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Summary record of the 1345th meeting

Topic:
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which set out all the classes of persons who did not have to produce full powers. The rule in paragraph 1 (*b*) was thus intended to cover only certain more or less marginal cases. In the Vienna Convention on the Law of Treaties, that rule covered, for example, the case in which the commander-in-chief of a State's armed forces could conclude a cease-fire agreement or an armistice without having to produce full powers. The situation might obviously be different in the case of a treaty between a State and an international organization, although the possibility could not be excluded that, for example, the commander-in-chief of United Nations forces might conclude an agreement for the cessation of operations in a certain country. There might also be technical agreements—a more common case—concluded, for example, between the representative of a national treasury and an international organization.

45. He approved of the wording used in paragraph 1 (*b*). But since only bilateral agreements were involved so far, it might perhaps be better to speak of "the practice of the State and the international organization concerned". It seemed difficult to refer to "the practice of the States and international organizations concerned", as it was not known whether there was any generalized practice of States and international organizations in the matter.

46. He had reservations about paragraph 2 (*b*), which seemed to him to mix up two very different situations. For instance, Italy's representative to the International Labour Conference was empowered to adopt an international labour convention at that Conference without having to produce full powers, because that was a treaty between States, and such a case came within the scope of article 7, paragraph 2 (*c*) of the Vienna Convention. But Italy's representative to the International Labour Conference was not empowered to conclude a treaty between Italy and the International Labour Organisation, if he did not produce full powers. So perhaps paragraph 2 (*b*) should be drafted differently, to cover only the case of a treaty concluded between a State and an international organization.

47. Article 7 of the Vienna Convention was a simple article, as it related only to treaties between States. The article under consideration, on the other hand, related both to the representative of a State who had to negotiate with an international organization, and to the representative of an international organization. And whereas in the first case the situation was a simple one, since it concerned a treaty between a State and an international organization, in the second case there were two possibilities, since the representative of an international organization could negotiate either with the representative of a State or with the representative of another international organization, so that the situation would not always be the same. Paragraph 3 should therefore specify that the treaty could be one concluded with a State or with another international organization, to show that the rule stated was applicable to both cases.

48. He would be interested to hear the Special Rapporteur's reply to Mr. Ushakov's comments before expressing an opinion on paragraph 3 (*b*). He doubted whether it was appropriate to speak of the practice of the States and international organizations concerned in that context.

49. With regard to paragraph 1 (*c*) of article 2 (Use of terms), he was not sure that Mr. Ushakov's criticism of the phrase "a document emanating from the competent authority" was justified. He would like to know whether there were any cases in which a written document could really be dispensed with? The Special Rapporteur, with his great experience of the subject, would certainly be able to answer that question. It also seemed necessary to indicate, at the end of paragraph 1 (*c*), that the treaty in question was one concluded between an international organization and a State or between two or more international organizations.

50. He would also like the Special Rapporteur to say whether treaties concluded between international organizations were real treaties concluded by representatives who had produced full powers, or mere agreements. For example, could the Andean Altiplano co-operation agreements concluded between international organizations such as the United Nations, the ILO, WHO and UNESCO really be called treaties, or were they simply working agreements? That point should be clarified, for the subject under consideration was very complicated and still evolving; it had not yet been crystallized by centuries of practice like the law of treaties between States.

51. Mr. USHAKOV said that, in his opinion, the assumption that a treaty concluded with an international organization could, in practice, bind anyone at all, was absolutely inadmissible.

The meeting rose at 1.10 p.m.

1345th MEETING

Monday, 7 July 1975, at 3.50 p.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Welcome to Mr. Rossides

1. The CHAIRMAN, speaking on behalf of all the members of the Commission, welcomed Mr. Rossides, and said he hoped he would be able to take part in the work of the Commission until the end of the session.

2. Mr. ROSSIDES said he wished to express to members of the Commission his apologies and regret for his absence, which had been occasioned by the grave circumstances in which his country had found itself after two consecutive attacks against it, and the tragic developments that had followed its invasion together with the continuing foreign military occupation of almost half its territory. The implications of the neglect of fundamental principles of law in those and other circumstances

were of import for the entire world. The signs pointed clearly to the advent of total anarchy and he believed, therefore, that the time had come to give consideration to the duty of the Commission to restore the basic concepts of the international legal order.

3. Mr. BILGE said he reserved his right to comment on the statement by the previous speaker.

State responsibility

(A/CN.4/264 and Add.1; A/CN.4/L.230 and Corr.1)

[Item 1 of the agenda]

(resumed from the 1317th meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

4. The CHAIRMAN invited the Commission to consider draft articles 10, 11, 12, 12 *bis*, 12 *ter* and 13 as proposed by the Drafting Committee (A/CN.4/L.230 and Corr.1).

ARTICLE 10 [1]

5. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 10:

Article 10

Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.

6. The Committee had based its deliberations on the revised draft of article 10 submitted by the Special Rapporteur. [2]

7. Paragraph 1 of the Special Rapporteur's revised text had begun with the phrase "The conduct of an organ of the State or of another entity empowered to exercise elements of the governmental authority . . .", a phrase which the Drafting Committee had decided to expand by referring more explicitly to the two types of entity mentioned in article 7. In order to bring out the meaning of the phrase "provided that it acted as an organ", at the end of the first paragraph of the Special Rapporteur's revised text, the Drafting Committee had amended it and had placed it nearer the beginning of the paragraph, with the result that there now appeared after the enumeration of the types of organs the words "such organ having acted in that capacity".

8. The Special Rapporteur had placed the second paragraph of his revised version of the article within square brackets. The Committee, taking into account a view which had seemed to predominate in the Commission and which was acceptable to the Special Rapporteur, had decided that the paragraph was not essential and could be omitted from its own version of the article.

9. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to approve article 10 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 11 [3]

10. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 11:

Article 11

Conduct of persons not acting on behalf of the State

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

11. The Committee had based its deliberations on the revised draft of article 11 submitted by the Special Rapporteur. [4]

12. Paragraph 1 of the Special Rapporteur's revised article had provided that "The conduct of a person, group of persons or entity acting in a purely private capacity shall not be considered as an act of the State under international law". The Committee had decided, after some consideration, to omit the reference to an "entity", so that the paragraph as now proposed followed the language of article 8 in speaking of "a person or a group of persons", a phrase which, as indicated in the commentary to article 8, was intended to cover not only physical persons, but also juridical persons. The Committee had preferred, for the sake of precision, and in order to employ the language already used in article 8, to replace the phrase "acting in a purely private capacity" by the phrase "not acting on behalf of the State".

13. With regard to paragraph 2, the Committee had endeavoured to take into account the comments made in the Commission concerning the problems which would arise if its provisions trespassed into the field of primary rules, and had accordingly made a number of changes to the Special Rapporteur's revised version, designed to stress the link between the conduct of the person or group of persons referred to in paragraph 1 and other conduct which was related to that of the person or group of persons, but which was to be considered as an act of the State by virtue of articles 5 to 10. Consequently, the reference in paragraph 2 to "other conduct" which might be attributable to the State meant all the forms of conduct dealt with in articles 5 to 10.

14. Mr. KEARNEY suggested that paragraph 2 could be deleted and its sense retained by the insertion at the beginning of paragraph 1 of a phrase such as "Without prejudice to the content of articles 5 to 10 . . .".

15. Mr. AGO (Special Rapporteur) said that he would be reluctant to adopt Mr. Kearney's suggestion because

[1] For previous discussion see 1303rd meeting, para. 1.

[2] See 1307th meeting, para. 1.

[3] For previous discussion see 1308th meeting, para. 1.

[4] See 1311th meeting, paras. 21 and 23.

the essence of the rule relating to responsibility for the actions of private individuals was, precisely, that it did not provide for the attribution of such actions to the State, but for the attribution to the State of any other conduct connected with such actions and which was an act of the State. The rule stated in article 11 would thus lose a great deal of its value if paragraph 2 were deleted.

16. Mr. KEARNEY said he did not find the explanation given by Mr. Ago entirely satisfactory, but he would not press his amendment at the present stage. In his opinion, paragraph 2 did not add anything to what had been said in articles 5 to 10.

17. The CHAIRMAN said that if there were no further comments he would take it that the Commission approved article 11, as proposed by the Drafting Committee.

It was so agreed.

ARTICLES 12, 12 *bis* AND 12 *ter* [5]

18. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that a number of members had expressed the view that the original article 12 should be divided into three elements, dealing with the conduct of an organ of another State, of an international organization and of an insurrectional movement, respectively. The Special Rapporteur had agreed to draft separate articles on each subject. As a result, the Committee was now submitting articles 12, 12 *bis* and 12 *ter*.

ARTICLE 12

19. For article 12, the Drafting Committee proposed the following text:

Article 12

Conduct of organs of another State

1. The conduct of an organ of a State acting in that capacity, which takes place in the territory of another State or in any other territory under its jurisdiction, shall not be considered as an act of the latter State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

20. With regard to paragraph 1, the Drafting Committee thought that the phrase "in the territory" of a State might leave some doubt as to the attribution of conduct occurring outside the territory of a State as strictly understood, but nonetheless in a place under its jurisdiction. Various cases had been contemplated, such as that of conduct occurring on a vessel on the high seas. The Committee had thought it desirable that the article should be framed in such a way as to cover all possible cases and that that could best be achieved through the use of the phrase "or in any other territory under its jurisdiction".

21. Paragraph 2 provided a safeguard, in line with the general idea of article 11, paragraph 2. A State, including the State in whose territory another State had acted, might still have attributed to it any other conduct related to the conduct referred to in paragraph 1, which was attributable to it by virtue of articles 5 to 10.

22. Mr. TSURUOKA proposed that, in paragraph 1, the words "in any other territory under its jurisdiction" be replaced by the words "in any other place under its jurisdiction".

23. Mr. AGO (Special Rapporteur) said that the Drafting Committee had in fact had some difficulty in choosing between the words "any other territory" and the words "any other place". He himself had no preference. The word "territory" was perhaps less specific, but it might be less likely to give rise to misunderstanding.

24. Mr. KEARNEY said, with regard to paragraph 1, that if the Commission wished to make the criterion for attribution the territory in which conduct occurred, the simplest solution would be to replace the phrase "which takes place in the territory of another State or in any other territory under its jurisdiction" by the phrase "which takes place in any territory under the jurisdiction of another State". If the Commission accepted the amendment proposed by Mr. Tsuruoka, it would have to retain a bifurcated definition.

25. Sir Francis VALLAT said that the point was one which had preoccupied him in both the Commission and the Drafting Committee. He still preferred the solution proposed by Mr. Tsuruoka, but he would not press his views, provided it was made absolutely clear in the commentary that, in adopting the wording proposed by the Drafting Committee, the Commission was not implying that conduct of an organ of a State which occurred elsewhere than in the "territory" of another State would be attributable to that other State.

26. Mr. AGO (Special Rapporteur) said that the wording proposed by Mr. Kearney, "in any territory under the jurisdiction of another State" was exactly what he himself had proposed in the Drafting Committee. The Drafting Committee had, however, preferred a more detailed wording, "in the territory of another State or in any other territory under its jurisdiction", so that it would also cover a number of different special cases, such as acts committed on board a ship, in maritime waters subject to the jurisdiction of a State, in a dependent territory and so on. Like Sir Francis Vallat, he was of the opinion that the wording should be explained in the commentary, but he was prepared to accept the phrase "any other place" if the Commission so wished.

27. Mr. CALLE Y CALLE said that he favoured the retention of the wording proposed by the Drafting Committee, particularly since the same language also appeared in article 12 *bis*. While it might be possible to speak of the "place" or "locality" in which the internationally wrongful act was committed, it seemed preferable, since the reference was to States, which were often extensive in area, to employ the word "territory".

28. Mr. AGO (Special Rapporteur) pointed out that in article 13 the expression "territory under its administration" meant a dependent territory in which a new State was formed.

29. Mr. REUTER said that if, for the reason given by Mr. Ago, the use of the word "territory" in the expression "territory under its administration" was justified in article 13, it could be concluded, by reasoning *a contrario*, that its use in article 12 in the expression "territory under

[5] For previous discussion of article 12 see 1312th meeting, para. 1.

its jurisdiction" was not justified, for in article 12 it had two meanings: first, a legal meaning and, secondly, a spatial or geographical meaning. It would therefore be better to say: "in its territory or in any other place under its jurisdiction".

30. Mr. USHAKOV said that, in his opinion, there was always a territory involved even if it was not under any jurisdiction.

31. Mr. REUTER said he wondered whether Mr. Ushakov would therefore agree to the use of the word "territory" in relation to international organizations —because the problem could arise in connexion with the draft articles on treaties concluded between States and international organizations.

32. Mr. USHAKOV said that there was no territory under the jurisdiction of an international organization.

33. Mr. AGO (Special Rapporteur) said he was in favour of using the expression "territory under its administration" in article 12 *ter* and article 13. In the case of article 12, he would not object to the wording suggested by Mr. Reuter, namely, "in its territory or in any other place under its jurisdiction".

34. Mr. ELIAS said that the Commission should not reopen the discussion on paragraph 1. The present wording had been decided on after several meetings and members had had ample time for reflection.

35. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 12 as proposed by the Drafting Committee, subject to the inclusion in the commentary of the explanation requested by Sir Francis Vallat.

It was so agreed.

ARTICLE 12 *bis*

36. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 12 *bis*:

Article 12 bis

Conduct of organs of an international organization

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

37. In considering the article, the Committee had had in mind the fact that a number of members of the Commission had been anxious that its provisions should not go beyond the boundaries of the topic and impinge on the subject of international organizations. Hence the apparent lack of symmetry between article 12 and 12 *bis*.

38. Article 12 *bis* had been drafted in a way designed to emphasize its rather limited purpose, which was to state that the conduct of an organ of an international organization acting in that capacity in the territory of a State or in territory under the jurisdiction of that State should not be attributed to that State "by reason only of the fact that . . .". By the use of that phrase, the article clearly stated the intended rule and also left open the possibility that other facts or factors might be relevant in ascertaining whether, in a given case, the conduct of an organ of an international organization might be attributed to the State in whose territory the organ had acted.

39. Mr. TSURUOKA said that, in addition to what was provided in article 12 *bis*, reference should also be made to the case in which an act of an organ of an international organization must not be considered to be an act of the State by reason only of the fact that the organ in question was a national of that State. That point should at least be made clear in the commentary.

40. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 12 *bis*, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 12 *ter*

41. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 12 *ter*:

Article 12 ter

Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement, which is established in the territory of a State or in any other territory under its jurisdiction, while acting as an organ of that movement shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

42. The drafting of article 12 *ter* reflected some of the considerations he had mentioned in connexion with article 12. In particular, paragraph 2 contained the same sort of safeguard clause as was found in paragraph 2 of article 12.

43. Paragraph 3 dealt with the possible attribution to an insurrectional movement of conduct of an organ of that movement. The Drafting Committee, in the phrase "in any case in which such attribution may be made under international law", had avoided speaking of the possession by an insurrectional movement of international personality or status, since that was a question outside the scope of the article. The paragraph was merely intended to show that the article left the way open to and did not prejudice any such attribution, in any case where that might be possible.

44. Mr. AGO (Special Rapporteur) said he thought that, in order to establish a parallel with article 13, it would be necessary, in paragraph 1 of article 12 *ter*, to replace the phrase "in any other territory under its jurisdiction, while acting as an organ of that movement" by the phrase "in a territory under its administration".

45. Mr. KEARNEY said that it was not clear from the present form of paragraph 1 whether the word "established" referred to the insurrectional movement itself or its organ. It was important to remove that ambiguity,

since it was entirely possible that a movement and its organ could be based in different States.

46. In order to avoid giving the impression that the Commission had given up in the face of a problem it could not solve, he suggested that paragraph 3 of the article be deleted and the reasoning behind its initial inclusion set out in the commentary.

47. Mr. AGO (Special Rapporteur) said that the apparent ambiguity in paragraph 1 to which Mr. Kearney had referred was useful, since it made it possible to cover all the possible cases which could arise. For example, the provisional Government of the Republic of Algeria had had its headquarters at Cairo and at Tunis and, in both cases, that organ could have committed wrongful acts.

48. With regard to Mr. Kearney's second suggestion, it would be remembered that the text of paragraph 5 of the original article 12 was much more precise because its intention was to provide for attribution of conduct to the insurrectional movement as a subject of international law. In the case of the nationalist insurrection in Spain, for instance, responsibility for certain acts had been attributed to General Franco's Government by several States. In order to meet Mr. Kearney's wishes, he would suggest that paragraph 3 be explained in the commentary.

49. Sir Francis VALLAT said that, when the Commission had discussed the topic of State succession in respect of treaties, some Governments had had difficulty in understanding the phrase "territory under the administration of a State", and the Commission had accordingly decided to replace it by the phrase "territory for the international relations of which a State is responsible". While he was not proposing such a change in the present instance, he hoped that the reason why the Commission had approved the shorter phrase proposed by Mr. Ago would be explained in the commentary.

50. Mr. AGO (Special Rapporteur) said that Sir Francis Vallat had been right to refer to the difficulties to which the words "territory under its administration" gave rise, but he (the Special Rapporteur) would urge the Commission not to amend the present text in order not to introduce even worse confusion than that it was trying to avoid, by using an expression which implied giving the word "responsibility" a meaning different from that in which it was used in the draft. It was enough to indicate, in the commentary, the reasons why the Commission had preferred the words "territory under its administration".

51. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 12 *ter*, as proposed by the Drafting Committee and amended by the Special Rapporteur, subject to the inclusion in the commentary of the explanation requested by Sir Francis Vallat.

It was so agreed.

ARTICLE 13 [6]

52. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 13:

Article 13

Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

53. The new text represented an attempt to reformulate the article in order to meet certain criticisms which had been made. The original title of the article had read "Retroactive attribution to a State of the acts of organs of a successful insurrectional movement". The words "retroactive" and "successful" had now been omitted from both the title and the text, since questions concerning the legitimacy of an insurrectional movement were outside the scope of the article. Other changes had been made in the text to clarify the content of the article and limit its scope. Paragraphs 1 and 2 corresponded to paragraphs 2 and 1 respectively of the original version.

54. Paragraph 1 of the new version dealt with the attribution to the State of the act of an insurrectional movement which became the new government of the State. In that case there was a change of government and continuity of the State. The second sentence of paragraph 1 reserved the possibility of attribution to the State of conduct which would previously have been considered as an act of the State by virtue of articles 5 to 10.

55. Paragraph 2 dealt with the attribution to the State of the act of an insurrectional movement which resulted in the formation of a new State, whether in part of the territory of a pre-existing State or in a territory under a pre-existing State's administration. The Drafting Committee considered that reference should be made in the commentary to the possibility that a new State would be established in the whole of the territory of a pre-existing State, but it did not think that such a case need be dealt with in the articles themselves.

56. Mr. KEARNEY said he found it strange that paragraph 1 should refer to the "act" of an insurrectional movement, whereas article 12 *ter* had spoken of the "conduct" of such a movement. The change seemed to suggest that there was some difference between an "act" and "conduct". He assumed that the phrase "which would have been previously considered as an act of the State", which was unduly vague, referred to conduct of organs or persons on behalf of the government which had been replaced and occurring prior to the installation of the new government. With regard to paragraph 2, it would seem better to speak of the "insurrection" rather than the "action" of an insurrectional movement.

57. Mr. HAMBRO said he was still not convinced of the need for or even the usefulness of articles 12 *ter* and 13.

58. Mr. AGO (Special Rapporteur) said that the problem raised in those two articles was nonetheless a very important one. It had frequently caused concern to

[6] For previous discussion see 1316th meeting, para. 2.

Governments and tribunals and had played a prominent role in the practice. It could therefore not be ignored.

59. Replying to the comments by Mr. Kearney, he said that article 13 did not deal with the attribution of conduct to a specific subject of international law other than a State, but rather with the attribution to the State resulting from the insurrection of an act previously attributed to an insurrectional movement because it had been committed by an organ of that movement. The expression "act of an insurrectional movement" was an elliptical rendering of that idea. He realized that the wording of the second sentence of paragraph 1 was very succinct, but was convinced that more elaborate wording would not be any clearer.

60. With regard to the words "whose action results" in paragraph 2, which Mr. Kearney had criticized, it had to be remembered that the aims of an insurrection could change as the insurrectional movement gained momentum.

61. The CHARIMAN said that if there were no further comments he would take it that the Commission agreed to approve article 13, as proposed by the Drafting Committee.

It was so agreed.

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

(A/CN.4/285)

[Item 4 of the agenda]

(*resumed from the previous meeting*)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 7 (Full powers) AND

ARTICLE 2 (Use of terms), paragraph 1 (*c*) (*continued*)

62. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 7 and the related provision in paragraph 1 (*c*) of article 2.

63. Mr. REUTER (Special Rapporteur) said he was glad to note that neither the meaning of, nor the need for, those two provisions had been questioned. Nevertheless, a number of comments had been made and some clarification was called for. To begin with, many members had felt that article 7, paragraph 2 (*b*), did not take sufficient account of article 12 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. [7] To meet that criticism, he was prepared to subdivide the paragraph in order to introduce the concept of the head of mission, and model it on article 12 of that Convention. There would then no longer be any reference to treaties concluded with the organization, which must obviously be bilateral treaties.

64. Mr. Ago thought it would be desirable to specify in several places in the body of article 7 that it related to treaties between States and one or more international organizations. But the Commission had already approved a definition of the word "treaty", in article 2, paragraph 1 (*a*). It would be necessary to wait until the draft as a whole had been considered before making any changes in that definition, which must necessarily be different from the definition contained in the Vienna Convention on the Law of Treaties.

65. As Mr. Ushakov, Mr. Pinto and Mr. Tsuruoka had pointed out, there was no general practice of international organizations. It was possible to speak of the practice of two international organizations in their mutual relations, but otherwise each organization had its own practice. In his opinion, the words "the practice of the States and international organizations concerned" should refer to the practice of each organization. In order to clear up any misunderstanding, either the phrase "the practice of the States and international organizations in question" or the more specific phrase "the practice of the States and the organization or organizations in question" might be used. The definition of the term "rules of the Organization" contained in article 1, paragraph 1 (34) of the 1975 Vienna Convention spoke of the "established practice of the Organization". That did not necessarily mean that all international organizations had a practice. Nor were they all empowered, by virtue of their constituent instruments, to create a practice. The reference in draft article 7 to the practice of the organizations in question could therefore not prejudge the question of the constitutional limits to the creation of a practice in each organization. But, in the light of the reference to the "practice of the Organization" in the 1975 Vienna Convention, it was difficult to start from the assumption that organizations had no practice at all. When such practice did exist, it bound only the organization and its member States. Under draft article 7, third States would always be in a position to demand that the representative of the organization should have full powers. If States had seldom required full powers, it was because the need to do so had not been felt. The Commission should be careful not to complicate matters.

66. Mr. Ushakov had said that it was debatable whether the term "full powers" could be used both for organizations and for States. He (the Special Rapporteur) suggested that that term might be reserved for States and the term "credentials" used for international organizations. The term "credentials" was, however, used in connexion with delegates of States in article 44 of the 1975 Vienna Convention. It was therefore important to use the appropriate wording. If applied to an international organization, the term "full powers" could be ambiguous because, according to the definition proposed, it meant a document appointing one or more persons to represent the organization not only for the purpose of negotiating, adopting or authenticating the text of a treaty, but also for the purpose of expressing the consent of the organization to be bound by the treaty. It would, however, be inadmissible for a person who had received full powers from the secretary-general of an organization to be able, on his own initiative, to express the consent of that organization. The representative of an organization who had powers to represent it must not be entitled to define the content of the consent of the organization;

[7] See document A/CONF.67/16.

that must be defined by the organization itself in accordance with its own rules. Since representatives of organizations were, in sum, only channels of communication, he proposed to reserve the word "express" for the consent of the State and to use the word "communicate" for the consent of the organization.

67. To take account of a comment by Mr. Ushakov concerning the term "competent authority", in article 2, paragraph 1 (*c*), he suggested that the use of that term be reserved for States and that the term "competent organ" be used for international organizations. With regard to the term "appropriate full powers", in article 7, paragraph 3 (*a*), which had also been the subject of a comment by Mr. Ushakov, he proposed that it be replaced by the term "full powers for that purpose". They were in fact, powers for the purpose of adopting or authenticating the text of a treaty or communicating the consent of the organization to be bound by the treaty.

68. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to refer article 7 and paragraph 1 (*c*) of article 2 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed. [8]

ARTICLE 8

69. The CHAIRMAN invited the Special Rapporteur to introduce article 8, which read:

Article 8

Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or international organization for that purpose is without legal effect unless afterwards confirmed by that State or organization.

70. Mr. REUTER (Special Rapporteur) said that the provision was intended only to extend the application of the rule of the Vienna Convention on the Law of Treaties to the case envisaged in the draft.

71. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to refer article 8 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed. [9]

ARTICLE 9

ARTICLE 2, PARAGRAPH 1 (*g*) AND

ARTICLE 10

72. The CHAIRMAN invited the Special Rapporteur to introduce article 9, article 2, paragraph 1 (*g*), and article 10, which read:

Article 9

Adoption of the text

1. The adoption of the text of a treaty concluded between one or more States and one or more international organizations takes place by the consent of the State or States and the organization or organizations participating as potential parties in its drawing up.

2. The adoption of the text of a treaty between several international organizations takes place by the consent of the organizations participating as potential parties in its drawing up.

3. The adoption of the text of a treaty at an international conference admitting, in addition to States, one or more international organizations possessing the same rights as States at that conference, takes place by the vote of two thirds of the States and organizations present and voting, unless by the same majority the States and organizations shall decide to apply a different rule.

Article 2

Use of terms

1. (*g*) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force; in the same conditions it means an international organization when its position with regard to the treaty is identical to that of a State party;

Article 10

Authentication of the text

The text of a treaty is established as authentic and definitive:

(*a*) by such procedure as may be provided for in the text or agreed upon by the States and international organizations participating as potential parties in its drawing up; or

(*b*) failing such procedure, by the signature, a signature *ad referendum* or initialling by the representatives of those States and organizations of the text of the treaty or of the Final Act of a conference incorporating the text.

73. Mr. REUTER (Special Rapporteur) drew attention to a very important problem raised by those three provisions. It could happen that an international organization took part in the preparation and adoption of the text of a treaty between States or even that it signed such a treaty, without becoming a party to it. That was the position of the World Bank in connexion with the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. [10] It could also happen that the text of a treaty was authenticated by an act emanating from a representative of an international organization, or from the president of the assembly of an international organization, acting as an organ of that organization. For the purposes of the present draft, therefore, it was important to take into consideration only those international organizations which took part in the preparation, adoption and authentication of the text of a treaty as future parties to the treaty.

74. In view of the principle of the sovereign equality of States, no such distinction had been necessary in the case of the Vienna Convention on the Law of Treaties. It was only in the cases to which the present draft applied that an entity could receive only a proportion of the rights to which a party to a treaty was entitled. As the Observer for the European Committee on Legal Co-operation had pointed out, [11] there was a convention of the Council of Europe to which the European Communities could become parties on the same basis as States. The European Communities would, however, be deprived of a right, because no account would be taken of the instrument in which they expressed their consent to be

[8] For resumption of the discussion see 1353rd meeting, paras. 9 and 23.

[9] *Ibid.*, para. 29.

[10] United Nations, *Treaty Series*, vol. 575, p. 160.

[11] See 1333rd meeting, para. 38.

bound by that Convention in calculating the number of instruments of ratification necessary for its entry into force.

75. Referring to a difficulty regarding article 9 pointed out to him by Mr. Ushakov, he said that the equivalent of the words "all the States", used in article 9, paragraph 1, of the Vienna Convention which gave that provision its legal force, should be included in article 9, paragraph 1, of the present draft. It was only because he had not been able to find a satisfactory wording that he had left the text he was proposing somewhat imprecise.

The meeting rose at 6.10 p.m.

1346th MEETING

Tuesday, 8 July 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

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

(A/CN.4/285)

[Item 4 of the agenda]

(*continued*)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 9 (Adoption of the text),

ARTICLE 2 (Use of terms), PARAGRAPH 1 (*g*), AND

ARTICLE 10 (Authentication of the text) (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of articles 9 and 10 and the related provision in paragraph 1 (*g*) of article 2 (Use of terms).

2. Mr. ŠAHOVIĆ said that although he recognized the need to keep the law of treaties as consistent as possible, the study of treaties concluded between States and international organizations or between several international organizations required a thorough analysis of the practice because there were wide differences in that respect between States and international organizations. The Commission had so far adopted a realistic method. Article 6, on the capacity of international organizations to conclude treaties, was a compromise which was perfectly acceptable in the present circumstances. In considering the draft articles, the Commission should try both to promote the progressive development of international law and to reaffirm the principles already codified in the Vienna Convention on the Law of Treaties.

3. He agreed with the way in which the Special Rapporteur had framed article 9. In particular, two separate paragraphs were needed, one dealing with treaties concluded between States and international organizations, and the other with treaties concluded between several international organizations. The phrase "as potential parties", which was intended to eliminate any difficulties which might arise as a result of the particular situation of certain organizations taking part in the drawing up of the text of a treaty, did not seem to him indispensable. It would be sufficient to use the word "parties" and to provide the necessary clarification in the commentary.

4. Although international organizations could not be fully assimilated to States as subjects of international law, it was important, particularly in article 9, paragraph 3, not to make too great a distinction between the status of States and that of international organizations. The definitions already adopted by the Commission were applicable to the draft as a whole and would not allow it to treat States and international organizations very differently.

5. Mr. ELIAS said he found both articles 9 and 10 acceptable for the reasons given in paragraphs 3 and 4 of the commentary to article 9, especially in paragraph 3, to which there was a reference in the commentary to article 10. A satisfactory explanation was given of the way in which the corresponding provisions of the Vienna Convention on the Law of Treaties had been adapted.

6. Article 10 did not involve any difficulty, but article 9 raised the problem of the position of an international organization as a party to a treaty. For obvious reasons, there were instances where a conference was held under the auspices of an international organization and the participants did not all have the same status. It was thus possible for an organization to participate in the drawing up of a convention without necessarily becoming a full party to it subsequently. The Special Rapporteur had therefore been well advised to frame article 9 so as to confine the requirement of consent to those organizations which had participated in the drawing up of the text as "potential parties". In paragraph 3 of the commentary to article 9, the Special Rapporteur mentioned the possibility of using instead the form of words "which participated in that drawing up during the negotiation". He himself did not favour that alternative and much preferred the wording used in the text submitted by the Special Rapporteur.

7. In paragraph 3 of article 9, the Special Rapporteur had taken the position that, in computing the required two-thirds majority, only international organizations possessing the same rights as States at the conference should be counted. Clearly, the matter would depend entirely on whether, in that situation, an organization was regarded as broadly comparable to a State.

8. He suggested that articles 9 and 10, together with the definition of "party" contained in paragraph 1 (*g*) of article 2, be accepted and referred to the Drafting Committee, with instructions to examine the possibility of improving the wording, particularly that of article 9, paragraph 3.

9. Mr. PINTO said that the provisions under discussion involved for him problems both of substance and of drafting.