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Summary record of the 959th meeting

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

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tion should be taken into account in determining whether the size of a permanent mission was reasonable. He supported the view that the needs of the organization should come before those of the host State.

55. On the other hand, the words "the sending State should observe" had the disadvantage of not imposing any real obligation. Consultations between the host State, the organization concerned and the sending State were the only sanction mentioned in the commentary. But paragraphs 3 and 4 of the commentary showed that difficulties did in fact arise regarding the size of permanent missions to international organizations.

56. A rule of conduct such as that formulated in article 14 was therefore insufficient. A strict legal rule should be laid down. For that reason, he proposed that the word "should" be replaced by the words "is required to".

57. Mr. TABIBI said he regretted that he could not support either the text of article 14 or the Special Rapporteur's commentary on it. The Special Rapporteur had drawn up article 14 on an analogy with the provisions relating to permanent diplomatic missions and to special missions, but the present draft articles dealt with an entirely different matter; instead of relations between States, they concerned relations between States and international organizations.

58. He agreed with Mr. Reuter that article 14 seemed to take more account of the interests of the host State than of those of the organization and the sending State. If the article was to be included at all, it should be drafted in such a way as not to hamper the functioning of the organization and the permanent mission. The interests of the host State should, of course, be safeguarded, but they would in any case be covered by a headquarters agreement such as that concluded between the United Nations and the United States of America.

59. There was a danger that the phrase "having regard to the circumstances and conditions in the host State" might be interpreted by the latter in its own interests, in such a way as to give it what would be practically a power of veto. In view of the present competition among States to act as host to international organizations, such a power might be very dangerous. He proposed, therefore, that the phrase "having regard to the circumstances and conditions in the host State ..." be deleted.

60. Mr. KEARNEY said that for some years he had dealt with the problems arising in his country as a receiving State and had sometimes felt that, to paraphrase the biblical saying, it was more blessed to send than to receive. In his opinion, the Special Rapporteur had succeeded in striking a reasonable balance between the interests of the host State, the sending State and the organization concerned. He did not think it had been his intention to emphasize the interests of any one of the parties more than those of another, but he would not object to their rearrangement in some different order.

61. He could not agree with Mr. Tabibi that the phrase "having regard to the circumstances and conditions in the host State" was undesirable; surely, it would be a one-sided approach to assume that the interests of the host State were not to be taken into account. Since there was a wide variety among host States, sending States and organizations, however, it was obviously necessary to frame the article in general language and with a reasonable degree of tolerance.

62. As to the United Nations Headquarters Agreement referred to in paragraphs 3 and 4 of the Special Rapporteur's commentary, he thought that there had probably been no concurrence by the United States Government in the interpretation placed on article V, section 15, by the Secretary-General. In practice, however, that had never prevented them from working out amicable solutions in consultations such as those referred to in the last sentence of paragraph 5. Mr. Ustor had suggested that a reference to consultations as a method of resolving difficulties should be included in the draft articles themselves. He had no objection to that, but he did not consider it essential.

63. He agreed with Mr. Reuter that it might be desirable to replace the conditional tense used in article 14 by more positive language. Alternatively, the reference to the sending State could be omitted altogether; the first part of article 14 would then merely state that the size of a permanent mission should not exceed what was reasonable and normal.

64. Mr. RAMANGASOAVINA said he agreed that the article only had the force of a recommendation and that its utility could therefore be questioned. In his view it was useful, because it affirmed the right of the sending State to determine the size of its permanent mission itself. That was a standing principle. It was normal, however, for the host State to have its say, because the permanent mission was established in its territory.

65. In deciding the substantive question whether the size of a permanent mission was normal or excessive, the main consideration obviously seemed to be the needs of the international organization. But if the size of the permanent mission was excessive, it was scarcely an inconvenience to the organization. It was the host State which might be inconvenienced. The paradoxical result was that despite its status as a third party, it was the host State which had reason to complain of excessive size. Hence the contents of the article gave no ground for objection.

66. With regard to the drafting, he agreed with Mr. Reuter about the use of the conditional, which was not generally employed in conventions. The Commission could adopt the formula proposed by Mr. Reuter, or the article could begin: "The sending State must ensure ...". That more imperative wording would be in the nature of a firm recommendation.

The meeting rose at 1.5 p.m.

959th MEETING

Friday, 21 June 1968, at 10.5 a.m.

Chairman: Mr. José María RUDA

Present: Mr. Ago, Mr. Albónico, Mr. Amado, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney,

Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and inter-governmental organizations

(A/CN.4/195 and Add.1; A/CN.4/203 and Add.1-2; A/CN.4/L.118 and Add.1-2)

[Item 2 of the agenda]
(continued)

ARTICLE 14 (Size of the permanent mission)[1] *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 14 of the Special Rapporteur's draft (A/CN.4/203/Add.2).

2. Sir Humphrey WALDOCK said that there were many host States in the world today and it was a fact that they were sensitive about admitting permanent missions to their territory. It would be wise, therefore, to include a provision such as article 14 in the draft and to state it as a rule of law.

3. In his opinion, the Commission should be cautious about stating rules in the form of directives or recommendations, rather than as rules of law. Admittedly, article 8, paragraph 1, of the Vienna Convention on Diplomatic Relations [2] stated that the members of the diplomatic staff of the mission should "in principle" be of the nationality of the sending State, but the next two paragraphs set out what were actually rules of law.

4. If article 14 was to provide that the size of a permanent mission should not exceed what was "reasonable and normal", it would be rather strange to leave it as a mere directive, since that would imply that if the State did act in a way that was not reasonable and normal, the matter would be left to its own conscience.

5. He agreed with Mr. Kearney that the phrase "having regard to the circumstances and conditions in the host State" should be retained, since, as Mr. Ramangasoavina had pointed out, the host State was the one most affected by the rule.

6. He also agreed with Mr. Reuter, however, that the phrase beginning with those words should be rearranged so as to place more emphasis on the needs of the organization itself, since it was those needs that were the main criterion for determining what was "reasonable and normal".

7. The Drafting Committee might well consider Mr. Kearney's suggestion that the beginning of article 14 be amended to read: "The size of the permanent mission shall not exceed what is reasonable and normal ...".

8. Mr. Ustor's suggestion that a provision be included concerning consultations in the event of disputes between the parties deserved serious consideration, and he hoped the Drafting Committee would take it into account. Such a provision would be particularly desirable if the article was, as he strongly hoped, to have the force of a rule of law.

9. Mr. YASSEEN said that when a State agreed to the establishment of the headquarters of an international organization in its territory, it was presumed to have agreed that all the conditions for the proper functioning of the organization would be fulfilled. Naturally, the host State was sovereign in its territory, like any other State, and could subject foreigners residing there to special regulations. But the limits which could be imposed on the size of a permanent mission to an international organization had to be judged in the light of requirements for the proper functioning of the organization. Consequently, it was not the circumstances and conditions in the host State that should be considered, but the functioning of the organization.

10. The use of the conditional was unfortunate, because it over-emphasized the recommendatory nature of the article.

11. Mr. BARTOŠ said that when it had drafted the Conventions on Diplomatic Relations and Consular Relations, the Commission had not been in favour of limiting the size of missions. It had taken the view that the sending State had the sovereign right to decide on the number of persons needed to enable the mission to perform its functions. It had been at Vienna, in 1961, that an overwhelming majority of States had secured acceptance of a different view, namely, that it was for the receiving State to decide what was a reasonable size for the mission, provided that it did not discriminate.

12. When considering the draft articles on special missions, the Commission had preferred, without going against the provisions adopted in Vienna, to adopt a more flexible solution,[3] and he thought it was on that solution that the Special Rapporteur had based his present draft. That was why article 14 expressed a recommendation rather than a legal rule.

13. If a strict legal rule was to be adopted, it would be necessary to state which of the interests involved should prevail and determine the content of the rule. The theory of the primacy of the interests of the organization, in other words, of requirements for its proper functioning, had been advanced; but in practice, organizations had nothing to do with decisions on the size of permanent missions.

14. It had been asked whether the size of a permanent mission should be fixed or should vary according to circumstances, but in practice, States had always increased it whenever circumstances required. In the Kennedy Round negotiations, for example, all the States concerned had strengthened the economic side of their missions by increasing the number of specialist advisers. A further example was the missions of Israel and the Arab countries, which had found it necessary to attach numerous specialist advisers to their representatives during the recent events. Thus the size of a permanent mission depended on the needs of the sending State as determined by circumstances. The interests of the sending

[1] See previous meeting, para. 37.

[2] See United Nations, *Treaty Series*, vol. 500, p. 100.

[3] See *Official Records of the General Assembly, Twenty-second Session, Supplement No. 9*, p. 7, article 8.

State must be respected by the host State, which could not be authorized to restrict the size of a mission arbitrarily. Moreover, a host State which had agreed to receive an international organization in its territory must accept the resultant burden in good faith and not prevent permanent missions from working normally as required, for that would impair the functioning of the international organization.

15. It was interesting to note that misunderstandings between the United Nations and the United States of America had always been settled amicably. A solution on those lines might be considered for the text of article 14.

16. One difficulty which had not been touched on, either by previous speakers or in the commentary, was the case of a permanent mission representing the sending State in several organizations whose headquarters were not all in the same State. Could the whole staff of such a mission move freely between the territories of the host States of the various organizations, as required by the sending State? That question arose from time to time in practice, and it should be decided whether or not all reference to it was to be omitted, not only from the article, but even from the commentary. Difficulties could result from the fact that all the host States would then be equally entitled to invoke the provisions of article 14 regarding the size of the permanent mission with respect to their territory.

17. He was in favour of a legal rule limiting the number of members of permanent missions to international organizations. But although the receiving State was certainly entitled to defend its public policy interests, some allowance must also be made for the needs of the sending State as determined by circumstances and the operating requirements of the organization. Hence a legal rule, and not a mere recommendation was what should be adopted. Consideration should also be given to the case of permanent missions accredited to several international organizations whose headquarters were not all in the same State.

18. Mr. EUSTATHIADES said that on the whole he agreed with the principle stated in article 14 and with the approach adopted by the Special Rapporteur. It would be better, however, to provide that the sending State was strictly bound to observe certain limits with regard to the size of its permanent mission, instead of merely stating that it should do so; for in the latter case, if a dispute arose, the sending State could always claim that it had done everything possible, and there would then be no solution. To lay down a strict obligation would clarify the position.

19. Moreover, it was not absolutely necessary to mention the needs of the mission, since article 6 described the functions of the mission and it was self-evident that, in order to perform those functions, the mission must be permitted to have the necessary staff.

20. There was no doubt that the question of the size of permanent missions concerned the host State; but the host State should not be able to intervene in a dispute concerning the size of the mission *in concreto*. The preparation of headquarters agreements was the stage at which the interests of the host State should be considered.

21. Article 14 placed the obligation on the sending State, but any disputes that arose must be settled by negotiations between the host State and the international organization. The organization must be made the custodian of the host State's interests. That aspect of the matter was mentioned in the commentary, at the end of paragraph 5, but should perhaps be brought out more clearly.

22. In short, the needs of the organization had an essential role, and that should be emphasized. If, instead of merely explaining that point in the commentary, it were decided to emphasize the role of the international organization in the article itself, the text could read: "The sending State is required to ensure that the size of its permanent mission does not exceed what is reasonable and normal, having regard to the needs of the organization in view of the circumstances and conditions in the host State." The problem of the size of permanent missions would be discussed when the headquarters agreement was drawn up, and if disputes arose, or if the headquarters agreement was silent on the point, it would be for the international organization to judge the position.

23. Mr. CASTAÑEDA said he congratulated the Special Rapporteur on having found a formula which reconciled conflicting interests and factors. Article 14 did not state a legal rule; it provided a directive, a recommendation, as was clear from the text of the article itself and from the explanations given in paragraph 1 of the commentary. That was the right solution, because if a categorical obligation to limit the size of the permanent mission were imposed on the sending State, the host State or the international organization would have the concomitant right to demand that limitation, and the situation would thus be distorted by wrongly assimilating it to that of ordinary diplomatic missions.

24. In the case of diplomatic missions it was understandable that the receiving State could limit the size of the sending State's mission, since it could, in the last resort, refuse its consent to the presence of a diplomatic mission from a certain State. But the host State to an international organization did not have that right. The two situations were radically different. Besides, there would be a risk of empowering the host State to hamper the conduct of the mission's activities. Hence the correct solution was that indicated in paragraph 5 of the commentary, namely, that the sending State was free to choose the members of its permanent mission.

25. That right could not be absolute, however: it was circumscribed by the recommendation to the sending State to have regard to various factors. Although article 14 did not prescribe a legal obligation to comply with the contents of the recommendation, that did not mean that the recommendation was a purely moral one. As Judge Lauterpacht had said in his separate opinion appended to the Advisory Opinion of the International Court of Justice of 7 June 1955 (South-West Africa—Voting Procedure), there was no legal obligation to comply with recommendations of the United Nations,[4] but there was an obligation to give consideration to them in good faith; any State which failed to do so might find itself beyond the

[4] See *I.C.J. Reports, 1955*, pp. 114 *et seq.*

legal pale of the organization. The legal value of the recommendation envisaged in article 14 was similar.

26. It would be dangerous to replace the word "should" by the word "shall", because that would give the impression that the host State enjoyed a greater right than was in fact the case. He would prefer to have the words "in principle" added, as suggested by Mr. Reuter.

27. With regard to the factors to be taken into consideration, although the Special Rapporteur had not intended to arrange them in any order of precedence, it would be advisable to mention the needs of the organization first and those of the host State last.

28. Mr. ALBÓNICO said he did not think so much discussion about article 14 was necessary, as in most cases it would not give rise to any major problems. Permanent missions to international organizations were generally selected with the greatest care: the member State only sent the staff that was strictly necessary, the organization was satisfied with the mission it received and, for reasons of prestige, the host State never objected to the number of members of the mission.

29. Article 14 of the draft differed considerably from article 11, paragraph 1, of the Vienna Convention, under which it was the receiving State that decided what was "reasonable and normal", whereas under article 14 it was the sending State which was the judge of that matter.

30. Article 14 should certainly be retained, but the Commission should bear in mind two basic factors: first, the interests of the organization, and secondly, the interests of the sending State. In practice, the interests of the host State were always protected by a headquarters agreement.

31. Mr. AMADO said that once again he must object to the terms "reasonable" and "normal"; they smelt of the 17th century, and were practically meaningless today.

32. It was hard to decide whether an actual legal rule or a mere recommendation should be stated in a text such as article 14. He supported the solution advocated by Mr. Castañeda, who had spoken firmly in favour of a recommendation.

33. There was no denying that the Special Rapporteur's text had stood up to discussion. The only remaining question was whether to refer it to the Drafting Committee as it stood, or to incorporate the notion of good faith, which several speakers had mentioned.

34. Sir Humphrey WALDOCK said he could not accept the attitude towards the host State suggested by Mr. Yasseen; there might be many States today which were eager to act as hosts to international organizations, but from a legal and a practical point of view there were two sides to the question. Moreover, when an organization and its member States decided to establish a headquarters for the former, they were not unaware of the circumstances existing in the host State which they chose.

35. He still maintained that the principal point at issue was whether the purpose of article 14 was to lay down a rule of law or a mere guide-line. In his opinion, in drafting international conventions, the Commission should have recourse to recommendations or guide-lines only as a last resort. An analogous provision concerning the size of the mission had already been accepted as a rule of law in the Vienna Convention on Diplomatic Relations, and he saw no reason why it should not be accepted as a rule of law in article 14. The Commission's task was to clarify the legal position between the parties and not to leave anything at all obscure unless, owing to the particularly delicate nature of a problem, it proved impossible to obtain general agreement on anything but a principle expressed in the form of a "directive".

36. As was clear from the Special Rapporteur's commentary, permanent missions were accredited to the organization itself and not to the host State. That meant that the host State did not even have the usual protection of the need for its *agrément*, and made it all the more necessary to draft article 14 as a rule of law. It was true that conflicts between host States and sending States concerning the size of permanent missions were not common, but conflicts concerning the size of diplomatic missions had arisen in the past and it was highly desirable to give the host State the protection of a rule of law.

37. While he was confident that host States would not take exception to permanent missions unless they were of truly monstrous size, he supported Mr. Ustor's proposal that article 14 should include some provision for consultation between the parties for the settlement of disputes. Host States would undoubtedly continue to encourage the presence of international organizations in their territory, but they might not ratify the proposed convention if they felt that they did not have adequate protection against missions of extreme size. The Council of Europe, for example, had had the experience of a privileges and immunities convention not being ratified by the host State.

38. Mr. NAGENDRA SINGH said that the Special Rapporteur was to be congratulated on having drafted an excellent article. If past practice was any guide, the problem of the size of a permanent mission was one which called for tripartite settlement between the sending State, the host State and the organization in question; the Special Rapporteur had brought out that tripartite aspect of the question in paragraph 5 of his commentary. Some members had proposed that article 14 should be omitted altogether, but he thought it was essential to retain it in the interests of all three parties.

39. The question had also arisen whether article 14 should be a mere recommendation, or should have the mandatory character of a rule of law. He agreed with Sir Humphrey Waldock that the subject was of such importance that it deserved to be embodied in a substantive statement of law. Its tripartite aspect, in particular, was so vital that it should be covered in the text of the article and not left to the commentary.

40. He would have no strong objection to the inclusion of a special sub-clause providing for consultations in the event of disputes, as proposed by Mr. Ustor, but once the tripartite principle was accepted, it followed *ipso facto* that if a dispute arose, all three parties would have to be consulted.

41. It had also been argued that the interests of the organization should take precedence over those of the sending State and the host State. But once the tripartite principle was accepted, the question which interests

came first was no longer of paramount importance; it was rather one of decorum.

42. It had further been argued that the qualifying clause, "having regard to the circumstances and conditions in the host State", was too vague; but it was not any more vague than the words "reasonable and normal", which were also essential for qualifying the size of the permanent mission. If those words were accepted, the final clause should also be accepted as being of equal importance.

43. He supported Mr. Kearney's proposal that the opening phrase in article 14 be replaced by the words "The size of the permanent mission shall not exceed what is reasonable and normal ...".

44. Mr. USHAKOV said he could accept article 14 as proposed by the Special Rapporteur. Essentially, it contained two ideas: first, that the host State, in agreeing to the establishment of an international organization in its territory, must accept the full consequences of its action; and secondly, that the sending State, in exercising its power of free appointment of the staff of the special mission, must act in good faith and take into consideration the factors referred to in the article, including "the circumstances and conditions in the host State". The reference to the circumstances and conditions could be retained, although he would not oppose its deletion, as suggested by Mr. Tabibi.

45. Among the new elements proposed for inclusion in the article was provision for tripartite consultations between the sending State, the host State and the organization. In his view, that would alter the sense of the article, because in practice the ostensibly tripartite consultations would come down to bilateral negotiations between the sending State and the host State and would be held on the initiative of the host State; the organization would be left out altogether. The result would therefore be contrary to the principles it was intended to state in article 14.

46. In the last sentence of paragraph 5 of the commentary, the Special Rapporteur seemed to have envisaged consultations about the persons composing the permanent mission, rather than its size. Such consultations did take place in practice. Tripartite consultations were necessary when the host State had some objection to a particular person, because the organization must be in a position to say whether the presence of that person was necessary to enable the permanent mission to carry out its duties.

47. It remained to be decided whether derogations from article 14 were possible. He personally thought that derogations were possible in particular cases in respect of particular organizations, and that they should take place, as indicated by Mr. Eustathiades, through the headquarters agreement. If the host State wished to raise the question of the size of permanent missions, it must do so when negotiating the headquarters agreement.

48. Article 14 could be referred to the Drafting Committee, which could try to improve the drafting.

49. Mr. TSURUOKA said he accepted article 14 as drafted. The ideas it expressed could be reduced to two essential points: first, that the size of the permanent mission should, or could, be large enough to enable it to perform the functions specified in article 6; and secondly, that in deciding on the size of its permanent mission, the sending State must take account of the circumstances and conditions in the host State. Thus formulated, article 14 was satisfactory and useful.

50. To lay down the principle that the size of the permanent mission must be large enough for it to perform its functions might mean introducing a subjective criterion. The member States of an international organization could question whether the permanent mission of a particular State had sufficient staff to enable it to discharge its duties. It would therefore be better not to lay down an obligation, but only to provide for a faculty. The exercise of that faculty would require common sense and good faith. So long as a sending State displayed both those qualities, the host State which had agreed to the establishment of an organization in its territory was not entitled to raise objections to the size of the permanent mission.

51. Mr. BARTOŠ stressed that the host State was aware of its own position and of normal conditions in its territory when it agreed to accept permanent missions. Consequently, it could not subsequently invoke that position as a ground for objections unless the circumstances were exceptional, as could happen from time to time. The sending States should therefore allow for the possibility of exceptional circumstances arising in the host State.

52. With regard to the rule based on the concept of what was "reasonable and normal", he accepted it in the hope that it might one day become a real legal rule. That would happen when provision was made for judgment, either by compulsory arbitration under an additional protocol, as was done in many conventions, or by reference to the International Court of Justice. Without such provision, the rule was of no practical value and could lead to arbitrary action and confusion.

53. Mr. STAVROPOULOS (Legal Counsel) said that, if he had been called upon to draft a provision on the size of permanent missions, he would have been inclined to adopt wording similar to that used at the end of paragraph 5 of the commentary, beginning with some such sentence as: "The principle of the freedom of the sending State in the composition of its permanent mission and the choice of the members of the mission is recognized". There would follow a sentence to the effect that the freedom in question was nevertheless subject to certain limitations and that the size of the mission must not exceed what was reasonable and normal. The provision would conclude with a sentence stating that any difficulty which might arise would be settled by means of "consultations between the host State, the organization concerned and the sending State, having regard to the needs of the particular mission and the organization concerned and to the special circumstances of the host State".

54. The matters dealt with in article 14 were of a tripartite, not of a bilateral, character. It was essential not to allow them to be settled by agreement between only two of the parties, namely, the sending State and the host State. The organization concerned always had a role to play and, indeed, in the case of the United Nations, the

organization always participated in the solution of the problem.

55. In paragraph 3 of the commentary, the Special Rapporteur had quoted article V, section 15, paragraph 2, of the New York Headquarters Agreement,[5] which read "Such resident members of their staffs as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned". At first sight, that passage would appear to establish beyond doubt that the Secretary-General was competent in the matter. According to the interpretation of the United States State Department, however, the role of the Secretary-General was confined to formal action at the beginning. It had not been recognized by the State Department that the Secretary-General had any say in the settlement of difficulties which might subsequently arise in connexion with the composition of a permanent mission.

56. From his experience of permanent missions to the United Nations, he could say that there had practically never been any difficulty with regard to the actual size of such missions. All the difficulties which had arisen had related to the choice of persons and, in the case of the employment of an alien by a sending State, to the nationality of the persons chosen. The solution of such problems should be sought in tripartite consultations between the organization, the sending State and the host State.

57. It was his feeling that the question of the privileges and immunities of permanent missions was not altogether suitable for treatment in a draft convention. There were already in existence numerous agreements on the privileges and immunities of international organizations, representatives to international organizations and members of the staff of international organizations; no attempt should be made to invalidate all those agreements by drafting a uniform convention to replace them.

58. Since the draft articles were to serve more as a guide to the interpretation of the existing rules than as a draft for a convention, he thought the text of the articles should be less terse.

59. He would like to draw attention to article 21, on general facilities (A/CN.4/203/Add.3), which required an organization to "accord to the permanent mission the facilities required for the performance of its functions". He hoped that would not be interpreted as meaning that the organization assumed the obligation to provide facilities for which it had no provision in its budget, such as offices, clerical assistance and so on.

60. Mr. EL-ERIAN said he would reply at the next meeting to the various points raised by the Legal Counsel.

Other Business

RATIFICATIONS OF CONVENTIONS CODIFYING INTERNATIONAL LAW

[Item 8 of the agenda]

61. The CHAIRMAN invited Mr. Ago to address the Commission on the question he had raised during the discussion of items 4 and 6 of the agenda,[6] following the statement by the Legal Counsel.

62. Mr. AGO said that the question he wished to raise was that of the fate of conventions codifying international law.

63. Codifying conventions differed from ordinary multilateral conventions. Except in special cases, the latter, once adopted, normally entered into force as soon as the required number of ratifications or accessions had been obtained, and then bound a certain number of States, while those which had not become parties remained outside the régime established. But in codifying international law, the objective was not really achieved unless the convention became, or made, the general law on the subject; and it could do that only if it bound a group of States which was sufficiently numerous and representative. A convention codifying international law had to express the general agreement of the international community.

64. If such a convention bound only a group of States which was too limited, either in number, importance or geographical distribution, the result might be the opposite of what had been intended; instead of increased security and certainty of international relations, there was uncertainty, because some States followed the rules of the new convention, whereas others relied on the former customary law, so that in the end it was not known what the law was.

65. Codification, as at present practised, comprised several stages. The first was the preparatory stage; the International Law Commission, which did much of the preparatory work, had developed that stage very satisfactorily. The second stage was that of the diplomatic conference. Such conferences, convened simply by a decision of the General Assembly, enjoyed the able assistance of the United Nations Secretariat; they worked on texts which had already been very carefully prepared and usually achieved satisfactory results. Unfortunately, similar progress had not been made with the third and last stage. Suddenly, collective effort gave place to individual effort and each State became solely responsible for deciding not only whether or not to participate, but also when to take the decision and when to announce it.

66. The Secretariat played a useful, but inevitably passive, role in the third stage: it recorded ratifications, accessions, reservations, acceptances of, or objections to, reservations, and so on, but had no means of bringing pressure to bear on States.

67. There was, however, one class of conventions for which a system for speeding up ratification and accession had been established: those were the conventions concluded under the auspices of UNESCO, WHO and the ILO. The most highly perfected system was probably that adopted by the ILO. It consisted essentially of two measures. Under the first, a State which had signed a convention undertook to submit it to the competent organs for ratification within twelve months of signature—a period which in certain cases could be extended to eighteen months. Under the second measure, the State had to report to the Secretariat on the progress of the ratification

[5] General Assembly resolution 169 (II).

[6] See 957th meeting, para. 53.

procedure, stating the reasons for any delay, and subsequently submit periodical progress reports explaining, if need be, the reasons why ratification could not take place. The system was effective, without being a burden on States, as was proved by the number of ratifications secured for international labour conventions. And since conventions were usually adopted by a two-thirds majority, it was obvious that States with a sense of responsibility would not vote for a text if they had no intention of ratifying it.

68. The reason why ratifications were so tardy was not deliberate opposition, but the complexity of the procedure whereby States established their consent to be bound. In addition, Governments and parliaments had other problems and gave priority to more pressing matters. If, therefore, a Government was obliged to initiate the ratification procedure within a certain period, or, if it failed to do so, to provide explanations—which was always rather disagreeable—it would naturally be inclined to take action to secure the desired result.

69. Those comments were merely an introduction to the subject. He intended to review the question more comprehensively in a written report, and hoped the Commission would then discuss it and consider ways of ensuring that States became bound by codification conventions. An amendment to the United Nations Charter would probably be too lengthy a process, but the Commission could propose that the General Assembly adopt a recommendation on the matter.

70. Consideration could also be given to the procedure proposed at the time of the League of Nations, namely, the adoption, simultaneously with a convention, of a protocol by which States undertook to submit the convention to the competent organs for ratification within a given period, failing which they had to report to the Secretary-General. The strengthening of the role of the Secretariat in the matter of ratification might be a particularly important factor in the success of the last stage of codification.

71. Mr. TABIBI said that the question raised by Mr. Ago was one of vital importance for the implementation of the purposes set out in Article 13, paragraph 1 (*a*), of the United Nations Charter.

72. The reasons for delay in the ratification of conventions by African and Asian countries were rather different from those applicable in the countries of Europe and America. The new countries of Africa and Asia were so absorbed with urgent problems that they were not in a position to digest the voluminous material they received from the United Nations.

73. There were several ways in which the United Nations could assist States in the matter. The first would be to publish every year an up-to-date list of signatures, ratifications, and accessions, covering all the multilateral treaties in respect of which the Secretary-General performed depositary functions.

74. Another would be to place on the agenda of the General Assembly the question of information by the Secretary-General on the status of multilateral conventions. From the information which the Secretary-General would submit in connexion with that item, representatives in the Sixth Committee would be able to see which conventions their countries had still to ratify.

75. There was also the possibility of action in the Administrative Committee on Co-ordination, which consisted of the executive heads of the specialized agencies, under the chairmanship of the Secretary-General of the United Nations. That body could establish a committee consisting of the legal advisers of the various specialized agencies, which would meet every year and examine the status of the multilateral conventions.

76. Mr. YASSEEN said the matter was very important with regard to general codification conventions, whose purpose was to establish new rules of international law, although such conventions, even if unratified, could be the source of a general custom. Of course, States could not be compelled to act and ratification was their prerogative; but the expression of their will was sometimes obstructed for reasons which had nothing to do with their essential interests or their sovereignty.

77. It was probably not possible to find a solution quickly, but the question should be placed on the agenda of the Commission or of the General Assembly and be given detailed consideration.

78. Mr. EUSTATHIADES said he welcomed the initiative taken by Mr. Ago and endorsed Mr. Yasseen's remarks. The problem had diverse and highly complex political and technical aspects which required detailed study by the Commission and the General Assembly. The results achieved by some organizations were encouraging, but that did not necessarily mean that their system could be generalized. To combat the tendency to vote rather unthinkingly at conferences and even to sign without a real intention of subsequent commitment by ratification, the most effective method of exerting pressure might be for each codification convention to lay down a time-limit within which States were authorized to deposit their instruments of ratification or accession. That method would in no way impair the sovereignty of States or their right to ratify or refuse ratification, since they would voluntarily have undertaken to proceed as indicated. Moreover, provision could be made for extending the time limit for ratification in exceptional circumstances.

79. Mr. BARTOŠ said he had often stressed that the positive international law reflected in certain conventions concluded under United Nations auspices did not apply only to States parties to the conventions.

80. Nevertheless, Mr. Ago had rightly pointed out that it was not enough for codification conventions to be ratified by the prescribed number of States; the regional distribution of ratifications and the physical and moral power of the ratifying States played an important part. The Commission should study the matter, refer to it henceforth in its reports and recommend the General Assembly to place it on its agenda.

81. Mr. AMADO said that he too welcomed the initiative taken by Mr. Ago. The Commission, which was conscious of its responsibilities and strove for efficiency, should follow up the results of its work for the good of the international community.

82. Mr. STAVROPOULOS (Legal Counsel) said he was grateful to Mr. Ago for raising a matter of great

importance and one in which it was appropriate that the Commission should take the lead. The codification of international law did not consist merely in writing rules; it was also essential to ensure the general acceptance of those rules.

83. As matters now stood, the Secretariat itself had only a passive role. When a codification convention was adopted, the Secretariat supplied two copies to each State and waited for ratifications. When a new State joined the United Nations, it was the practice of the Secretariat to furnish it with a list of all the conventions it could sign, which included the codification conventions.

84. The Secretariat also issued regularly a volume entitled "Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions", (ST/LEG/SER.D/1), a publication that deserved to be better known. Delegations occasionally asked questions to which they could have found the answers themselves merely by referring to that publication.

85. He fully agreed with Mr. Ago's remarks on the reasons for failure to ratify conventions. It was extremely rare for a State to be opposed to a convention: it was much more common for a State to be indifferent. Problems also arose in some countries as a result of the relations between the Government and parliament; in other countries delay in ratification was due to the inadequacy, or total lack, of a treaty section in the foreign ministry.

86. If so requested by the Commission, the Office of Legal Affairs would be glad to furnish it with a comparative study of the status of the codification conventions in respect of which the Secretary-General performed depositary functions.

87. He felt certain that if the Commission were to include a passage in its report on the matter raised by Mr. Ago, the Sixth Committee would take it up. Of course, it was only after thorough consideration of the problem that concrete suggestions could be made for its solution.

88. The CHAIRMAN said he noted that there appeared to be general agreement in the Commission, first, to mention in the report that a preliminary discussion had taken place on the matter raised by Mr. Ago, and secondly, to place on the Commission's agenda a new item relating to the ratification of codification conventions. The exact wording of the item could be decided later in consultation with Mr. Ago.

It was so agreed.

The meeting rose at 1.20 p.m.

960th MEETING

Monday, 24 June 1968, at 3.10 p.m.

Chairman: Mr. José María RUDA

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and inter-governmental organizations

(A/CN.4/195 and Add.1; A/CN.4/203 and Add.1-2; A/CN.4/L.118 and Add.1-2)

[Item 2 of the agenda]
(resumed from the previous meeting)

ARTICLE 14 (Size of the permanent mission)[1] *(resumed from the previous meeting)*

1. The CHAIRMAN invited the Commission to continue consideration of article 14 of the Special Rapporteur's draft (A/CN.4/203/Add.2).

2. Mr. EL-ERIAN (Special Rapporteur) said that one of the main points on which the discussion had centred had been the character of the rule laid down in article 14. Several members had questioned the advisability of providing what was only a rule of conduct and would prefer the article to state a categorical legal obligation.

3. While not questioning that, in general, the provisions of conventions prepared by the Commission should take the form of legal obligations, he believed that there could be exceptions to that rule. For example, the draft articles on the law of treaties had included a number of expository articles which had given rise to criticism, but the Commission had finally decided that the articles should not be strictly confined to legal obligations. Perhaps Sir Humphrey Waldock had provided the real test when he had said that the Commission might have recourse to a rule of conduct or a recommendation as "a last resort".

4. There were, indeed, other examples of rules of conduct in draft conventions which were not strictly legal obligations. Article 37, paragraph 4, of the Vienna Convention on Diplomatic Relations[2] provided that private servants of members of the mission might "enjoy privileges and immunities only to the extent admitted by the receiving State", but went on to say that the receiving State "must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission." The word "must" had caused difficulties in the Drafting Committee; some members had wished to use the word "should", while others had preferred the word "shall". The text finally adopted was a compromise which might be described as *lex imperfecta.*

5. A similar compromise had been reached by the Eighteen-Nation Committee on Disarmament in 1962, when the eight non-aligned countries had submitted a joint memorandum[3] proposing the establishment of an International Commission of scientists to report on any

[1] See 958th meeting, para. 37.

[2] See United Nations, *Treaty Series*, vol. 500, p. 116.

[3] Document ENDC/28.