] See *Official Records of the United Nations Conference on the Law of Treaties, Summary Records, First Session*, p. 83, para. 42 *et seq.* and p. 344 para. 67 *et seq; Second Session*, pp. 24 and 25 (United Nations publications, Sales Nos. E.68.V.7 and E.70.V.6)

to him, since he had no intention of proposing a formalism which international organizations did not observe and which they were not prepared to accept.

57. With regard to sub-paragraph (*e*), if the definition in sub-paragraph (*a*) was formulated "for the purposes of the present articles" the words "as a potential party" could be deleted. Those words were, in fact, justified only in so far as an attempt was already being made to combine the draft articles and the Vienna Convention in a coherent system.

58. The use of the terms "contracting State" and "party" in the Vienna Convention had raised difficulties for Mr. Ushakov. The term "contracting State" had been used when a State had expressed its consent to be bound by a treaty, whether or not the treaty was in force; the term "party" had been used only for treaties that were in force. Article 2 might have been expected to refer to a "State or organization party", but it should be noted that no provision corresponding to article 2, paragraph 1 (*g*) of the Vienna Convention, which defined the term "party" had been included in the draft articles, because it was very difficult to define an international organization party to a treaty. That definition had been left for later consideration.

59. Sub-paragraph (*i*) raised a question of substance which would be examined in connexion with article 6. Mr. Kearney had taken the view that the term "intergovernmental organization" was no longer quite correct, because there were now international organizations which were members of an international organization. In addition to the examples already mentioned, there was that of United Nations participation in the International Telecommunication Union (ITU). It was true that the United Nations was not a member of ITU, but it occupied a certain position in that organization. In addition, since Namibia had become an associate member of the World Health Organization (WHO), it was represented there by the Council for Namibia, which was an organ of the United Nations. Its status as a member of WHO would oblige Namibia to make a contribution, which would be paid by the United Nations. Thus it was true that the situation of the international organizations was becoming increasingly complicated, but that was no reason for departing from the official terminology. Even though the United Nations was in a sense an associate member of ITU and participated in WHO through Namibia, the intergovernmental character of ITU and WHO was in no way changed. Moreover, that was the terminology used in the Charter itself.

60. Article 2, paragraph 2 had raised the problem of the "law peculiar to any international organization", for which he had no final solution to propose. He agreed to the deletion of the word "peculiar", but was not sure whether the terminology of article 2, paragraph 2 should be made uniform with that of article 6. The expression "relevant rules of each organization", in draft article 6, had been borrowed from article 5 of the Vienna Convention. It was the product of long discussions and a process of elimination by the Commission. The Drafting Committee would have to seek a suitable form of words for article 2, paragraph 2, to convey that every international organization was the centre of a body of rules which constituted its specific law.

61. The term "practice" of international organizations should not be used in the text, however, as Mr. Ushakov had suggested. That rather flexible term covered both established practice, which was to say customary rules, and practice in the process of formation. To secure the assent of the international organizations, the Commission would have to respect their faculty of developing a practice, to which they attached great importance. That was why he had pointed out in his commentary that the relevant rules of an international organization included, where applicable, the practice of that organization. The use of the word "practice" would suggest that there might be a customary element in the constitution of an international organization. That was possible, but not necessarily so. Governments might very well establish an international organization and give it an inflexible constitution, rejecting the possibilities of adaptation afforded by recourse to practice. The idea of practice should not be imposed on international organizations; it should follow implicitly from the rules of the organization, as it followed from the internal organization of States in the case of the Vienna Convention.

62. With regard to article 3, he would merely explain why he had drafted that provision and leave it to the Drafting Committee. By the corresponding provision of the Vienna Convention, the Commission had intended to reserve the secondary effects of that Convention on treaties to which it did not apply. The same procedure should be followed in the draft under consideration. It might be asked, however, whether the treaties not covered by the draft articles should be reserved in them or only in the Vienna Convention. According to the present wording of article 3, a treaty concluded between one or more States, one or more international organizations and one or more other subjects of international law, such as the International Committee of the Red Cross, would come under the Vienna Convention rather than the draft articles.

63. As Mr. Ushakov had maintained, it might be doubted whether it was advisable to reserve so strictly the legal force of agreements which increasingly departed from the principal type of agreement, namely, the treaty between States. There was no denying, however, that many oral agreements existed between international organizations and States, and their legal force could not be questioned. By requiring written form, the Vienna Convention defined a treaty rather narrowly. It was quite common for the Secretary-General or an authorized representative of an international organization to make a statement at an international conference, which represented an undertaking by a State. Such undertakings were included in the record of the meeting, which constituted written evidence, but there was no agreement "concluded in written form". Article 3 thus filled a need, but it ought to reserve the relevant rules of international organizations, which might impose any limitations required on undertakings given orally in such circumstances. Accordingly, reservation of the rele-

vant rules of the organizations would provide a safeguard.

64. Article 6 raised the basic question of the field of application of the draft. Should it apply only to international organizations in the United Nations system, only to organizations with a universal mission, or to all international organizations? In his opinion it should apply to all international organizations. The *sedes materiae* of the subject under study was not the law of international organizations, but the law of treaties. The object was to supplement the Vienna Convention, as could be seen from the attitude adopted by the General Assembly and by the Commission itself.

65. The draft could not be confined to certain international organizations when the régime of the treaties to which international organizations were parties depended on general international law and not on the law of each organization, except where the formation of consent was concerned. For instance, any agreements which the Arab League might conclude with the United Nations would derive their legal force from the law of treaties, not from the Charter or from the Statute of the Arab League. If, in addition to the Vienna Convention, there were to be one convention for certain large organizations and another for other organizations, the Commission would be moving towards extremely difficult rules on co-ordination. The only set of draft articles relating to international organizations which was likely to become an international convention was the draft concerning representation of States in their relations with international organizations. There would probably be no other; moreover, apart, perhaps, from a few very general principles, the law of international organizations did not exist. It was possible to discern a common tendency in the different laws of international organizations, but at present there was no single legal régime.

66. The number of international organizations, which was about two hundred, was greater than the number of States and would continue to increase. There were enormous differences between organizations. Among those in the United Nations system, certain characteristics had been established for practical purposes, but even when the International Court of Justice had created the notion of "functional competence" it had specified that that notion was to be understood as it appeared in practice. It could not be extended to any and every type of organization.

67. Certain international organizations did not conclude headquarters agreements; it was their member States which did so. Recently, a European Patent Office had been set up by a Convention[11] which itself determined the headquarters agreement; there was a provision merely specifying that the patent office could amplify the provisions on the headquarters agreement. For the Latin American Energy Organization, also recently established,[12] there was no general capacity either, but it was provided that a headquarters agreement could be negotiated.

68. True, it followed clearly from the draft articles that an international organization could be a subject of international law, which almost necessarily implied that it participated in conventional acts. But if it were affirmed that every international organization had the right to conclude treaties, that would be giving a definition of an international organization. It was, however, necessary to take account of developments in that sphere: many entities were on the way to becoming international organizations and that development must mot be obstructed. In the practice of the North Atlantic Treaty Organization, member States had taken many precautions to ensure that that entity did not conclude external agreements, especially not a headquarters agreement, but if the practice were known, it might perhaps be found that some small international agreements had been concluded.

69. The Commission would have to choose between the two texts proposed for article 6. Personally, he was inclined to prefer the second version. (A/CN.4/279, para. (20) of commentary). The term "capacity", borrowed from private law, was not the most attractive, but it was the term used in the Vienna Convention; besides, private law was old and its notions were concrete. As Special Rapporteur, however, he gave his preference to the first version, since it followed from the discussion that the capacity of international organizations to conclude treaties derived from international law.

70. The competence of States to create new subjects of international law in the form of international organizations itself derived from international law. That point should be made in the commentary, but it was implicit in the first version of article 6. The principal merit of that provision, which could not be deleted as Mr. Ushakov had suggested, was that it respected simultaneously the will of States, which satisfied those who considered that will the only source of international law, the social reality, which satisfied those who emphasized that aspect of the problem, and the autonomy of international organizations, which feared restriction of their creative power.

71. Mr. USHAKOV, referring to article 2, paragraph 1 (*f*), reiterated that he did not understand how a State or an international organization could become a "contracting State" or a "contracting organization" to a treaty that was already in force. Not only the draft under consideration, but also the Vienna Convention and the draft articles on succession of States in respect of treaties raised that question.

72. The CHAIRMAN said that if there were no objection, he would take it that the Commission agreed to refer draft articles 2, 3, 4 and 6 to the Drafting Committee.

It was so agreed.[13]

The meeting rose at 6.05 p.m.

[11] See *International Legal Materials*, vol. XIII (1974), p. 268.

[12] *Ibid.*, p. 377.

[13] For resumption of the discussion see 1291st meeting, para. 9.