Document:-
A/CN.4/SR.776

Summary record of the 776th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1965, vol. I

therefore be appropriate to make some adjustment in the presentation of the Yearbook and the Commission's annual report to cover that point. The Commission should not take a hasty decision, however, and he suggested that the question be examined by the Chairman and officers in consultation with the Secretariat, so that specific proposals could be made later in the session.

32. Mr. YASSEEN said that he had himself been hindered in his research by the second of the difficulties mentioned by Mr. Paredes. The Commission's Yearbook was an important part of the *travaux préparatoires* for international conventions; it should therefore give a clear account of all the stages in the drafting of an article, and the summary records should accordingly embody the texts discussed, including those subsequently dropped or amended.

33. The CHAIRMAN said that Mr. Paredes had raised two important points. First, the summary records should faithfully record the thinking of members, which might be distorted by subsequent translation. Secondly, it was certainly difficult to use the Yearbook; he himself had often had to refer to his personal files in order to get to the bottom of a discussion. The difficulty must be much greater for anyone who had not taken part in the discussion.

34. He suggested that the Commission ask the Secretariat to consider those two questions and report to the Commission's officers.

It was so decided.

Adoption of the Agenda

35. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/174/Rev.1), explaining that adoption of the agenda as it stood would not mean that the Commission must take the items in the order in which they were set out.

36. Mr. AGO proposed that consideration of item 1 of the agenda, " Filling of a casual vacancy in the Commission ", should be deferred for a time, because the vacancy had only just occurred.

37. Mr. BRIGGS seconded that proposal.

Mr. Ago's proposal was adopted.

38. Mr. ROSENNE, referring to item 7, " Co-operation with other bodies ", said that at its previous session the Commission had examined the question of the exchange of documentation with other bodies.[2] After some discussion it had considered the possibility of setting up, at the present session, a small committee to study the problems involved. He hoped that the Commission would be able to discuss those problems early in the present session.

39. The CHAIRMAN said that the point raised by Mr. Rosenne would be borne in mind.

The provisional agenda (A/CN.4/174/Rev.1) was adopted.

The meeting rose at 5.5 p.m.

[2] *Yearbook of the International Law Commission 1964*, Vol. I, pp. 300-302.

776th MEETING

Tuesday, 4 May 1965, at 10.5 a.m.

Chairman : Mr. Milan BARTOŠ

Present : Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Organization of Work

1. The CHAIRMAN informed the Commission of messages received from several absent members. Mr. Liu was detained at New York, but hoped to arrive soon. Mr. Cadieux was detained by his official duties and Mr. Verdross by the celebration of the sixth centenary of the University of Vienna; both hoped to arrive on 17 May. Mr. Pal had written to say that he was prevented from attending by illness. If members of the Commission agreed he (the Chairman) would send a telegram to Mr. Pal wishing him a speedy recovery.

2. As Mr. Rosenne had reminded them at the previous meeting, the Commission had decided at its last session to set up a committee to discuss the question of the distribution of documents of the Commission; he suggested that Mr. Rosenne should prepare draft terms of reference for that committee.

3. Mr. ROSENNE said that he had nothing to add to paragraph 49 of the Commission's last report [1]; it seemed hardly necessary to be more specific.

4. The CHAIRMAN said that in that case the Commission would appoint the committee the next day.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

[Item 2 of the agenda]

5. The CHAIRMAN invited the Commission to take up item 2 of the agenda.

6. Sir Humphrey WALDOCK, Special Rapporteur, introducing his fourth report on the law of treaties (A/CN.4/177 and Add.1), drew attention to the accompanying documents, namely, the two volumes of comments by governments on Parts I and II of the draft articles drawn up by the Commission at its fourteenth and fifteenth sessions (A/CN.4/175 and Add.1-3) and a document prepared by the Secretariat (A/CN.4/L.107), containing the text of all the draft articles adopted by the Commission. If it proved necessary, he would later submit a further series of draft articles, on which he was at present engaged. At its last session the Commission had expressed the hope that a document setting out the comments of governments in full under each article would be made available. For technical reasons it had proved

[1] *Yearbook of the International Law Commission, 1964*, Vol. II, p. 227.

impossible to comply with that request; he had therefore given a summary of those comments under each article.

7. If the Commission was to conclude consideration of the law of treaties at the 1966 session, it had a heavy programme of work before it; as the draft would soon be approaching its final form, it might be advisable to set up the Drafting Committee at an earlier stage than usual.

8. The CHAIRMAN said he agreed that the Drafting Committee should begin its work without delay; he therefore suggested that the Committee should be set up at the next meeting.

9. He gathered that the Special Rapporteur thought the Commission had reserved the right to make amendments to the draft on its own initiative in the light of the comments by governments. If there were no objections he would take it that the Commission agreed to the method of work proposed by the Special Rapporteur.

10. He asked the Special Rapporteur whether, in his view, the Commission should first come to a decision on the general questions mentioned in the introduction to his report or whether it should first discuss the next of the articles.

11. Sir Humphrey WALDOCK, Special Rapporteur, said he thought it advisable to take up the substance of the articles as soon as possible. Nevertheless, he wished first to mention two problems referred to in the introduction to his report and the following pages.

12. The first was the order of the draft articles in their final form. At the sixteenth session there had been a suggestion that some rearrangement was necessary; and indeed, since the articles on termination, for example, could affect the actual drafting of the other articles, it would be desirable to have a clear idea of the order. He did not propose that the point should be taken up at that stage; he would submit a paper on the general order of the articles later in the session.

13. The second problem was that of the form of the draft articles. Some governments doubted whether the Commission's work on the law of treaties should take the form of a convention. His own view was that the Commission ought not to reconsider its decision to prepare its draft in the form of a convention or series of conventions. Even if it were thought that the General Assembly might ultimately decide on some form of code, the draft should nevertheless be prepared by the Commission in such a way that it would be capable of forming the basis of a convention if governments so decided; in other words, the Commission should draft a set of articles suitable for practical application.

14. The CHAIRMAN invited the Commission to discuss the form which the Commission's draft should take. The Commission had committed itself to the preparation of a clear text which would be applicable as a rule of international law.

15. Mr. AMADO expressed his agreement with that view. At previous sessions the Commission had decided to prepare a convention on the law of treaties so that States could be presented with precise and clear formulae to assist them in developing relations with each other. Those who had drawn up the Statute of the Commission [2] had taken the view that States could hardly be asked to endorse theoretical opinions such as might appear in a code. States were guided by positive and precise interests, and that was why the Commission, under article 16, paragraph (*h*) of its Statute, was consulting States on the practical methods of reaching agreement between them. He had always supported that view and he wished to reaffirm it. The Commission might regard itself as the agent of States acting through the General Assembly. The States, meeting in conference, were subsequently free to adopt the legal rules proposed to them for the purpose of fixing the limitations they were prepared to accept.

16. He fully approved of the position taken by the Special Rapporteur in his fourth report. The Commission should abide by its previous decision. Some governments had commented on the difficulty of formulating a text intended to be a convention binding States. The subject was a difficult one, but the Commission was there to overcome the difficulties, to prune the text and to remove anything relating to the philosophy of law and anything expressing abstract wishes or a concern for perfectionism.

17. Mr. TSURUOKA said he agreed with the Special Rapporteur that the Commission should continue to follow the method adopted hitherto for codifying the law of treaties, and should, at least for the time being, drop any idea of preparing a code; that was a matter which could always be taken up again by the representatives of States meeting in conference. It was true that some governments had expressed the opinion that the Commission should prepare a code, but that was probably because the draft seemed to them too cumbersome and too burdened with details and controversial points. The Commission should take that view into account. It should endeavour to prepare a draft convention acceptable to the large majority of States, and to that end it should, as far as possible, eliminate details and controversial points.

18. Mr. de LUNA said that the question had already been examined by the Commission on previous occasions and the comments by governments had not introduced any new element. It was a question that arose in regard to any codification considered in comparison with customary law. Codification had the advantage of certainty and security, while customary law, precisely because it was vague and uncertain, was more flexible and dynamic.

19. Personally, he would prefer the Commission to work on the basis that it was preparing a draft convention rather than a mere code or restatement. They all knew the fate of recommendations for model treaties. If the Commission wished to perform its function of codifying international law and contributing to its progressive development, it must prepare the best possible text, and that text could only be a draft convention; States would subsequently decide what form they would give to the final instrument. Experience had shown that, however perfect the text prepared by the Commission, States would always wish to introduce changes, even though such changes might not always be improvements.

20. He agreed with the Special Rapporteur that a text which could serve as a convention could also serve as a code.

[2] A/CN.4/4/Rev.1.

21. He accordingly urged the Commission to prune the text of all non-essential details and all elements that were not of permanent value. At the present stage, when the Commission was engaged in the second reading of the draft, it was essential to concentrate on what was universal and permanent and drop all provisions dealing with matters that could be left to the discretion of States.

22. The CHAIRMAN said that, under article 23, paragraph 1, of its Statute, the Commission was competent to recommend what action the General Assembly should take on its draft. It should therefore decide whether its draft was intended to become a convention.

23. Mr. REUTER said that he, too, shared the view of the Special Rapporteur. The Commission should submit a draft convention for two reasons. First, it should abide by its earlier decision. Secondly, it should aim at maximum results and prepare as perfect a text as possible: since conventional law was the highest form of legal commitment, the text could only be a draft convention. The question whether a conference should be convened to conclude the convention was a political matter for governments to consider.

24. Moreover, the Commission's draft should be a single draft convention. The question whether the law of treaties should form the subject of several separate conventions was likewise a political one with which the Commission need not concern itself.

25. Some members seemed to think that a code would mean a less firm undertaking than a convention; viewed in that light, the idea of a code should be dropped. Others, in particular Mr. Tsuruoka and Mr. de Luna, seemed to consider that a code would be a fuller text in which the Commission could deal with controversial questions. His own opinion was that the existing text was balanced and that all doctrinal or over-theoretical points had already been virtually eliminated.

26. Mr. AGO said that, when it had decided to undertake the study of certain topics, such as the law of treaties, the succession of States and State responsibility, the Commission had intended really to codify the law, in other words to transform unwritten into written law, in the belief that the time was ripe for such a change. He did not think that the Commission should alter its approach simply because it had received comments from some governments holding other views. The Commission should draw up a single general convention with the firm intention of recommending to the General Assembly that a conference be convened to conclude that convention. Even if States did not proceed on the lines laid down for them, the work would not have been in vain. But the Commission's aim should be to produce a convention.

27. He was disturbed to find that some members apparently thought the Commission should deal only with general questions and should delete from its text what they considered to be details and controversial points. Having taken the law of treaties as the subject of his lectures that year, and having, in those lectures, followed point by point the text so far prepared by the Commission, he had the very definite impression that, although it could be improved, the text was sound and not too detailed. He would therefore advise the Commission against excessive excisions.

28. He agreed with the Special Rapporteur that the Commission should draw up provisions that were as balanced and precise as possible. Experience had shown that, when the Commission had done its work well, States meeting in conference had followed its lead, whereas when it had been unsure of itself and the text submitted had been defective, difficulties had arisen. The Commission should face up to its responsibilities, and its work would then have the best chance of success.

29. Mr. EL-ERIAN said that the question had both a theoretical and a practical aspect. So far as theory was concerned, the Commission had decided that, despite the special character of the law of treaties and the central position it occupied in the system of international law, the draft articles should take the form of a convention. The practical problem was that objection might be made to a convention on the ground that some States might not participate in it, which might have a weakening effect on customary international law; but the Commission had taken the view that that risk was inherent in all its work.

30. He agreed with the Special Rapporteur's remark, in connexion with the comment by the Swedish Government, that a number of articles still contained some element of " code " and were not yet cast in the form required for a convention (A/CN.4/177, section C). Nevertheless, such articles should not be omitted ; after all, there were provisions of an expository nature in both the Diplomatic and the Consular Conventions. He was of the opinion that the Commission should proceed on the same basis as before, but should bear in mind that some articles needed revision.

31. Mr. ELIAS said he agreed with the Special Rapporteur's summary of the position. The Commission was not bound to accept the views of governments, although in order to enlist the support of the majority of States it might have to redraft some of the articles. Unless the proposals by governments raised fundamental issues that had not yet been considered, the Commission should not go over the whole ground again. The form of presentation to the General Assembly and the question whether the draft should contain expository elements should be left to the Commission.

32. Mr. BRIGGS said he fully agreed with the Special Rapporteur that the Commission should proceed on the assumption that its draft should be of a kind that would be capable of incorporation in a convention. Article 20 of the Commission's Statute stated that " The Commission shall prepare its drafts in the form of articles ". That did not preclude the possibility that, when the Commission reached article 23, it might recommend a scientific restatement instead of the conclusion of a multilateral treaty. Nevertheless, the approach to the articles should be that suggested by the Special Rapporteur.

33. In 1962 the Commission had not sufficiently emancipated itself from the idea of drafting a code; it would now have an opportunity to review the articles very carefully. He was impressed by the comments of certain governments to the effect that some material, especially in the first twenty-nine articles, could be eliminated.

34. Mr. ROSENNE said he saw no reason why the Commission should reverse its 1961 decision, especially as the report of the Sixth Committee of the General

Assembly, as its seventeenth session, had stated that the great majority of representatives approved the decision to give the codification of the law of treaties the form of a convention.[3] Moreover, General Assembly resolution 1765 (XVII) had recommended that the Commission should continue the work of codification of the law of treaties, taking into account the views expressed at the seventeenth session of the General Assembly.[4] Hence the Commission had a proper basis for its work.

35. The Special Rapporteur had rightly introduced a nuance in stating that the articles should be " capable of " forming the basis of a convention. There were in fact two separate questions : the form and structure of the draft articles and the recommendations to be made by the Commission regarding the manner in which the articles should be dealt with at the political level. As the Special Rapporteur had pointed out, it was only when the Commission had completed its work that it could consider its final recommendations to the General Assembly.

36. The Commission should come to an understanding that it was contemplating a single convention; he did not think it desirable to split up the subject and prepare several separate instruments. A decision to do that would affect the drafting throughout.

37. He noticed that, whereas thirty-one governments were listed in the introduction to document A/CN.4/177, document A/CN.4/175 and its addenda contained the comments of only twenty-three.

38. Mr. TUNKIN said that at its last three sessions, the Commission had worked on the assumption that the draft was intended to form the basis of a convention rather than a code. No member had formally challenged the 1961 decision; it therefore remained in force and no new decision was required. That being so, he would not repeat the arguments in favour of a convention put forward in 1961, beyond saying that the Commission should do the maximum, and that meant produce a convention.

39. It seemed to him that the draft still contained some elements from earlier drafts which had been intended as a basis for a code. The Commission should take into account the comments made by governments on that point and make the text as concise as possible.

40. Mr. CASTRÉN said he shared the views of previous speakers; unless he was mistaken, the Commission had unanimously decided to adopt the form of a convention for the rules it was preparing, and he did not see why that decision should be changed merely because two or three governments had criticized the Commission's method. Nevertheless, he agreed that, as the Swedish Government had suggested, and as the Special Rapporteur and Mr. El-Erian had said, certain paragraphs or clauses in the draft ought to be deleted or amended.

41. Mr. YASSEEN said that in 1961 the Commission had decided to prepare a draft convention, not a code. That decision had led to the plan which the Special Rapporteur had followed, and had determined the Commission's method of work.

42. The Commission had gone too far in that direction to be able to reconsider its decision. Besides, very few States had opposed the idea of a convention, and most of their arguments had been against the idea of codification in general, not against the codification of treaty law in particular. Nevertheless, it was always possible to improve a text, and the Commission could draft the provisions in more precise terms, more suitable for a convention.

43. Mr. TSURUOKA said he was not opposed to the decision taken earlier. He had listened to the discussion with satisfaction, for it had shown that the Commission would keep to the method adopted. But now that the Commission was aware of the results of its work, it might be said that a certain modesty was called for. Part I of the draft had been commented on by governments, which doubted whether they could really sign and ratify as a convention a text in that form and including so much detail.

44. The CHAIRMAN, speaking as a member of the Commission, said he associated himself with the comments of earlier speakers, especially Mr. Ago. He had already expressed his views on the recommendations addressed to the Commission, which had not exactly filled him with enthusiasm, any more than the General Assembly's decision concerning the Commission's draft on the rights and duties of States, to the effect that the draft articles were to serve as a " guide " — in other words, as a text not forming part of positive law.

45. Mr. LACHS said he fully shared the view of previous speakers that there was no reason why the Commission should depart from its former decision. Nevertheless, it could not ignore the comments by governments and should define its attitude.

46. It should be remembered that, although very few governments had opposed the draft, only a quarter of the Members of the United Nations had yet replied. Hence the Commission should not underestimate the difficulties the draft might encounter when it reached the General Assembly. The draft should be prepared in the form of a convention, but in formulating the articles the Commission should be careful not to invite criticism in the final stage by including a mixture of principles and descriptive elements. When the time came for the Commission to submit its final draft, it should draw attention to the problem of form in its introduction; it should then recommend a convention, but should not rule out the possibility of some other form of document that might be more acceptable to States.

47. The CHAIRMAN said he thought he could interpret the Commission's position, especially after Mr. Tsuruoka's second statement, as being that it upheld the decision it had taken in 1961, and that its intention was to prepare a single set of draft articles on the law of treaties, designed to serve as the basis for a convention.

48. He would ask the Special Rapporteur and the General Rapporteur to take account, when preparing their report, of Mr. Ago's proposal that the General Assembly should be asked to recommend the draft to Members with a view to the conclusion of a convention and to convene a conference to conclude a convention, in

[3] *Official Records of the General Assembly, Seventeenth Session, Annexes*, Vol. III, agenda item 76, p. 13, para. 19.

[4] *Op. cit., Seventeenth Session, Supplement No. 17*, p. 65.

accordance with article 23, paragraph 1 (*c*) and (*d*) of the Commission's Statute.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that a number of general questions arose out of the comments by governments. The first was that of terminology, which he suggested should not be dealt with at the present stage; many questions of terminology were bound to attract the attention of the Commission and its Drafting Committee as their work advanced, and it would be easier to deal with them definitively when some progress had been made with the re-examination of the articles.

50. There was, however, another general question which should be dealt with at that initial stage, and which affected the title of the draft articles as a whole and the definitions, in particular the definition of a " treaty " in paragraph 1 (*a*) of article 1. That was the question of stating explicitly that the draft articles were confined to treaties between States. At present, there was some inconsistency between the definition of a " treaty " in article 1 and the provisions of article 2, paragraph 1, on the one hand, and the rest of the draft on the other hand. The definition stated that " treaty " meant an international agreement in written form concluded between two or more States " or other subjects of international law ". Article 2, paragraph 1, stated that : " Except to the extent that the particular context may otherwise require, the present articles shall apply to every treaty as defined in article 1, paragraph 1 (*a*) ". One would therefore expect the remainder of the draft to deal not only with treaties between States, but also with treaties concluded between " other subjects of international law ". In fact, there were few, if any, provisions on the latter kind of treaty. The special rules contained in the draft articles on the constitutional instruments of international organizations did not come under that heading, because those instruments were treaties between States. With the exception of some provisions in article 3, on the capacity to conclude treaties, the draft articles did not contain any rules on treaties concluded by international organizations.

51. In the circumstances, and bearing in mind that the draft articles would have to stand the test of a conference of plenipotentiaries, it was necessary to limit their scope to what they actually covered. The general principle that subjects of international law other than States had the capacity to conclude treaties was not in question, although there were some differences of opinion regarding the conditions applied to those treaties. That point, however, could be covered in the commentary; the draft articles, in order to be coherent, must show that their scope included only treaties between States. That fact could be made clear in the title and in the definition of " treaty ", or in the provisions of article 2 on the scope of the articles.

52. The CHAIRMAN said he would like to make sure he had been right in understanding that the procedure proposed by the Special Rapporteur was that the Commission might comment on questions of terminology and on definitions, but that the final text would be settled by the Drafting Committee.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee would have to give particular attention to the question of definitions. In general, it would be convenient for the Commission to follow the same practice as hitherto and examine each definition with the article to which it related, after which the Drafting Committee would deal with the drafting of the definition.

54. Mr. BRIGGS said that, although he agreed with the suggestion that the Commission should not attempt to deal with all terminology questions at that stage, he believed that such questions would arise from the outset. That was certainly true with regard to the language used in the definition of a " treaty " in article 1, paragraph 1 (*a*).

55. Mr. CASTRÉN said that, like Sir Humphrey Waldock, he thought the draft should not mention " other subjects of international law ". He had noted that, in addition to Finland, the Netherlands and Colombia had submitted comments to that effect. The references to " other subjects of international law " and " international organizations " should be deleted.

56. Mr. ROSENNE said that the discussion had raised two separate questions. The first was that of definitions; that was a question of substance and he agreed with the Special Rapporteur's proposal regarding the discussion of the definitions. The second was that of terminology which, except where it occasionally affected matters of substance, was above all a question of clarity and consistency in the use of expressions throughout the articles; it also involved the problem of ensuring to the fullest degree the concordance between the English, French and Spanish versions.

57. Mr. AGO said that the general impression given by the Commission's work was greatly affected by the article introducing the draft. The Commission should give close attention to the definitions in order not to expose itself to criticism; hence, before referring the definitions to the Drafting Committee it should discuss them itself.

58. With regard to the question raised by the Special Rapporteur, he would be very sorry if the reference to " other subjects of international law " were just deleted. Two passages in the draft articles were affected : article 1, paragraph 1 (*a*), and article 2, where the treaties to which the draft articles applied were identified. If any limitation was to be indicated, it should be done in article 2, which specified the scope of the articles, rather than in article 1 (*a*), which contained definitions, for a treaty was still a treaty, even if concluded between a State and an international organization, and it would therefore be absurd to exclude such a treaty from the definitions in the draft. On the other hand, the Commission could say in article 2 that the draft articles did not apply to treaties concluded between international organizations or between States and international organizations. It should not be stated too categorically that the draft articles applied exclusively to treaties between States. The Commission's commentary on article 1 in its report on the work of its fourteenth session,[5] included a relevant paragraph which read :

> " (8) The term ' treaty ', as used in the draft article, covers only international agreements made between ' two or more States or other subjects of international

[5] *Yearbook of the International Law Commission, 1962*, Vol. II., p. 162.

law '. The phrase ' other subjects of international law ' is designed to provide for treaties concluded by: (*a*) international organizations, (*b*) the Holy See, which enters into treaties on the same basis as States, and (*c*) other international entities, such as insurgents, which may in some circumstances enter into treaties. The phrase is not intended to include individuals or corporations created under national law, for they do not possess capacity to enter into treaties or to enter into agreements governed by public international law. "

Clearly, although the Commission now wished to exclude from the application of the draft articles treaties concluded by international organizations, it would certainly not wish to exclude treaties concluded by the Holy See or by insurgents. The expression " other subjects of international law " was still necessary.

59. To cover the point over which the Special Rapporteur had expressed concern, paragraph 2 might provide that treaties concluded by international organizations would be considered separately; that would exclude such treaties, and only such treaties, from the application of the draft articles.

60. Sir Humphrey WALDOCK, Special Rapporteur, replied that there would be a gross inelegance in defining a " treaty " in article 1, for purposes of the draft, as though it covered instruments concluded by subjects of international law other than States, when all the language of the subsequent draft articles related exclusively to treaties between States. In a draft convention, there would be serious implications if it were suggested in a definition that the contents covered more than they actually did. What governments expected of the Commission was that it should draft a set of rules governing treaties between States, and although it could be assumed that treaties concluded by other subjects of international law would follow similar rules, it was highly desirable to limit the scope of the draft explicitly so as to show that those treaties were not covered by it.

61. The problem had a very real connexion with the manner in which the Commission would deal with article 3, on the capacity to conclude treaties. The provisions of that article dealt with difficult and controversial problems and had been adopted with little enthusiasm. The text as it now stood seemed to him a somewhat inadequate statement on the capacity to conclude treaties, but any attempt to enlarge its provisions was bound to create difficulties, as the comments by governments clearly showed. He was therefore proposing the deletion of article 3, although with some regret because, as a lawyer, he would have liked an article on capacity to be included. If the Commission adopted his proposal, the only article which contained a reference to subjects of international law other than States would be dropped.

62. The CHAIRMAN pointed out that in his report the Special Rapporteur had formally proposed a new text to replace article 1, paragraph 1 (*a*), as adopted in 1962.

63. Mr. YASSEEN said that it would not be logical to speak of treaties concluded between subjects of international law other than States; on that point he fully agreed with Sir Humphrey Waldock's comments.

64. On the other hand, he did not agree with the Special Rapporteur's suggestion that article 3 should be omitted altogether. The draft articles should mention the capacity of States to conclude treaties, and the article should therefore be amended. For example, it would be possible to retain paragraph 1 as far as the words " . . . is possessed by States " ; to retain paragraph 2, which served a useful purpose; and to delete paragraph 3.

65. Mr. AGO said that in order to allay the Special Rapporteur's fully justified concern, while at the same time providing for the possible application of the draft articles to other subjects of international law, he would propose that article 1, paragraph 1 (*a*) read simply : " For the purposes of the present articles, the expression ' treaty ' means a treaty concluded between States ". But in that case it would be necessary to delete paragraph 1 of article 2, which would become unnecessary, and add a provision on the following lines : " The fact that the articles apply to treaties concluded between States shall in no way preclude their application, in so far as it is possible, to treaties concluded by other subjects of international law ".

66. Mr. REUTER said he supported Mr. Ago's remarks. He himself had tried to draft a text, which he submitted to the Commission for comment, but not as a model, reading : " Nothing in the present treaty shall prejudice the application of all or of some of the rules stated therein to international agreements concluded by entities treated by international law on the same footing as States or by other subjects of international law ". That proviso would make it possible to treat entities such as the Holy See and international organizations in the same way as States, under other rules of international law which need not be discussed at the moment.

67. Mr. ROSENNE said he was inclined to agree with Mr. Ago. To his great regret, he could not agree with the Special Rapporteur's categorical statement that all the articles had been drafted with only States in mind. Some of the articles in Parts II and III referred to " States ", others to " parties "; and there was even a proposal to include a definition of the term " party " in article 1.

68. As paragraph (8) of the commentary on article 1 indicated, treaties concluded by international organizations could be of two kinds : those concluded between two international organizations and those concluded between a State and an international organization. The latter type of treaty involved a State and it would be a retrograde step to exclude it from the definition. In that connexion it was interesting to compare the definition of " treaty " contained in the Harvard draft of 1935[6] with that of an " international agreement " contained in article 118 of the American Law Institute's 1962 restatement of the foreign relations law of the United States.[7] An increasing number of modern constitutions—for example, article 27 of the French Constitution of 1946 and article 53 of that of 1958—also referred to treaties with international organizations in their provisions concerning the national treaty-making power.

[6] *Research in International Law*, "III, Law of Treaties"; Supplement to the American Journal of International Law, vol. 29, 1935, p. 686.

[7] The American Law Institute, Restatement of the Law, *The Foreign Relations Law of the United States*, p. 422.

69. The general reservation which the Special Rapporteur proposed should be included in article 2, paragraph 2 (*b*) would go a long way towards meeting the practical exigencies in the matter; he therefore saw no reason at all to change the title of the draft articles and replace it by the cumbersome phrase proposed in the report.

70. He suggested that both the title of the draft articles and the definition of a " treaty " in article 1 be retained, and that in the course of its work the Commission should always bear in mind the question whether a given article should refer to a State or to a party.

71. Mr. LACHS said he understood the concern of Mr. Ago and Mr. Reuter but did not think the point raised by Mr. Ago would be adequately met by a negative formulation to the effect that parties to a treaty which were not States were not precluded from adopting the rules in the draft articles. It would be more appropriate to state, in a positive formulation, that the rules applied *mutatis mutandis* to the types of treaty which Mr. Ago had in mind.

72. Mr. TUNKIN said he agreed with the Special Rapporteur that there was a logical discrepancy between the definition contained in article 1 and the remainder of the draft. If it was stated in the definitions clause that the term " treaty " covered treaties concluded both by States and by other subjects of international law, the logical implication would be that the remaining provisions of the draft would deal with all those treaties. But in fact, and that point was relevant to the remarks of Mr. Rosenne, the Commission had taken a formal decision to deal only with treaties between States.

73. The problem that had arisen could be settled by dropping from the definition in article 1, paragraph 1, the opening words " For the purposes of the present articles ". Elsewhere in the draft it would be made clear that the articles which followed dealt only with treaties between States.

74. Lastly, he drew attention to the difference between the English and French texts of the opening sentence of article 1.

75. Mr. CASTRÉN said he was quite willing to accept the new formula proposed by Mr. Ago and Mr. Reuter, which met his own difficulties, and he hoped that the Special Rapporteur would also be able to accept it. He preferred a negative formula, such as the text read out by Mr. Reuter, because a positive formula might go too far and suggest that there were too many analogies between treaties concluded by States and those concluded by other subjects of international law.

76. The CHAIRMAN said that at its next meeting the Commission would elect the members of the Committee to consider documentation, and he hoped that at that meeting he would receive proposals concerning the membership of the Drafting Committee, which should then begin its work without delay.

The meeting rose at 1.5 p.m.

777th MEETING

Wednesday, 5 May 1965, at 10 a.m

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Appointment of a Committee on the Distribution of Documents

1. The CHAIRMAN said that, as agreed at the previous meeting, a small committee would be appointed to study the problems raised by the distribution of the documents of the Commission. He suggested that the committee should consist of Mr. Ago, Mr. Lachs, Mr. Pessou, Mr. Rosenne and Mr. Ruda.

It was so agreed.

2. Mr. TSURUOKA asked what would be the committee's terms of reference.

3. The CHAIRMAN said they would be as stated in paragraph 49 of the Commission's report on the work of its sixteenth session.[1]

Appointment of a Drafting Committee

4. The CHAIRMAN said that, having consulted the officers of the Commission, he suggested that a Drafting Committee be appointed consisting of the two Vice-Chairmen, the Rapporteur of the Commission, the Special Rapporteur on the law of treaties, Mr. Ago, Mr. Briggs, Mr. Lachs, Mr. Tunkin and Mr. Yasseen. Mr. Wattles, the Assistant Secretary to the Commission, would act as Secretary to the Drafting Committee.

It was so agreed.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(resumed from the previous meeting)

[Item 2 of the agenda]

ARTICLE 1 (Definitions)

Article 1

Definitions

1. For the purposes of the present articles the following expressions shall have the meanings hereunder assigned to them:

(*a*) " Treaty " means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agree-

[1] *Yearbook of the International Law Commission, 1964*, Vol. II, p. 227.