

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1970

Volume I

*Summary records
of the twenty-second session*

4 May – 10 July 1970

UNITED NATIONS



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OF THE
INTERNATIONAL
LAW COMMISSION

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UNITED NATIONS
New York, 1971



INTRODUCTORY NOTE

The summary records in this volume include the corrections to the provisional summary records requested by members of the Commission and such editorial changes as were considered necessary.

The symbols appearing in the text, consisting of letters combined with figures, serve to identify United Nations documents.

The Special Rapporteurs' reports discussed at the session and certain other documents, including the Commission's report to the General Assembly, are printed in volume II of this *Yearbook*.

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MEMBERS OF THE COMMISSION

<i>Name</i>	<i>Country of nationality</i>	<i>Name</i>	<i>Country of nationality</i>
Mr. Roberto AGO	Italy	Mr. Paul REUTER	France
Mr. Fernando ALBÓNICO	Chile	Mr. Shabtai ROSENNE	Israel
Mr. Gonzalo ALCÍVAR	Ecuador	Mr. José María RUDA	Argentina
Mr. Milan BARTOŠ	Yugoslavia	Mr. José SETTE CÂMARA	Brazil
Mr. Mohammed BEDJAOUI	Algeria	Mr. Abdul Hakim TABIBI	Afghanistan
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OFFICERS

<i>Chairman:</i>	Mr. Taslim O. ELIAS
<i>First Vice-Chairman:</i>	Mr. Richard D. KEARNEY
<i>Second Vice-Chairman:</i>	Mr. Fernando ALBÓNICO
<i>Rapporteur:</i>	Mr. Milan BARTOŠ

Mr. Anatoly P. Movchan, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

AGENDA

The Commission adopted the following agenda at its 1042nd meeting, held on 4 May 1970:

1. Filling of casual vacancies in the Commission (article 11 of the Statute)
2. Relations between States and international organizations
3. Succession of States and Governments:
 - (a) Succession in respect of treaties
 - (b) Succession in respect of matters other than treaties
4. State responsibility
5. Most-favoured-nation clause
6. Co-operation with other bodies
7. Survey of topics suitable for codification
8. Organization of future work
9. Date and place of the twenty-third session
10. Other business

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE TWENTY-SECOND SESSION

Held at Geneva from 4 May to 10 July 1970

1042nd MEETING

Monday, 4 May 1970, at 3.15 p.m.

*Chairman: Mr. Nikolai USHAKOV
later: Mr. Taslim O. ELIAS*

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

Opening of the Session

1. The CHAIRMAN, after declaring open the twenty-second session of the International Law Commission, expressed his great sorrow at the death of Mr. Gilberto Amado, the senior member of the International Law Commission, an eminent professor and ambassador, an outstanding jurist, diplomatist, writer, poet and personality, who had been universally esteemed for his culture, his wit and his profound humanism. The Sixth Committee had devoted a special commemorative meeting to Mr. Amado at the General Assembly's last session. During that meeting, as Chairman of the International Law Commission, he had requested the Chairman of the Sixth Committee to convey to the Brazilian Government and to Mr. Amado's family the condolences and deep sympathy of the members of the International Law Commission.

On the proposal of the Chairman, the members of the Commission observed a minute's silence in tribute to the memory of Mr. Amado.

2. He had great pleasure in informing the Commission that two of its members, Mr. Jiménez de Aréchaga and Mr. Ignacio-Pinto, had been elected Judges of the International Court of Justice and that he had congratulated them personally and on behalf of the Commission.

3. He wished to extend his warm congratulations to Mr. Bartoš, the Special Rapporteur for special missions, on whose work the General Assembly had placed the seal of its approval by adopting, at its twenty-fourth

session, the Convention on Special Missions prepared by the International Law Commission on the basis of Mr. Bartoš's draft articles. The Sixth Committee had paid a tribute to Mr. Bartoš in its report to the General Assembly.¹

4. In accordance with the Commission's decision, he had attended the meetings of the Sixth Committee devoted to consideration of the report of the International Law Commission. The Sixth Committee and the General Assembly had expressed, in resolution 2501 (XXIV) of 19 November 1969,² their appreciation of the valuable work accomplished by the International Law Commission at its twenty-first session. He drew the Commission's attention to paragraph 5 of that resolution, in which the General Assembly recommended that the Commission should study the question of treaties concluded between States and international organizations or between two or more international organizations as an important question. The Sixth Committee had deferred taking a decision on the extension of the term of office of the Commission's members and on the question whether the Commission should hold an extended or additional session in 1971, and had meanwhile invited the Commission to give further consideration to the various possible solutions that might be applied.³

5. He had received a letter from the Secretary-General (A/CN.4/231) drawing the Commission's attention to General Assembly resolution 2499 (XXIV)⁴ relating to the celebration of the twenty-fifth anniversary of the United Nations, and in particular to part A, paragraph 11, concerning the contribution of United Nations organs to the celebration. In his letter the Secretary-General suggested that the International Law Commission might wish to be associated with the celebration.

6. In accordance with the Commission's decision, he had attended the proceedings of the Asian-African Legal Consultative Committee, on which he would report to the Commission in due course.

¹ See *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda item 87, document A/7799, para. 12.

² *Op. cit.*, *Supplement No. 30*, p. 97.

³ *Op. cit.*, *Annexes*, agenda items 86 and 94 (b), document A/7746, para. 117.

⁴ *Op. cit.*, *Supplement No. 30*, p. 1.

Election of Officers

7. The CHAIRMAN called for nominations for the Office of Chairman.

8. Mr. EL-ERIAN proposed Mr. Elias, who had played an important part in making possible the adoption of the Vienna Convention on the Law of Treaties. The Commission had never yet elected a national of an African State as Chairman, and the election of Mr. Elias would emphasize the importance of the role of African States in international law. His many qualities included a firm faith in the rule of law and dignity, objectivity and moderation.

9. Mr. YASSEEN, supporting the nomination, said that the Vienna Conference on the Law of Treaties indeed owed much to Mr. Elias, who had devised the final compromise.

10. Mr. RAMANGASOAVINA said he wholeheartedly supported the nomination of Mr. Elias.

11. Mr. NAGENDRA SINGH and Mr. AGO also supported the nomination.

12. Sir Humphrey WALDOCK said that the Commission would be honoured by the election of Mr. Elias, who had won the respect and admiration of the entire international community by his work at the Conference on the Law of Treaties.

13. Mr. BARTOŠ, Mr. USTOR and Mr. ALBÓNICO warmly supported the nomination of Mr. Elias.

Mr. Elias was unanimously elected Chairman and took the Chair.

14. The CHAIRMAN thanked the Commission for the honour it had done him in electing him Chairman. He would do his best to ensure that the objectives set for the session were attained, and he felt sure he could rely on the co-operation of all members of the Commission.

15. He called for nominations for the office of First Vice-Chairman.

16. Mr. AGO proposed Mr. Kearney.

17. Sir Humphrey WALDOCK seconded the nomination.

18. Mr. BARTOŠ, Mr. NAGENDRA SINGH, Mr. USHAKOV, Mr. RAMANGASOAVINA, Mr. REUTER and Mr. EL-ERIAN supported the nomination.

Mr. Kearney was unanimously elected First Vice-Chairman.

19. Mr. KEARNEY thanked the members of the Commission for his election.

20. The CHAIRMAN called for nominations for the office of Second Vice-Chairman.

21. Mr. YASSEEN proposed Mr. Albónico.

22. Mr. BARTOŠ, Mr. AGO, Mr. USHAKOV, Sir Humphrey WALDOCK and Mr. REUTER supported the nomination.

Mr. Albónico was unanimously elected Second Vice-Chairman.

23. Mr. ALBÓNICO thanked the members of the Commission for his election.

24. The CHAIRMAN called for nominations for the office of Rapporteur.

25. Mr. USHAKOV proposed Mr. Bartoš.

26. Mr. AGO, Mr. CASTRÉN, Mr. REUTER, Mr. ROSENNE, Sir Humphrey WALDOCK, Mr. EL-ERIAN, Mr. RAMANGASOAVINA, Mr. YASSEEN and Mr. USTOR supported the nomination.

Mr. Bartoš was unanimously elected Rapporteur.

27. Mr. BARTOŠ thanked the members for his election.

Adoption of the Agenda

The provisional agenda (A/CN.4/222) was adopted unanimously.

Organization of work

28. Mr. MOVCHAN (Secretary to the Commission) said that messages had been received from Mr. Bedjaoui, who would be participating in the Commission's work from 11 May, and from Mr. Ruda, who would arrive in Geneva the following week. The Commission had also received communications from the Inter-American Juridical Committee, which was to send two observers, the European Committee on Legal Co-operation, whose representative would attend from 10 to 13 June, and the Asian-African Legal Consultative Committee, whose Chairman would attend as an observer.

29. The CHAIRMAN suggested that, in view of the absence of Mr. Ruda and Mr. Castañeda, the filling of casual vacancies in the Commission should be postponed to 11 May, when the Commission might also pay its tribute to the memory of Mr. Amado.

30. He suggested that the Commission should begin its work with item 2 of the agenda (Relations between States and international organizations).

It was so agreed.

31. Mr. ROSENNE said it might be useful to begin the discussion of item 7 (Survey of topics suitable for codification) and to consider the Secretary-General's letter regarding the celebration of the twenty-fifth anniversary of the United Nations, at a time when the Legal Counsel could be present. Perhaps the Officers of the Commission could prepare a programme of work for at least the first few weeks of the session.

32. Mr. MOVCHAN (Secretary to the Commission) said that the Legal Counsel would be arriving in Geneva on either 6 or 15 June.

33. Sir Humphrey WALDOCK suggested that the date for the discussion of item 7 of the agenda should be given further consideration.

It was so agreed.

34. Mr. EL-ERIAN said he might be unable to stay

until the end of the session, so he hoped that the Drafting Committee would be appointed early.

The meeting rose at 5.10 p.m.

1043rd MEETING

Tuesday, 5 May 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227)

[Item 2 of the agenda]

1. The CHAIRMAN invited the Special Rapporteur to introduce his fifth report.

2. Mr. EL-ERIAN (Special Rapporteur) said that his fifth report, contained in document A/CN.4/227, and the addenda to follow, had been prepared in accordance with the Commission's declared intention at its previous session "to consider at its twenty-second session draft articles on permanent observers for non-member States and on delegations to sessions of organs of international organizations and to conferences convened by such organizations".¹

3. At its twentieth session, the Commission had adopted twenty-one articles forming Part I (General Provisions) and section 1 (Permanent missions in general) of Part II (Permanent missions to international organizations). At its twenty-first session, the Commission had adopted a further twenty-nine articles forming section 2 (Facilities, privileges and immunities) of Part II, thus completing its first reading of all the articles on permanent missions.

4. The twenty-one articles adopted at the twentieth session had already been submitted to the governments of States Members of the United Nations and comments had so far been received from ten governments (A/CN.4/221 and Add.1).

5. At its last session, the Commission had decided that the draft articles should also be submitted to the specialized agencies and to the Swiss Government. Since the specialized agencies had submitted a good deal of material for the preparation of the draft articles, it was only

logical to seek their views. The Swiss Government's comments would also be useful and were necessary, since that Government was host to the Geneva Office of the United Nations and to a large number of specialized agencies. The earlier articles had also been submitted to the specialized agencies and to the Swiss Government, but only belatedly, so that the comments so far received on them came only from States Members of the United Nations.

6. He would clearly be unable to complete his work on the first fifty articles until comments has been received from governments and from the specialized agencies. In respect of the articles to be considered at the present session, it would probably be necessary to depart from the practice of giving governments two years in which to submit their comments, otherwise the Commission would not be able to adopt those articles on second reading by the end of 1971.

7. Introducing Chapter II of his fifth report (A/CN.4/227), dealing with Part III (Permanent observers of non-member States to international organizations), he said he had prefaced the draft articles on permanent observers with an introduction containing a summary of the Commission's discussions at its twenty-first session. The decision to include a section on permanent observers had been reached without much difficulty, but opinion had been divided on whether articles on delegations to conferences should also be included. At the 993rd meeting the Commission had decided to authorize him as Special Rapporteur "to draft a chapter on the legal status of delegations of States to international conferences convened by international organizations, on the understanding that the Commission would take no decision of substance on the matter until it had examined that chapter".²

8. The introduction also gave a summary of the discussion in the Sixth Committee, at the twenty-fourth session of the General Assembly, on relations between States and international organizations. The views expressed there had been very similar to those expressed in the Commission; a number of representatives had had reservations about including articles on delegations to conferences.

9. He had also included a summary (paras. 9 to 13) of the discussion in the Sixth Committee, at the same session, on the draft convention on special missions. During that discussion, there had been an important development: the United Kingdom delegation had proposed that an article on conferences should be included in the draft convention. The Expert Consultant, Mr. Bartoš, had favoured that course, but had pointed out that, if it was decided to include rules relating to international conferences in the draft convention on representatives of States to international organizations, it should be made clear that the article proposed by the United Kingdom, if adopted, must be considered as provisional and applicable only until such time as that draft convention was adopted.

¹ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, para. 17.

² See *Yearbook of the International Law Commission, 1969*, vol. I, p. 13, para. 26.

10. At first, he had been opposed to the United Kingdom proposal on theoretical grounds: conferences represented the *ad hoc* aspect of multilateral diplomacy and a provision on that subject would be out of place in a convention dealing with special missions, which was concerned with the *ad hoc* aspect of bilateral diplomacy. On reflection, however, he had come round to the view that there were practical arguments in favour of including a provision on conferences in the draft convention on special missions, pending the adoption of a convention on representatives of States to international organizations.

11. The United Kingdom delegation had withdrawn its proposal, on condition that the Sixth Committee's report would include a statement recognizing that the question of the legal status, privileges and immunities of members of delegations to international conferences "constituted a gap in the law relating to national representation which remained to be filled", and noting "that the International Law Commission had discussed, and would discuss again at its next session, the general question of further work on the status, privileges and immunities of delegations to international conferences".³

12. Clearly, the General Assembly now expected the International Law Commission to take up the matter of delegations to conferences.

13. The draft articles in his report included an article 0 (Use of terms) defining the terms "permanent observer mission" and "permanent observer"; it formed a necessary complement to the article 1 adopted at the twentieth session, which dealt only with permanent missions.

14. Articles 51 to 61 constituted Part III of his draft and contained provisions on permanent observers. He had added notes on assignment to two or more international organizations or to functions unrelated to permanent missions, and on the question of credentials in relation to permanent observers.

15. In a section entitled "General comments" he had traced the growth of the institution of permanent observers. That institution was a new one, on which very little material existed. It was significant that in the Secretariat study on the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities⁴ only one-and-a-half pages out of about 170 dealt with the question of permanent observers.

16. It had been pointed out by the Legal Counsel that permanent observers were "not entitled to diplomatic privileges" under existing agreements and that "whatever facilities they may be given in the United States are merely gestures of courtesy by the United States authorities".⁵

17. The purpose of the draft articles in his fifth report was to provide a legal definition of the institution of

permanent observers, so that there would be a legal basis for the privileges, immunities and facilities extended to the members of permanent observer missions.

18. The institution of observers should also be of some help in dealing with the difficulties of very small States, which might not wish to become members of the United Nations. It would be recalled that those difficulties had been discussed in the Security Council, which had appointed a committee of experts on the subject.

19. The CHAIRMAN said that members might wish to comment on some of the general problems raised by the Special Rapporteur. He drew attention to paragraph 93 of the Commission's report on its twenty-first session⁶.

20. Mr. EL-ERIAN (Special Rapporteur) said that that paragraph dealt with priorities and did not in any way conflict with paragraph 17 of the same report. The Commission had completed its first reading of the fifty articles on permanent missions. At the present session it could adopt the articles on permanent observers (Part III) and on delegations to conferences (Part IV). The second reading of Parts III and IV raised a problem, however, because of the need to obtain comments from governments.

21. The CHAIRMAN said that the Commission would have to consider whether it should abide by the practice of allowing governments two years in which to submit their comments.

22. Mr. ROSENNE said it would be premature for the Commission to discuss that question, because the answer would to some extent depend on the progress made at the present session. Moreover, the answer did not depend on the Commission alone; it also depended on the calendar and the work of the Secretariat. For example, the Commission's twentieth session had ended on 2 August 1968, but its draft had not been submitted to governments until 14 October 1968, in the middle of the General Assembly. Hence it had been only in January 1969 that governments had begun to consider the draft.

23. Mr. TSURUOKA said he agreed with the Special Rapporteur that to ensure the unity of the whole draft of articles, it was essential to have the same membership of the Commission and the same Special Rapporteur to work on Parts III and IV and prepare the final text.

24. Mr. USHAKOV said he had no doubt that the Commission would easily be able to complete the first reading of Parts III and IV of the draft of articles at the present session. Whether it would be able, before the expiry of its term of office, to receive the comments of governments on Parts III and IV and then revise the final draft as a whole, was therefore a question of the organization of future work. The Commission could settle that question at the end of the present session, and could request the General Assembly for authority either to prolong its twenty-third session, though it might have

³ See *Official Records of the General Assembly, twenty-fourth Session, Annexes*, agenda item 87, document A/7799, para. 178.

⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 154.

⁵ *Ibid.*, p. 190, para. 169.

⁶ *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10.*

to delay the opening date to leave governments time to submit their comments, or to hold an additional session.

25. Mr. MOVCHAN (Secretary to the Commission) said that in resolution 2501 (XXIV)⁷ the General Assembly had taken note with approval of the programme of future work set out by the Commission in its report on its twenty-first session⁸ and, in operative paragraph 4 (a), had recommended that the Commission should “continue its work on relations between States and international organizations, with a view to completing in 1971 its draft articles on representatives of States to international organizations”.

26. With regard to the submission of the drafts to governments, he pointed out that the Commission’s twentieth session had ended much later than usual; the present session was due to end on 10 July 1970 and he hoped that any draft articles adopted would reach governments by the end of August. The Secretariat would not fail to draw the attention of Member States to any decision of the Commission on the question of finalizing its work on the topic.

27. The Secretariat had taken all the necessary steps to prepare material in anticipation of a possible decision to extend the 1971 session or to hold a special session in order to enable the Commission to complete its work on the topic with the present membership.

28. Mr. AGO said that there was both a question of substance and a question of organization. With regard to substance, the different parts of the draft belonged together and he did not think they could be submitted to governments piecemeal in order to save time. As to organization, it would be better to complete the examination of the draft on first reading without delay, and then decide what was to be done about the rest of the work.

29. Mr. NAGENDRA SINGH said that some way should be sought of expediting the process of adopting the draft articles. In the present instance, the Commission must consider abandoning its practice of giving governments two years for their comments. There seemed to be no important argument against giving governments only one year, or even six months, in which to make their observations, since the text would ultimately be submitted to a conference of government representatives. In addition, the Secretariat should be asked to do its utmost to expedite its side of the procedure, which was essential.

30. Sir Humphrey WALDOCK pointed out that, under article 16 (h) of its Statute, the Commission was only bound to allow governments “a reasonable time” in which to submit their comments. It had been the practice of the Commission—and it was a good practice—to allow governments a fairly long period for their comments; but it would not be the first time that the process had been accelerated.

31. The Commission should do its best to complete its work on the topic with its present membership, in order to be able to deal in the near future with subjects such as State responsibility, on which the General Assembly was pressing it to make progress.

32. The CHAIRMAN said that those matters would be discussed later in the session. He invited the Commission to consider the Special Rapporteur’s fifth report on relations between States and international organizations (A/CN.4/227) article by article, beginning with article 0.

PART III: PERMANENT OBSERVERS OF NON-MEMBER STATES TO INTERNATIONAL ORGANIZATIONS

Article 0

Use of terms

For the purpose of the present articles:

(a) A “permanent observer mission” is a mission of representative and permanent character sent by a State non-member of an international organization to the Organization.

(b) The “permanent observer” is the person charged by the sending State with the duty of acting as the head of a permanent observer mission.

33. Mr. ROSENNE suggested that it might perhaps be premature to discuss article 0 in detail, and that the Commission should follow its usual practice by leaving it to the Drafting Committee to propose definitions for the terms it thought required defining. The article seemed to him rather over-simplified: the definition in sub-paragraph (a), for example, was modelled too closely on sub-paragraph (d) of article 1.⁹ The Drafting Committee should give it careful consideration.

34. Mr. CASTRÉN observed that the Special Rapporteur had had a particularly difficult task, since there were no written rules on the topic he was dealing with and the practice was little developed. The Special Rapporteur had had to take a position on three main questions of principle. Should States which were not members of an international organization be granted the right freely to establish permanent observer missions to that organization? What should be the functions of such missions? And should such missions and their members be granted facilities, privileges and immunities similar to those enjoyed by the permanent missions of member States.

35. With regard to article 0, on the use of terms, he shared Mr. Rosenne’s view that the expressions defined were perhaps rather over-simplified. In sub-paragraph (a) of the article it would be preferable to refer to the official character of the permanent observer mission, rather than to its representative character; for in his opinion the main function of that type of mission was to keep its government informed of the activities of the international organization and to do liaison work, so that one could not really speak of representation. Moreover, in view of the special nature of the functions of a permanent

⁷ Op. cit., *Supplement No. 30*, p. 97.

⁸ Op. cit., *Supplement No. 10*, paras. 92 and 93.

⁹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 196.

observer mission, he would prefer sub-paragraph (a) to refer to those functions; wording similar to that of article 7¹⁰ could be used for the reference.

36. Mr. KEARNEY said that, like Mr. Castrén, he had doubts about the representative character of a permanent observer mission. Article 2 stated that: "The present articles apply to representatives of States to international organizations of universal character". Since the status of an observer seemed to be of a different kind, he suggested that the Drafting Committee should consider replacing the word "representative" in article 0, sub-paragraph (a), by some other word.

37. Mr. REUTER said it was difficult to say much about article 0, since the question was either one for the Drafting Committee or one on which the Commission could not pronounce until it had considered the subsequent articles. Apart from that, he shared the views of Mr. Castrén and Mr. Kearney. He nevertheless wished to draw attention to a drafting difficulty which was particularly noticeable in the French text of article 0: sub-paragraph (a) of that text referred to a mission of "*observateurs permanents*" in the plural, but it was obvious that if there were several permanent observers, the "permanent observer" could not be defined in sub-paragraph (b) as the head of the mission, for that would mean that every mission of that kind had several heads. The expression must therefore be changed in the French text.

38. Mr. AGO said he must warn the Commission of the danger of considering the draft too quickly; for that reason he only wished to make some very general remarks at that stage. First of all, he thought that the Commission might perhaps be attaching too much importance to permanent observer missions, to the detriment of the balance of the draft articles as a whole; it was not easy to express a definite opinion on the question, particularly since it was becoming apparent that the term "permanent observer mission", like the term "special mission", covered a number of quite different things. For example, the "micro-States", which were not large enough and did not have the means to participate as members in the life of international organizations, nevertheless had to make themselves heard in those bodies. Then there were other States which were not members of international organizations because of their special situations, for instance the divided States. Lastly, there were some very important States, such as the one which was host to the Geneva Office of the United Nations, which, because of their special situation, did not consider that they could participate in certain international organizations. He therefore agreed with the Special Rapporteur that the status of permanent observer missions should be clarified.

39. As to the representative character of those missions, he also shared the view of the Special Rapporteur, who had referred to their bilateral function: it was their function to represent the State which had sent them vis-

à-vis the international organization—a function which should not be confused with that of the representatives of States within international organizations and their organs; the latter function, unlike the former, belonged to multilateral diplomacy. He was glad that the term "mission" had been used in sub-paragraph (a), for that helped to unify a terminology which had hitherto lacked clarity. Nevertheless, he agreed with Mr. Reuter's views on sub-paragraph (b) and considered that, in order to avoid all confusion, it would be advisable to refer to the "head of the mission"; for the terminology must be unified, even if it did not correspond to State practice, which in any case was not uniform. Lastly, he suggested that the term "permanent observer mission" should be replaced by the more appropriate term "permanent mission of observers".

40. Mr. BARTOŠ said he was not sure that permanent observer missions could always be said to have a representative character; there had been cases in which member States had reduced their permanent missions to the status of observer missions, without withdrawing from an international organization. Hence he could not accept the wording proposed by the Special Rapporteur without some explanations. He shared Mr. Castrén's views on sub-paragraph (b); moreover, permanent observer missions sometimes included several officials with specific functions. Mr. Kearney's suggestion should therefore be adopted.

41. Mr. USTOR said that before drafting the final text of article 0, it would be necessary to consider it in conjunction with article 1 and to define the notion of representatives of States to international organizations. Article 1, as at present drafted, referred only to permanent representatives, but in his view it would be desirable to use some such language as: "Representatives of States to international organizations include the following: (1) permanent representatives, and (2) permanent observers". In his opinion, permanent observers necessarily had a representative character, since they were called upon to receive and answer communications from the international organization and to make statements on behalf of their governments. Provision should also be made in article 1, under the same heading, for the additional categories of (3) temporary representatives and (4) temporary observers to organs of international organizations and to international conferences. If article 1 was prepared along those lines, it would be easier to determine, on re-reading the draft articles as a whole, which rules applied to all categories of representatives.

42. Mr. NAGENDRA SINGH said that since it was an undeniable fact that permanent observers existed, it would be impossible for the Commission not to include some reference to them in the draft articles. It was equally undeniable that permanent observers possessed a representative character, and were not mere liaison officers. He agreed with Mr. Ustor, therefore, that some stress should be laid on their representative character, although he also agreed with Mr. Kearney that the Drafting Committee might find some more appropriate term than "representative". It was essential to distinguish

¹⁰ See *Yearbook of the International Law Commission, 1968*, vol. II.

the permanent missions of Member States from the observer missions of non-members; the Drafting Committee should bring out that distinction.

43. Mr. USHAKOV said he shared the Special Rapporteur's views on the importance that should be attached to the institution of permanent observer missions, for two main reasons. In the first place, the institution was developing and would develop further in future. Of course, the articles applied only to international organizations of a universal character, but, as was made clear in article 2, there was nothing to prevent them from applying to other international organizations which made wider use of the institution than did the organizations of a universal character. Secondly, there were no written rules on the matter, and that fact enhanced the importance of the series of articles on permanent observer missions, which seemed to be useful and necessary.

44. With regard to article 0, he drew the Commission's attention to paragraph 14 of its report on the work of its twenty-first session.¹¹ In his opinion, there was a close connexion between the definition of the term "permanent observer" and that of the term "permanent representative"; the terminology would obviously have to be standardized, taking into account the definition which would appear in article 1 of the draft. Like Mr. Ustor, he thought that a unified terminology should be adopted for the whole set of draft articles. With regard to the use of the term "*mission d'observateurs permanents*", some confusion had been created by the fact that the adjective "permanent" qualified, not the mission, but the observers themselves. In his opinion, it was the mission that should be described as permanent, and it might therefore be better to refer to "permanent missions of observers" or "permanent missions of observation" in article 0. The question was of considerable importance, for the articles on the legal status of permanent observers depended on the terminology used. He also endorsed the remarks made by Mr. Reuter and Mr. Rosenne on the drafting of article 0. The representative character of permanent observer missions could not be questioned, for that character was conferred on them by the very fact that they were sent by States.

45. Mr. RAMANGASOAVINA said that the Special Rapporteur had been confronted by the particularly difficult task of defining the legal status of representation which, by definition, was unofficial. A perusal of article 0 showed that the ambiguity of certain terms was due precisely to that difficulty. Thus, in sub-paragraph (a) of the article, confusion was caused by the use of the words "representative . . . character", which had a very specific meaning; he thought that that confusion could be avoided by referring only to the "permanent character" of the mission, without mentioning its official character, which was implicit in the mere fact that it had been sent by a State. He agreed with Mr. Reuter's remarks on sub-paragraph (b), but thought it became comprehensible if read in conjunction with article 55 of the draft. It seemed to him, therefore, that there was some justifi-

cation for the wording proposed by the Special Rapporteur.

46. Mr. ALBÓNICO said he agreed with Mr. Rosenne that it was too soon for the Commission to discuss article 0 in detail. He was inclined to think that a permanent observer had a certain representative character, but the question of his powers and functions vis-à-vis the international organization was a different matter. Article 52, paragraph 1, stated that "The principal function of a permanent observer mission is to ensure the necessary liaison between the sending State and the Organization", while paragraph 2 stated that such missions might also perform "other functions of permanent missions as set forth in article 7". In his opinion, only the functions referred to in sub-paragraphs (b) and (d) of article 7 were functions of permanent observer missions. Similarly, with regard to the facilities, privileges and immunities of permanent observer missions referred to in article 60, he did not consider it possible to grant such missions the same rights as permanent missions.

The meeting rose at 12.55 p.m.

1044th MEETING

Wednesday, 6 May 1970, at 10.15 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Albónico, Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227)

[Item 2 of the agenda]

(continued)

Article 0 (Use of terms) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 0 in the Special Rapporteur's fifth report (A/CN.4/227).

2. Sir Humphrey WALDOOCK said he agreed with Mr. Ushakov that the fact that permanent observer missions did not fulfil all the functions of a permanent mission did not mean that they were not representative in character. The difference was that the representative character of permanent observer missions as presented by the Special Rapporteur was unilateral, since they were invested with representative character only by the sending State, whereas that of permanent missions was

¹¹ Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10.

bilateral, since their representative character was derived from both the sending State and the international organization. He could accept Mr. Ushakov's notion that permanent observer missions were representative in character, for the simple reason that, on any view, they were invested with authority from the sending State to represent it in the performance of some functions, even if they were of a relatively minor character. The general principles underlying the position of permanent observer missions were, however, far from clear and would require further study; he had strong reservations on the question whether representation of a permanent observer mission to an organization could be established on a purely multilateral basis. The memorandum sent by the Legal Counsel to the Acting Secretary-General of the United Nations on that subject on 22 August 1962¹ seemed to indicate that although permanent observers were, in fact, present at United Nations meetings, they did not have an officially recognized status. In the case of the smaller international organizations, such as the Council of Europe, the establishment of permanent observer missions was subject to the organization's approval, but the procedure followed in the United Nations seemed to be much less formal. He would not go into the matter further at the present time, since the real difficulties would arise in connexion with the later articles.

3. The CHAIRMAN, speaking as a member of the Commission, said that in his view the Special Rapporteur had been right in ascribing a representative character to permanent observer missions, since if they were not representative, in the sense that they possessed official authorization from the sending State to be present at meetings of the international organization, and if they were expected merely to perform the functions of a post office, it would surely be unnecessary to refer to them at all in the draft articles. Their exact nature would, however, be brought out more clearly when the Commission took up the more substantive articles, in particular articles 51 and 52. He agreed with Mr. Rosenne, therefore, that at the present stage article 0 should be referred to the Drafting Committee, whose attention should be drawn to the points made during the debate.

4. Mr. YASSEEN said he considered the representative character of a permanent observer mission to be essential, since it was a constituent element of the mission. It was also evident that the mission was linked both with the State it represented and with the international organization to which it was sent. Nevertheless, he was not sure that that constituent element should be taken into account in the definition. He agreed with Mr. Ushakov that it was the mission itself, not the observers, that should be described as permanent. Like the Chairman, he thought that article 0 should be referred to the Drafting Committee.

5. Mr. ROSENNE, referring to Mr. Ago's suggestion at the previous meeting that the words "permanent

observer" in sub-paragraph (b) should be replaced by the words "head of the permanent observer mission", said that at the present stage in the discussion, it would be better to follow as closely as possible the wording of article 1 (e), which defined a "permanent representative"² though he agreed that subsequently that definition would probably have to be revised.

6. Mr. CASTRÉN said he supported the Chairman's proposal to refer article 0 to the Drafting Committee. With regard to the use of the expression "representative character", which had been discussed at the previous meeting, he was quite prepared to recognize that a permanent observer mission possessed that character by virtue of the fact that it had been sent by a State to an international organization; but he was not sure that it was necessary to say so. Like Mr. Ramangasoavina, he thought the expression could be omitted, since the representative character of the mission would still be implicitly recognized.

7. Mr. BARTOŠ said he would not object to article 0 being referred to the Drafting Committee, but he thought it necessary first to settle the awkward question of the relationship between that article and article 52, since paragraph 2 of the latter provision referred to functions of permanent observer missions other than liaison functions. That was a matter of substance and he asked the Commission to bear his comment in mind when it came to consider article 52. He might submit a specific proposal concerning that article.

8. Mr. EL-ERIAN (Special Rapporteur), summing up the discussion, said that Mr. Nagendra Singh and Mr. Ramangasoavina had rightly pointed out that the Commission could not ignore permanent observer missions, because the institution existed. Sir Humphrey Waldock had reminded the Commission that the Legal Counsel, in his memorandum of 22 August 1962, while acknowledging that permanent observers were present at United Nations meetings, had indicated that they did not have an officially recognized status. It was therefore necessary to give a definition of permanent observer missions which would establish their legal status and hence the facilities, privileges and immunities to which they were entitled. In that connexion, it was significant, as he had pointed out in his commentary to article 61 (A/CN.4/227), that the Supreme Court of the State of New York, in *Pappas v. Francini*, while noting that observers were not covered by the Headquarters Agreement of the United Nations, had recognized their representative character and had found that that was a reason for granting them functional immunity.

9. The majority of the members of the Commission seemed prepared to recognize the "representative character" of permanent observer missions, though there were some differences of opinion about the precise meaning of that expression and the desirability of referring to it in the definition. It appeared to be generally agreed that the institution of permanent observer missions should be

¹ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 190, para. 169.

² *Op. cit.*, 1968, vol. II, p. 196.

regulated in the draft articles, provided that it was possible to strike a proper balance.

10. With regard to the drafting, Mr. Ago had proposed that the term "permanent observer" in sub-paragraph (b) should be replaced by the words "head of the permanent observer mission" and a similar change had been suggested in sub-paragraph (e) of article 1, where the term "permanent representative" was defined. As Special Rapporteur he did not consider such uniformity desirable, because the usage of governments tended to vary. Not all of them might be prepared to accept the word "head"; his own Government, for example, had a "permanent representative" to the League of Arab States. He suggested that the Commission should obtain the views of governments and the specialized agencies before coming to a decision.

11. He agreed with Mr. Ushakov that the adjective "permanent" in sub-paragraph (a) should qualify the word "mission".

12. Mr. Castrén's suggestion that the article should describe in detail the function and purpose of permanent observer missions should be taken up by the Drafting Committee in connexion with articles 51 and 52.

13. He assured Mr. Ustor that it was his intention to draft articles based on common characteristics, applicable to both representatives and observers.

14. He agreed with Mr. Albónico that it was necessary to specify the exact powers and functions of permanent observer missions, as opposed to those of permanent missions.

15. In conclusion, he wished once again to emphasize the importance of receiving the views of governments before the expiry of the term of office of the present members of the Commission.

16. Mr. YASSEEN said that the debate, and especially the Special Rapporteur's statement, had shown that the Commission should keep to the method it usually followed with regard to terminology: it should wait until it had advanced further in its consideration of the substantive provisions.

17. Mr. USHAKOV said he agreed with Mr. Yasseen and hoped that the decision to refer the article to the Drafting Committee would be interpreted in that sense. Moreover, article 0 in its existing form did not define all the terms used in the subsequent articles, whereas article 1 contained a complete list of definitions. In his view, article 0 needed to be expanded.

18. Mr. TSURUOKA said he supported Mr. Yasseen's view. If the Commission referred draft article 0 to the Drafting Committee, that Committee would have to wait until the ideas now under discussion became much clearer; it could do no useful work until then.

19. Mr. ROSENNE said that Mr. Ushakov had raised a question of principle; it was his understanding that article 0 would be reported by the Drafting Committee as an addendum to article 1, not as part of a separate instrument, and that the articles now being discussed would be included in the same instrument as articles 1-50.

20. Mr. BARTOŠ said he fully shared Mr. Tsuruoka's views. It was essential that the Drafting Committee should consider article 0 not in isolation, but together with the succeeding articles 51 and 52.

21. Mr. NAGENDRA SINGH said that it was also his understanding that all the draft articles were intended to form a complete whole and could not be divided into two separate instruments.

22. Mr. EL-ERIAN (Special Rapporteur) said that the draft articles now under discussion were designed to supplement those on permanent missions, which formed the main part of the topic.

23. The CHAIRMAN suggested that the Commission should refer article 0 to the Drafting Committee, with the recommendation that final consideration should be deferred until more progress had been made with the substantive articles.

It was so agreed.³

ARTICLE 51

24.

Article 51

Establishment of permanent observer missions

Non-member States may establish permanent observer missions to the Organization for the performance of the functions set forth in article 52.

25. Mr. EL-ERIAN (Special Rapporteur), introducing article 51, said that the article contained a general rule under which non-member States might establish permanent observer missions to effect the necessary association with an international organization, short of full membership. It was assumed that the organization concerned was one of universal character within the meaning of article 1 (b). The same assumption could not be made in the case of a regional organization, though of course it might be of interest to a non-member to establish an observer mission to such an organization. He understood that there were observers to the Council of Europe, for example. Unfortunately, information had not been provided by the regional organizations; it had only been received from the specialized agencies and the International Atomic Energy Agency.

26. For different reasons, certain countries, notably Switzerland and Western Samoa, chose not to be members of the United Nations; but they did have observer missions. With regard to the "divided countries"—Germany, Korea and Viet-Nam—which had been excluded from the 1955 "package deal" and thereby from United Nations membership, he noted that some of their governments had gained admission to the specialized agencies and had thus been able to establish observer missions to the United Nations. That had been made possible by the practice of admitting observers only from States that were members of one or more specialized agencies or parties to the Statute of the International

³ For resumption of the discussion, see 1061st meeting, para. 56.

Court of Justice; but as a result of that practice, the other governments of the divided countries were prevented from establishing observer missions.

27. As explained in paragraph (4) of the commentary to articles 51 and 52, the institution of observer missions could be useful to very small countries which did not have the necessary resources to bear all the burdens of membership of the United Nations and were interested in some kind of association short of full membership.

28. Mr. CASTRÉN observed that article 51 reproduced, *mutatis mutandis*, the text of article 6 of the draft,⁴ on the establishment of permanent missions by member States, the principle of which was based on well established practice and had been easily accepted by the Commission at its twentieth session. Article 51, however, applied to the case of non-member States, and although the point of view adopted by the Special Rapporteur was backed by solid arguments—in particular the fact that it was generally useful for the organization and the States concerned to maintain permanent contact, especially in view of the universal character of the organization—it might be asked whether, in certain cases, the organization would not prefer not to grant freedom of access to a non-member State, even as an observer: for example, in the case of a member State which had been excluded from the organization. It was true that much would depend on the definition of the functions of permanent observer missions and the scope of the facilities, privileges and immunities granted to them, to which matters the Commission would revert later. In any case, the present practice of international organizations was not to grant non-member States the right to establish permanent observer missions—at least not without the tacit consent of the organization.

29. He did not believe, either that the question of the representation of very small States could be settled by the establishment of permanent observer missions; moreover, it was not only small States that were involved, but also several other classes of States which were in special situations. For all reasons, he would hesitate to give unreserved support to the Special Rapporteur's very liberal proposal for article 51. Perhaps it should be amplified by adding the words "in so far as this is provided for in the relevant rules of the organization", as suggested by the Netherlands Government in its comments on article 6 (A/CN.4/221), and adding to that phrase the words "or with the assent of the competent organ of the organization". The competent organ would normally be the general assembly of the organization concerned, and as stated in paragraph (5) of the commentary to article 3 of the draft, the expression "relevant rules of the organization" also included the practice prevailing in that organization.

30. Mr. REUTER said that the intentions which had led to the inclusion of article 51 in the draft were praiseworthy, in particular the concern for universality, which was in accordance with the spirit of the Charter and of the constituent instruments of the specialized agencies.

However, article 51 raised basic problems which affected the whole draft. For the words "may establish" did not necessarily convey the idea of a rule imposing an obligation on the organization, and it might therefore be asked whether the convention the Commission was drafting laid down rules for the organization or for the host State and third States bound by the convention. The second assumption seemed to be the correct one, but if the Commission decided that it was to the organization that the rules in the draft articles applied, three difficulties would arise. First, it was hard to see how an organization could be bound by a convention to which it was not a party as a legal person. Secondly, since according to article 3 the application of the articles was without prejudice to any relevant rules of the organization and it was agreed that those rules included practice, there was a conflict between article 51 and article 3. Thirdly, the organizations themselves might not agree that any non-member State whatever, for example, member States which had been excluded from the organization or entities having the character of States which had been created by civil wars, could establish a permanent observer mission to them.

31. Moreover, it was not satisfactory to offer States whose existence was not challenged, but which were not yet members of the organization in spite of their desire for membership, a bastard formula for participation in the form of permanent observer missions. Consequently, since the draft articles could hardly create an obligation for the organization, it would be more logical to add to article 51 the words "with the assent of the organization", as Mr. Castrén had proposed. That would at the same time solve other problems, in particular the problem of the representative character of a mission raised by sub-paragraph (a) of article 0; for since only States whose permanent observer missions had been accepted by the organization would benefit by the convention, the representative character would be conferred by the organization's assent. The problem of the functions of permanent observer missions, which was raised in article 52, would also be solved if the mission were only established with the assent of the organization. It was impossible to provide in the draft articles for a régime which would cover all the functions of permanent observers, but those functions would take on a representative character merely by virtue of the fact that the organization had recognized them.

32. He would not take up the question of the "micro-States", which was a very special one.

33. Mr. USHAKOV said he had no fault to find with article 51, which applied to a situation entirely similar to that dealt with in article 6 of the draft. It was self-evident that a member State which established a permanent mission in accordance with article 6 could only do so if the relevant rules, and hence the established practice, permitted it. That was laid down in articles 3 and 4 of the draft which, it must be emphasized, were general provisions applicable to the whole draft and consequently to article 51. In the absence of any rules or practice, non-member States would not be entitled to establish permanent observer missions, any more than member States

⁴ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 199.

would be entitled to establish permanent missions. If the Commission considered that the scope of articles 3 and 4 was not sufficiently wide, it would have to reformulate a general rule applicable to the permanent missions established by member States and to the permanent observer missions of non-member States; but article 51 in its present form was just as correct as article 6.

34. Sir Humphrey WALDOCK said that he would have difficulty in accepting the rule in article 51 without some recognition of the position of the organization as the body which was to receive the observer mission.

35. In his view, the case now under consideration was fundamentally different from that of the permanent representative, which was dealt with in article 6. The permanent representative represented a member State which was either a founder member or had gone through the admission procedure of the organization concerned. Under the present text, the State concerned would not have been accepted in any way, either by the organization or by its members, for relations with the organization. It was therefore necessary to introduce into the text of article 51 some element indicating the need for the assent of the organization.

36. The issue was an important one. If no reference were included to the consent of the competent organ of the organization concerned, who would decide the matter in controversial cases? The only possible answer to that question was that the decision would have to rest with the secretariat, perhaps in consultation with the host State, and it was most undesirable for a secretariat to have to take the decision on such a controversial question. A similar problem had arisen in connexion with the law of treaties in regard to participation in multilateral treaties, and the position taken repeatedly by the Secretary-General had been that responsibility for the decision should not be placed on his shoulders.

37. A formal statement in the Legal Counsel's memorandum of 22 August 1962⁸ clearly indicated that there was a procedure of acceptance for observer missions; no credentials were required, but there was a definite process of admission, as a result of which the appropriate facilities were extended to the mission concerned. It was also clear from that memorandum that, for the purpose of establishing an observer mission, certain qualifications were required, such as membership of one of the specialized agencies. The question who was to determine whether the observer mission was to be admitted to participate in that capacity in the work of the organization was therefore inescapable, and it could only be settled by adding to the text of article 51 some formula on the lines proposed by Mr. Castrén and Mr. Reuter.

38. Mr. ROSENNE said that, to his regret, he could not accept article 51 as it stood or the ideas underlying it, whether they were put forward *de lege lata* or *de lege ferenda*. His reasons were similar to those given by Mr. Castrén, Mr. Reuter and Sir Humphrey Waldock.

39. Paragraph (2) of the commentary showed that

those ideas had a direct relationship with the provisions of article 1 (b) and article 2. At the twentieth session, he had abstained from voting on those provisions, for the reasons he had given at the 973rd and 986th meetings.⁶

40. The discussion of article 1 (b) and article 2 in the Sixth Committee in 1968⁷ and the comments by governments (A/CN.4/221 and Add.1) showed that difficulties regarding those provisions were widely shared, and that the provisions of articles 3 and 4 probably did not provide a sufficient safeguard.

41. In the circumstances, prudence was indicated at the present stage, since article 1 (b) and article 2 would probably not emerge from the second reading, or from a future conference of plenipotentiaries, in the form in which they had been adopted at the Commission's twentieth session.

42. The position with regard to article 6 was similar; that article had been subjected to criticisms similar to those made against article 1 (b) and article 2.

43. He thought that much more could be extracted from the Secretariat study on "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities"⁸ than had hitherto been suggested in the course of the discussion. That was particularly true of the Legal Counsel's memorandum of 22 August 1962.⁹ From that statement of the position at United Nations headquarters, it was clear that observers were accepted only from non-member States which were full members of one or more specialized agencies and were generally recognized by Members of the United Nations. The passages of the Secretariat study relating to observers of non-member States sent to specialized agencies¹⁰ were equally clear.

44. In the circumstances, the question of the criteria for determining what constituted a "non-member State" would arise, and he thought it would prove even more difficult to define a "non-member State" than a "State". In that connexion he recalled that the Commission had consistently refused to define the term "State", whatever the context or situation in which that problem had arisen in the past.

45. It was possible to conceive of a situation in which an entity claimed to be a State, but had not succeeded in having its claim recognized by the Security Council in the exercise of its powers under Article 4 (2) of the Charter. It would surely be unthinkable that such an entity should send an observer to the United Nations.

46. The commentary to article 51 did not shed any light on the reasons why the Special Rapporteur pro-

⁶ Op. cit., 1968, vol. I, pp. 170-171, paras. 7-12, and p. 245, para. 20.

⁷ See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 84, document A/7370, paras. 23-25.

⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 154.

⁹ *Ibid.*, p. 190, para. 169.

¹⁰ *Ibid.*, pp. 203-204.

⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 190, para. 169.

posed to jettison, without suggesting any alternative, the two criteria set out in the Legal Counsel's memorandum of 22 August 1962, which had always been followed in practice.

47. He noted that article 60 would make articles 22 to 44¹¹ applicable to permanent observer missions. Those articles imposed certain obligations on the organization concerned. Leaving aside the question whether organizations would become parties to the draft convention under discussion, it should be noted that the implementation of article 60 by an organization would create, for its executive head and secretariat, precisely those difficulties which had made it impossible for the Secretary-General of the United Nations to apply the "all States" formula in the exercise of his functions as depositary for multi-lateral treaties.

48. The views he had expressed would govern his attitude to articles such as article 51, unless the representative of the Secretary-General could authoritatively state that his misgivings were unfounded. For those reasons the Commission should adopt a cautious attitude, similar to that which it had adopted in 1965 on the question of participation in treaties.

49. The New York telephone directory showed how many entities claimed to have observer missions which were unknown to the United Nations internal directory. Observer status could only be created by the practice of the competent organs of the organization concerned or by its constituent instrument.

50. As to the problem of "micro-States" mentioned in paragraph (4) of the commentary to article 51, the Commission was not empowered to examine a question that was at present under consideration by a committee of experts appointed by the Security Council.

51. He thought that an amendment of the text on the lines suggested by Mr. Castrén and Mr. Reuter would change the whole concept of article 51 and was likely to make its provisions much more acceptable to him, but he reserved his position until he saw an amended text.

Organization of work

52. The CHAIRMAN announced that he had received a telegram from Mr. Bedjaoui confirming that he proposed to attend the Commission's session from 11 May and suggesting that some time might be devoted to his third report on succession of States in respect of matters other than treaties (A/CN.4/226). He reminded the Commission of its decision at the previous session to give priority to the topic of relations between States and international organizations, followed by State responsibility, succession in respect of treaties and, if time permitted, succession in respect of matters other than treaties.¹²

The meeting rose at 1 p.m.

¹¹ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, pp. 4 *et seq.*

¹² *Ibid.*, p. 32, para. 93.

1045th MEETING

Friday, 8 May 1970, at 10.15 a.m.

Chairman: Mr. Richard D. Kearney

Present: Mr. Ago, Mr. Albonico, Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Nagendra Singh, Mr. Raman-gasoavina, Mr. Rosenne, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 51 (Establishment of permanent observer missions) (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of article 51.

2. Mr. BARTOŠ said that the first point to settle was whether the convention which the Commission was preparing would have the effect of obliging the organization to grant every non-member State the right to send a permanent observer mission to it. If the convention was to be open for signature or accession by the organizations concerned, the question would not arise, but if only States could become parties to it, article 51 would establish a unilateral privilege for States, since they would in any case be able to impose their presence on the organization. Moreover, the convention would place non-member States in a more favourable situation than member States, which were obliged to fulfil certain conditions in order to become members of the organization. Consequently, although he was in agreement with the general principle laid down in article 51, he thought it should be decided that the right thus granted to non-member States could be exercised only under the conditions provided for in the rules of the organization or with the consent of the organization.

3. Mr. NAGENDRA SINGH said that the statement of the rule contained in article 51 was certainly not incorrect, if taken together with Mr. Ushakov's interpretation of articles 3 and 4¹ regarding the overriding character of the rules of the organization concerned. It was a fact that a number of specialized agencies had made provision for observers.

4. Nevertheless, he was inclined to support Mr. Castrén's proposal to add a concluding proviso stating that the consent of the organization was required. The main argument in favour of such a proviso was that it would state at once, and at one point in the draft, what was the correct position.

¹ See previous meeting, para. 33.

5. The provisions of articles 3 and 4 could easily be lost sight of and the proposed proviso would help to clarify the position. Moreover, if the constituent instrument of the organization concerned was silent on the question of observers, the inference could be drawn—as was shown by the comments of the Netherlands Government (A/CN.4/221)—that any non-member State had the right to send an observer. Clearly, such an inference would be contrary to the Commission's intention; and as Mr. Rosenne had pointed out, articles 3 and 4 did not provide sufficient safeguard.

6. Lastly, the proposed amendment would serve to emphasize the difference between regular missions of member States and observer missions of non-member States.

7. Mr. TSURUOKA said he shared the general view which had so far emerged from the debate, that article 51, as now drafted, was rather over-simplified. Experience showed that there were all kinds of permanent observer missions, including missions from entities to which the Commission did not intend to grant an official international status; a clear distinction must therefore be drawn between such missions and permanent observer missions sent by States whose existence was not in dispute. For that reason, the establishment of permanent observer missions by non-member States should be made expressly subject to the consent of the organization, particularly since the proviso in article 3² would not apply to article 51, as the Special Rapporteur had said that there were no rules concerning the establishment of those missions.

8. Mr. YASSEEN said that article 51 might be confusing unless it was linked to other articles of the draft. If the future convention was to apply to international organizations of a universal character, the right it stated already existed by virtue of a general customary rule which was part of the law of the United Nations. On the other hand, even those who did not question the universal character of the United Nations did not claim that a State could become a member of the Organization as of right, without following a certain procedure, or obtaining a certain decision by a competent organ, and it would therefore be neither just nor logical for a State to be able to establish a permanent observer mission to an international organization without its consent. Accordingly, without contesting the right of every non-member State to establish a permanent observer mission to the organization, it should be specified in article 51 that that right could only be exercised in accordance with a certain procedure and by virtue of a decision of the organization. Where regional organizations were concerned, permanent observer missions could be established only with their consent and if their constituent instruments so provided.

9. Mr. RAMANGASOAVINA said he approved of the basic principle of article 51, which enabled non-member States to maintain relations with international

organizations, but was not sure how far the right thus conferred on them extended. He agreed with several other members of the Commission that the exercise of the right should be made subject to the consent of the organization concerned, mainly in order to establish a distinction between member States, whose right to establish permanent missions was absolute, and non-member States, for which that right so far derived only from practice. In addition to their rights, member States also had obligations and duties, and it would be unfair for non-member States only to enjoy privileges. It was true that by confirming the status of permanent observer missions the Commission would merely be following the progressive development of international law, for it sometimes happened that States having no diplomatic relations concluded bilateral agreements for the purpose of establishing trade missions whose members enjoyed the same privileges and immunities as officials of diplomatic missions.

10. Article 51 should therefore be adopted, but with the amendment proposed by Mr. Castrén.³ Nevertheless, it might perhaps be advisable also to consider the case in which an organization did not agree that a non-member State could establish a permanent observer mission to it, whereas that State considered that it was entitled to do so.

11. Mr. USTOR said that the clear and short rule contained in article 51 was based on the same idea as article 6.⁴ Both dealt with the relationship between a State and an organization of a universal character. For an organization of that type, it was appropriate to provide that States had the right to establish missions—permanent missions in the case of member States and observer missions in the case of non-member States. Such a rule was consistent with the postulate of universality and with the idea that general international treaties should be open to all States. The right to participate in organizations of a universal character was inherent in statehood.

12. That right was of course subject to the rules of admission. But those rules should be framed in such a way as to permit the participation of all States; they should not provide for a more restricted participation than Article 4 of the Charter.

13. It had been objected that article 51 would impose an obligation on an organization which might not be a party to the draft convention. The same could be said of the provisions of article 6, which imposed an obligation to accept a permanent mission.

14. It had also been said that article 51 would impose obligations on the host State; but those obligations were not more onerous than those resulting from article 6. The host State might well have more difficult relations with a State member of the organization than with a non-member State wishing to establish an observer mission.

³ See previous meeting, para. 29.

² See *Yearbook of the International Law Commission, 1968*, vol. II, p. 197.

⁴ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 199.

15. The position was similar to that which arose in connexion with the definition of what constituted a "State", and the same difficulty would arise over the application of article 6. And in the implementation of either article a conflict could arise between two authorities claiming to represent the same State.

16. In short, the position was that article 51 laid down a rule of principle which it might not be easy to carry out in certain cases; but that should not deter the Commission from adopting the rule.

17. Article 3 made it clear that the organization was in a position to regulate the establishment of observer missions, in the same way as that of permanent missions. Similarly, the organization could not be prevented from passing an individual resolution in respect of a State. The organization could exclude a State and could, by way of sanction, debar that State from maintaining an observer mission.

18. If, however, there was no rule to the contrary in the organization concerned and there was no individual decision to prevent it, any State had the right to participate in an organization of a universal character. If a State did not participate as a member, it had the right to maintain contact with the organization through observers, as provided in article 51.

19. For those reasons, he did not favour the addition of a proviso on the lines proposed by Mr. Castrén. If the majority of the members believed that some addition should be made to the text of article 51, it should take the form of a concluding proviso on the following lines: "unless precluded by the rules of the organization or by a specific objection by the organization". But he did not think that such an addition was necessary, because the provisions of article 51, read in conjunction with articles 3 and 4, were clear and consonant with general international law.

20. Mr. USHAKOV said he wished to explain his own views and to be sure he understood those of other members of the Commission. Article 51 laid down a general principle applicable to a situation similar to that of the establishment of permanent missions by member States. The latter situation was governed by article 6, which did not mention the consent of the organization. Why, then, should that consent be expressly required in the case of permanent observer missions? It was quite obvious that no member State would establish a permanent mission without the organization's consent and that that consent was tacit and sanctioned by practice only. If the Commission considered that the organization's consent was necessary for the establishment of missions of all kinds, that should also be specified in the case of permanent missions of member States, but such a provision would be superfluous, because the customary rule already existed. It was equally superfluous to specify that the application of article 51 was subject to the provisions of articles 3 and 4 of the draft, though he would not object to such a proviso. The essential point was to make it clear that article 51 set out a general rule and that it was impossible to provide for all the exceptions which might arise and which, moreover, had a political, rather than a legal, basis. If the practice was to accept

permanent observer missions, then any non-member State could establish such a mission, as the Special Rapporteur proposed. If no such practice existed, no State, whether a member or a non-member, could claim the right to send a permanent mission to an organization.

21. Mr. AGO said that the situations dealt with in articles 6 and 51, though apparently similar, were in fact fundamentally different. Article 6 stated a right of member States, in other words States which had become parties to the constituent instrument of the organization, and under article 3 that right was granted to them without prejudice to any relevant rules of the organization. The relevant rules, however, were usually silent on the matter, and the right of member States to establish permanent missions therefore derived from their membership. But admission to membership of an organization was not a right: the candidate State had to fulfil certain conditions, and its admission was subject to the organization's consent. Where non-member States were concerned, what was the source of their right to establish permanent observer missions? It had been claimed that there was a customary rule, but its existence had yet to be proved. Nor was there any relevant rule of the organization providing for such a right. Consequently, the only other possible source was agreement, even if tacit, between the organization and the State concerned.

22. Moreover, if the organization considered that a particular State did not fulfil the necessary conditions for becoming a member, that meant that it was not convinced of the desirability of allowing that State to take part in its work. If a State had not been admitted to membership and consequently could not establish a permanent mission, why should it be given the right to establish a permanent observer mission, when the organization might advance the same objections as it had to the State's admission? Since the Charter laid down conditions for the admission of Members, it was only logical that those conditions should apply to the acceptance of observers. Similarly, it would be paradoxical to recognize the right of a State which had been expelled from the organization to establish an observer mission, when it would no longer be entitled to a permanent mission under article 6. It was therefore clear that all the rights enjoyed by a State vis-à-vis an organization were of necessity subject to the organization's consent, which should be expressly provided for in appropriate wording in article 51.

23. Consideration should also be given to the position of the host State, which, in agreeing to act as host to the organization, certainly undertook to admit to its territory the permanent representatives of all States members of the organization, but not the representatives of non-member States.

24. Mr. ALBÓNICO said he agreed with Mr. Castrén that the position of non-member States was quite different from that of member States; for the former, the consent of the organization was obviously necessary. A new element would be introduced into the situation, however, if the organization refused its consent. Could it do so arbitrarily? Mr. Ushakov had argued that there should be absolute equality between member and non-

member States, but to him that argument was not legally acceptable. An organization might be justified in rejecting the application of a non-member State if that State's behaviour was not in conformity with the purposes and principles of the Charter. On the other hand, an arbitrary rejection would be unjust to a State which for financial reasons, for example, was unable to participate as a full member but wished to remain in contact with the organization through an observer. He hoped, therefore, that Mr. Castrén would amend his proposal to include the notion that any rejection of an application by a non-member State should at least be well-founded.

25. The CHAIRMAN,* speaking as a member of the Commission, said that he was in basic agreement with the observations made by Mr. Castrén, Mr. Reuter and certain other members. In particular, he agreed with those who thought that article 3 did not provide a satisfactory answer to the problem of article 51, since the latter article dealt not so much with constitutional provisions or actual rules as with practice. It would certainly be dangerous to attempt to solve the problem by relying on paragraph (5) of the commentary to article 3, which stated that "The expression 'relevant rules of the Organization'... is broad enough to include all relevant rules whatever their source: constituent instruments, resolutions of the organization concerned or the practice prevailing in that organization".

26. It had also been suggested that article 51 should include a reference, in some form or other, to the consent of the organization; if that suggestion were adopted, there would appear to be no need to refer to the relevant rules of the organization. He did not think, however, that the problem of article 51 could be solved by wording the article in a negative way, for example, by saying "non-member States may establish permanent observer missions... unless there is a decision to the contrary". That would place a substantial and perhaps unfair burden on both the Secretary-General and the host State, since in the event of disagreement between them, which might conceivably occur in political situations, the whole matter would be left in the air. In his opinion, such a decision could properly be taken only by the constituent organ of the organization itself.

27. It had been argued that article 51 could not possibly cover all exceptional cases, but surely that was what all law—the most obvious example being the law of contract—was designed to do. The Commission could not afford to ignore exceptional cases, since such cases were always arising as a result of civil wars and revolutionary régimes, and they posed grave political problems.

28. Sir Humphrey WALDOCK said that none of the arguments put forward in the discussion had led him to change his view that there was a fundamental difference between permanent observer missions from non-member States and permanent missions from member States. In the régime proposed for the former in articles 51 and 57,

as well as in his explanations concerning credentials, the Special Rapporteur had laid down what many would regard as a blanket provision giving non-member States the right to appoint permanent observer missions, subject only to notification of the organization. To his mind, that would be a rather startling development in international relations, which by their very nature were based on mutual consent. It was only proper, therefore, that article 51 should include some reference to consent, although the Commission could not impose on organizations the procedure by which that consent was to be expressed.

29. In his view, what the Special Rapporteur was attempting to do in article 51 and certain other articles was not supported by, and was really contrary to, existing practice as described in the Legal Counsel's memorandum of 22 August 1962,⁵ paragraph 1 of which said "... it has been the policy of the Organization to make such facilities available only to those [permanent observers] appointed by non-members of the United Nations which are full members of one or more specialized agencies and are generally recognized by Members of the United Nations". Moreover, by adopting article 51 as drafted at present, the Commission would be giving permanent observer missions not only a more clearly defined, but a larger legal status than they now possessed; that might be desirable as a progressive development of international law, and he himself was generally in favour of it, but it would be going beyond the present practice.

30. He supported the general concept which inspired the articles, but he thought they would be unacceptable to States if they failed to include some reference to the element of consent. Moreover, it was undesirable to leave the decision to admit a permanent observer mission to be taken largely by the Secretary-General and the host State in consultation. There should be some decision by the organization itself, which would be binding on the host State. Some members had said that it was unnecessary to provide for what would only be exceptional cases; but, as the Chairman had pointed out, such cases did arise. It would be unfair to throw the burden of dealing with them on the Secretary-General; and in an analogous context in the law of treaties, the Secretary-General had repeatedly declined to assume such a burden.

31. Mr. ROSENNE said that existing practice with respect to permanent observer missions, although meagre, seemed to be fairly uniform: the role of the organization ceased when it had accorded an appropriate seat to the observer in the gallery at a public meeting, and any privileges and immunities enjoyed by him were granted by the host State *ex gratia*. The suggestion that the draft need not make provision for exceptional cases was liable to obscure the fact that the institution of permanent observer missions itself was exceptional and anomalous and designed to meet exceptional and anomalous needs, which had their origin in highly political

* Mr. Kearney.

⁵ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 190, para. 169.

circumstances. That political aspect was evident from a perusal of paragraph (1) of the Special Rapporteur's general comments on Part III (A/CN.4/227). He feared, however, that if the institution of permanent observer missions was given an exaggerated legal status, the result would not be the progressive development of international law, but rather that in a few years some new informal institution would have to be created to meet exceptional needs. As a result of the discussion he now had serious doubts about the wisdom of going too far in the matter of permanent observer missions, and he thought it preferable for the Commission to confine itself to the problem of clarifying the respective rights and duties of the five parties concerned, namely the sending State, the host State, other member States, non-member States with permanent observer missions, and the organization itself, after a permanent observer mission had been established.

32. Mr. USHAKOV observed that there was no reason for leaving it to the host State to decide whether or not it accepted a permanent mission or a permanent observer mission sent to a given organization, since it had to bear all the consequences of the presence of the organization in its territory; the decision lay exclusively with the organization concerned and had to be respected by the host State. In his opinion, moreover, the rules which all organizations had to apply in accepting permanent observer missions were the relevant rules of the organization, referred to in article 3 of the draft. In the absence of such rules, it was for the organization itself to decide whether it should lay down new provisions on the subject; in any case, rules could not be imposed in advance on international organizations of a universal character, and he would therefore accept the addition of the words "subject to the provisions of articles 3 and 4" at the end of article 51.

33. Lastly, although he agreed that there were exceptional cases connected with political difficulties, he considered that the principle dealt with in article 51 should be stated without attempting to provide for those exceptions, since the Commission should not venture into the political sphere.

34. Mr. USTOR said that Mr. Ago had raised the question of the source of the right of a non-member State to establish a permanent observer mission. He (Mr. Ustor) submitted that every State, by virtue of the mere fact of being a State, had the right to participate in organizations of a universal character. It was clear that the organization itself was entitled to prescribe the conditions governing the admission of a permanent observer mission, but in his view no organization of a universal character could lay down more restrictive conditions than those in Article 4 of the Charter. If a State was unwilling, for financial reasons, for example, to become a full member of an organization, it should at least have the right to send observers, so that it could keep itself informed about what was going on.

35. It had been urged that a certain element of consent was necessary on the part of the organization, but surely the very fact of the establishment of an organization of a universal character implied that while mem-

ber States had the right to send permanent representatives to it, they must also tolerate the presence of permanent observer missions from non-member States. That principle corresponded more or less to existing practice and must be accepted if international law was to develop along progressive lines. Mr. Ago had noted that the constitutions of international organizations did not deal with the question of observers; he hoped that the present discussion in the Commission would encourage those drafting such constitutions in the future to give the matter some thought.

36. Mr. BARTOŠ said he had not intended to adopt an anti-liberal attitude, as some members of the Commission had made out. On the contrary, it seemed to him liberal to forestall the disputes which might arise from shortcomings in the precise conditions imposed on those who wished to make use of the articles under discussion. He endorsed Mr. Ushakov's first comment, but disagreed with the last, which was not clear. Mr. Ustor had tried to provide an explanation, but it did not seem to be legally convincing; he had said that access to international organizations could not be subjected to any conditions other than those laid down in the Charter for becoming a Member of the United Nations. But in saying that, he had ignored the fact that an organization such as ICAO laid down conditions which were not in the Charter, since it required the candidate State to accept the obligation to observe in practice some of the Chicago "freedoms of the air". It was indeed hard to conceive of a State not a member of ICAO, which refused to observe the principles on which that organization was founded, being allowed to establish a permanent mission or a permanent observer mission to ICAO. In his opinion, it was not necessary for the international organization concerned to make separate decisions on each request by a non-member State for the establishment of a mission, but it was necessary for the requesting non-member State to fulfil certain general, non-discriminatory, conditions stipulated in advance by the organization.

37. With regard to the exceptional cases referred to by Mr. Ushakov, he thought they were political rather than legal in origin, and the organization concerned might sometimes have to deal with them by adopting appropriate resolutions. He recognized that that procedure was discriminatory, but thought it was sometimes necessary, because certain States must be prevented from abusing the non-discrimination rule in order to evade the general rules laid down by the organization. In such cases, the organization must have the means of defending itself.

38. To sum up, he thought that international organizations should be allowed to decide whether or not to accept permanent observer missions, and he was therefore in favour of inserting a reference either to the relevant rules of the organization or to its consent, though he preferred the former solution.

The meeting rose at 1 p.m.

1046th MEETING

Monday, 11 May 1970, at 3.5 p.m.

Chairman: Mr. Taslim O. ELIAS

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

Tributes to the memory of Mr. Gilberto Amado

1. The CHAIRMAN said he felt sure that the members of the Commission would wish to honour the memory of Mr. Gilberto Amado, who had been a member of the Commission since it had first been established.
2. Mr. NAGENDRA SINGH said that with the passing of Mr. Amado the legal world had lost one of the greatest jurists of his time; his presence had been felt in many international organizations, in particular in numerous United Nations bodies. He had been a kind and gracious colleague and also a great orator, but one who never departed from the Sanskrit maxim which enjoined men always to speak the truth, but to speak it softly and not to say anything that would be unpalatable even to an enemy. He himself had joined the Commission in 1966 and from his own experience could speak of Mr. Amado with affection and admiration as a man of true humility and selflessness. He was reminded of the parable in the great epic of the Mahabharat, in which King Yudhisthir had to answer a number of searching questions before he could partake of water from a pool guarded by a *yaksha*. Two of those questions had been: "Who is the person most respected in the world?" and "Who is the person most loved in the world?". The answers were: "The person who cares for his colleagues is the most respected" and "The one who has no ego is the most loved". The care and attention which Gilberto Amado had given to his colleagues were indeed well known. From his own personal experience he could say that he had been a most kind and gracious colleague, who had gone out of his way to help other members of the Commission. Though given to making long speeches, he had had no ego. In fact, if humility was the greatest virtue in man and arrogance the greatest vice, Gilberto Amado had been the very embodiment of virtue. With him had passed away a veritable legal luminary whose contribution to law and diplomacy would always be remembered.
3. Mr. AGO said that it was difficult to sum up precisely the many-sided personality of Gilberto Amado. When the Sixth Committee of the General Assembly had paid its tribute to his memory, several speakers had recalled in turn the diplomat, the politician, the jurist, the poet and the novelist. He had been all those things, but to picture the whole man one should, perhaps,

imagine a fifteenth-century humanist who had chosen to be born in another age and another country than those which would normally have been his. Though born in Brazil, he had had a predilection for the Mediterranean region, and had loved what its people loved—beauty, life and the pleasures of life. He had been fundamentally good, like all who appreciated the good things of this world. He had been a man in the full sense of the word, with his good qualities and his weaknesses, which had only made him the more likable.

4. His statements in the Commission had always been full of life. Sometimes he would seem to stray from the point or would be groping for the right word; then there would be a sudden flash of humour, of insight, of wisdom—one of those lapidary phrases which his colleagues would afterwards take pleasure in quoting. Those sallies of his could change an occasionally overcharged atmosphere and revive the spirit of co-operation among the members of the Commission.

5. To have sat beside Gilberto Amado in the International Law Commission, session after session, for so many years, had been a remarkable experience; it had enabled him to appreciate the many-sided interests of an outstanding personality and his need to communicate with his fellow men. Sometimes Mr. Amado would draw his attention to a passage in a poem or a phrase in a letter; sometimes he would whisper an aside to him about the turn the discussion was taking or the part a particular member of the Commission was playing in it, occasionally with a touch of reproach or even of malice, which was dispelled the next moment by a kind word.

6. The Commission would certainly not forget Gilberto Amado's teachings, and it was to be hoped that it would be able to apply them at the right time and so avoid certain errors; but it had lost for ever the father and friend he had been to it and could only mourn him.

7. Mr. TSURUOKA said that Gilberto Amado had been not only a diplomat, a statesman, a scholar, a man of letters and an outstanding humanist, but also, and above all, one of the founders of the International Law Commission and the guardian of its traditions. He had shown his deep devotion to the Commission in his statements, his conversation and his writings, but he had also shown it by always remaining a member of the Commission, the only one of its founder members to do so. That strong attachment had seemed to spring from his conviction that the Commission's role was to relieve the world's sufferings and that it could do useful work for peace. Knowing that nations too often acted in contempt of the lawful interests of others, he had believed that, through its work of codification and progressive development of international law, the Commission could bring progress, justice, harmony and order to the international community. As a realist with great experience, he had not underestimated the difficulties of the task, but he had been convinced that the Commission would be able to surmount them.

8. Much as he had respected expert opinion, Gilberto Amado had not been much interested in legal subtleties and had taken little part in the discussion of technical

problems. But whenever he had seen the Commission too deeply divided or on the point of wavering, he had intervened with warmth and enthusiasm to counsel calm, to advocate wisdom and to persuade the Commission to maintain a balance between the doctrines and interests involved. The Commission had often been glad it had followed his advice.

9. As the senior member and father of the Commission, he had lavished his affection on all its members, including newcomers, and on all who worked for it.

10. A distinguished poet in his own country, he could not tolerate negligence of style and had often persuaded the Commission to improve the wording of the articles it was drafting.

11. Gilberto Amado had gone, but his spirit remained with the members of the Commission and continued to guide them. The Commission would be faithful to him and would do its best to ensure that the international community followed the path of progress and justice, bringing harmony and reconciliation to the nations.

12. Sir Humphrey WALDOCK said that when he had received the news of Mr. Amado's death, his first thought had been one of deep sadness at the passing of a close friend who had combined all the qualities of a civilized man. The international community as a whole had sustained a great loss by the death of a man whose learning, sound judgement and progressive outlook had contributed much to the codification and progressive development of international law, to the creation of the Commission's traditions and to the success of its work. His qualities as a member of the Commission had been outstanding and his loyalty and devotion to it absolute.

13. Mr. Amado had always had his own strong views, but had been sensitive to the opinions of his colleagues, and always ready to search for the best solution which would attract general agreement. His puckish humour and colourful language had been one of the joys of the Commission's debates. When the sharpness of his perception had led him to criticize, he had done so with frankness, but at the same time with warmth of spirit. He had given friendship and affection in full measure. He himself would carry with him a lasting memory of the charm and kindness with which Gilberto Amado, as the senior member of the Commission, had spoken upon the completion of the Commission's work on the law of treaties.

14. Mr. Amado had not had an opportunity of taking leave of the Commission, but his last statement to it, made at the 978th meeting,¹ was characteristic of his devotion to the work of codification; in it, he had urged the Commission to study the problem of encouraging the ratification of treaties, thus showing its sense of responsibility and its desire to ensure that the work to which it had contributed so much should bear its full fruit.

15. Mr. YASSEEN said that he was deeply grieved at the death of a man to whom he owed so much, whom he had regarded as a father and who had treated him

as his spiritual son. The first time he had seen Mr. Amado had been in 1958, in the Sixth Committee of the General Assembly, when he had been attacking the International Law Commission's report on arbitral procedure and, in particular, the unrealistic ideas of the Special Rapporteur, Mr. Georges Scelle. Despite his own great admiration for that eminent lawyer, he had been struck by the depth and humour of Mr. Amado's speech; since then he had always greatly admired him and had never ceased to receive kindness and encouragement from him.

16. Gilberto Amado had been the senior member of two bodies: the Sixth Committee and the International Law Commission. There was no need to recall his prestige in the Commission: the regard he had enjoyed in the Sixth Committee had been no less remarkable. Each of his statements had been awaited with impatience and listened to with deep respect. His aphorisms, always illuminating, had often been repeated. The reason why he had enjoyed such prestige and respect was that he had been a great jurist—not in the sense of one who had been through all the legal textbooks and knew every opinion, but in the much higher sense of one who had the necessary intuition to find the right answer. He had acted as arbitrator between the lawyers of the Sixth Committee, in the International Law Commission and at the codification conferences; and although most of the time he had represented a State, he had never given the impression of being tied by the instructions of a government. He had sought the right answer himself, and if it had been found by someone else he had supported it, for he had believed that he had an international mission to seek the truth. That was why he had always made a valuable contribution in international circles and at the conferences in which he had taken part. The outstanding features of his extraordinary personality had been his humanism, his universalism and his conviction of the interdependence of cultures and civilizations; and that was why he had given a fatherly welcome to young lawyers of all countries, particularly those of the Third World.

17. Mr. USTOR said that he too wished to pay homage to the memory of Gilberto Amado, who had taught him much during their acquaintance and given him friendly encouragement and welcome advice when he had first come to the General Assembly. Mr. Amado's statements in the Sixth Committee had displayed the wide range of outstanding qualities which had constituted his personality. He had been a wise man who had lived a full life in law, literature and the service of his country and Latin America. He had made an important contribution to the codification of international law. Without being a revolutionary figure, he had been fully aware of the social inadequacies of his time and had realized the need for change. He had enjoyed life, but had once described it, in memorable words, as no more than a short leave of absence from the eternity of death. He had been wholehearted in conveying his humanistic and legal wisdom to the younger generation of lawyers and diplomats. All who had been his disciples owed him a debt which they could only discharge by cherishing his

¹ See *Yearbook of the International Law Commission, 1968*, vol. I, p. 202.

memory, following his teaching and dedicating their lives to the cause of international law.

18. Mr. RAMANGOASAVINA said he had known Gilberto Amado for only a few years, but he had nevertheless been able to appreciate his vast knowledge of law, of things and of men, to learn from him and to enjoy his kindness and friendship. For him, Gilberto Amado, by reason of his culture, his character and the exuberance of his feelings, had been the very personification of Latin America, that cross-roads of races and civilizations and cradle of a new society. His life, his work and his influence testified to what Latin America had given mankind. He had been a living example of that marvellous story of how a transplanted scion of Europe formed for himself an original and fruitful personality and then came back to rejuvenate and enrich the Old World. As a national of a young State of the Third World, he himself could not fail to welcome the new conception of which Gilberto Amado had been an illustrious architect, working tirelessly to build a society founded on mutual aid, common understanding and universal brotherhood and peace, in a world where men and nations were equal. Despite the vicissitudes of history and the major upheavals he had witnessed, Gilberto Amado had never been discouraged and had kept his faith in the progress of mankind and the possibility of perfecting its organization and its laws. Because of the sympathy he had felt for Asia and Africa, he had given a very warm welcome to lawyers from those regions, who had always found in him a counsellor and a guide.

19. In the International Law Commission, his statements had been a joy to hear, for they had always been rich in ideas and inspiration which reflected the many facets of his exceptional talent and experience. He had always been able to relax the atmosphere by philosophical reflexions and lyrical flights and to raise a laugh with witticisms or anecdotes gleaned from a particularly full career.

20. As the Commission remembered the man who had been its senior member and one of its founders, its thoughts went out to his native Brazil and his family. His work would always remain an inexhaustible source of inspiration for the Commission, and when difficulties arose it would recall the examples he had set.

21. Mr. ALBÓNICO, speaking also on behalf of the absent Latin American members of the Commission, thanked those who had used such moving words about Mr. Amado. He himself had had the honour of knowing him only in the Commission, although Mr. Amado had served as his country's ambassador to Chile and had always been a great friend of Chile. He had greatly admired the depth of Mr. Amado's erudition, his many talents, his delicate sense of irony and his impressive humanistic culture. He remembered an episode on the return journey to South America in 1968 when Mr. Amado had felt unwell during the flight and, having recovered, had spoken of his presentiment that death was approaching. He had said that he did not fear it, and to express his thoughts he had quoted some lines by the Chilean poet Pedro Prado as a mark of friendship to his colleague from Chile, a gesture which he (Mr.

Albónico) had deeply appreciated. Gilberto Amado had been a jurist and a poet of simple things. His loss would be greatly felt, not merely in the Commission, but by Brazil and the whole Latin American community.

22. Mr. BEDJAOUI said that he had first met Gilberto Amado in 1965 at the seventeenth session of the International Law Commission, so he did not feel well qualified to extol his outstanding qualities. Instead of recalling Mr. Amado's threefold career as a jurist, diplomat and man of letters, he would say that he had a tender memory of the man who had guided his first steps in the Commission, whom he had sometimes been privileged to sit beside, and who had shown him all his zest, liveliness and erudition.

23. During those few years he had been struck, like so many others, by the brilliant sayings—sometimes outspoken, always unexpected or inspired—which had revealed a man to whom one could not remain indifferent even if one did not share all his ideas. To each he had left some legacy: an anecdote, a phrase, a confidence, something to remember him by. Each had thus had the impression of being bound to him by a special link of affection, and that was the mark of an exceptional man. When the Commission had met in Monaco in January 1966, Mr. Amado had spoken to him at length of the cherished memory of his daughter, Vera Clouzot, who had died some years before.

24. Mr. CASTRÉN said that unfortunately he had been absent when the Sixth Committee had paid its tribute to the memory of Gilberto Amado, but at a subsequent meeting he had expressed his grief at the passing of a very dear friend and respected colleague.

25. Everything which had been said showed how impressive had been the stature of the man and his very varied talents. Not only had he excelled in international law, but he had also been outstanding as a writer, poet, teacher, statesman and diplomat. And he had had charm such as was rarely found.

26. Although Gilberto Amado had been Brazil's first diplomatic representative to Finland thirty years before, he had only met him much later, at the second United Nations Conference on the Law of the Sea, at which, as head of the Brazilian delegation, he had made some notable statements. In one of them, in particular, he had extolled the grandeur and beauty of the sea and its importance to all mankind, in a poetic vision tinged with the wisdom of the law.

27. In the International Law Commission, Mr. Amado had intervened rarely, perhaps, but always at the right moment to keep the debate on practical lines and to prevent his colleagues from becoming too involved in the theoretical aspects of the matter under discussion. He had often suggested practical and wise solutions which had contributed much to the satisfactory progress of the Commission's work. It had been a great pleasure to listen to him, for he had been a master of the apt simile—he had once described the *rebus sic stantibus* clause as a "serpent of the law".

28. All the members of the Commission regretted the loss of their senior member, who had done so much for

the codification and progressive development of international law and for better understanding among nations. It was incumbent on the Commission to bear in mind his fine example, his valuable advice and his noble ideas.

29. Mr. EL-ERIAN said that Mr. Amado had been associated with the Commission from the beginning; in fact, he had been a member of the Sub-Committee of the Sixth Committee of the General Assembly which had drawn up the Commission's Statute. His membership of the Commission had been an honour which he had consistently preferred to any other with which a lawyer might seek to crown his career, and he had deeply cherished his position as the Commission's senior member.

30. The Commission was a body to which different members made different contributions: some gave their theoretical knowledge; some their practical experience; others excelled in the art of draftsmanship. Gilberto Amado's contribution had made a great impact on the Commission, but was not so easy to classify. A typical instance of it was his way of intervening in the final, critical moments of a debate, when the Commission was about to exceed the appropriate limits of the possible and realistic in progressive development, to remind it that in the last analysis, however far the Commission might wish to go, it was States that made international law. He had also been a humanist and a poet, but it was as a lawyer that he had wished to be remembered. Other speakers had rightly stressed his kindness and encouragement to the younger members of the Commission and his awareness of social inequalities. He would echo their comments, and in concluding remind the Commission that "old soldiers never die; they only fade away".

31. Mr. KEARNEY said that of all the qualities of Mr. Amado which other members had so eloquently recalled, the ones which stood out most prominently were his zest for life, his wide-ranging interests and his stubborn refusal to allow old age to dull the cutting edge of his mind, to curb his activities or to undermine his search for the best. Among many other things, Mr. Amado had been a poet, and it was the words of two famous poets that perhaps described his spirit best. For Tennyson had written, in *Ulysses*:

I cannot rest from travel: I will drink
Life to the lees: all times I have enjoy'd
Greatly, have suffer'd greatly, both with those
That loved me, and alone; on shore, and when
Thro' scudding drifts the rainy Hyades
Vext the dim sea: I am become a name;
For always roaming with a hungry heart
Much have I seen and known; cities of men
And manners, climates, councils, governments,
Myself not least, but honour'd of them all;
And drunk delight of battle with my peers,
Far on the ringing plains of windy Troy.
I am a part of all that I have met;
Yet all experience is an arch wherethro'
Gleams that untravell'd world, whose margin fades
For ever and for ever when I move.
How dull it is to pause, to make an end,
To rust unburnish'd, not to shine in use!
As tho' to breathe were life.

And then there were Dylan Thomas's lines:

Do not go gentle into that good night,
Old age should burn and rave at close of day;
Rage, rage against the dying of the light.
Though wise men at their end know dark is right,
Because their words had forked no lightning they
Do not go gentle into that good night.
Good men, the last wave by, crying how bright
Their frail deeds might have danced in a green bay,
Rage, rage against the dying of the light.

32. Mr. ROSENNE said that all those who, like himself, had been associated with Mr. Amado in the Commission, in the Sixth Committee and in the great codification conferences, would cherish that association and remember it with pride and humility, for he had been a good master in the law and in United Nations diplomacy.

33. Mr. Amado had made an outstanding contribution to international law through his personal efforts to create a good and friendly atmosphere, both in the Commission and in the Sixth Committee. He had had a remarkable gift for seeing clearly the middle road between legal perfectionism and diplomatic pragmatism. He had been an intensely practical diplomat, concentrating above all on the art of the possible. He could change his own views in the light of experience and after hearing discussion by his colleagues, as had been shown by his positions on reservations to multilateral treaties.

34. Mr. Amado would always be remembered for one of his favourite aphorisms, *Les Etats ne sont pas des bébés*, which so often pulled the Commission up short when that was most needed.

35. In 1946 and 1947, both in the Sixth Committee and in the Committee on the Progressive Development and Codification of International Law, Mr. Amado had been perhaps the most consistent proponent of two inter-related theses: first, that the conventional method should be the normal manner of codifying international law; second, that the members of the International Law Commission should not be allowed to retire to an ivory tower. Events since 1947 had proved him right on both points.

36. In his memorable statement at the 893rd meeting proposing a resolution of appreciation of Sir Humphrey Waldock's work as Special Rapporteur on the law of treaties,² Mr. Amado had made the significant statement that "The Commission did not give lessons in law; it tried to help States to derive the maximum benefit from their contacts within the international community". At the second meeting of the very first session of the Commission in 1949, he had said that the Commission's work "could not, of course, be purely theoretical. It would have to take into account political contingencies and the opinion of governments".³ He had then gone on to quote from his statement before the Committee on the Progressive Development and Codification of International Law:

"Neither the codification nor the development of

² See *Yearbook of the International Law Commission, 1966*, vol. I, part II, p. 335.

³ *Op. cit.*, 1949, p. 18, para. 34.

law can be achieved merely by the submission of learned opinions. They must take the form of resolutions by the General Assembly or of multilateral conventions. But those resolutions and conventions must not be submitted under 'take it or leave it' conditions."

37. Gilberto Amado had also been a great humanist, a person who deeply appreciated life, and a writer of no mean merit. It was a privilege to have been associated with such a man and it was an honour for the Commission to have had such a personality as its senior member.

38. Mr. BARTOŠ said that his friendship and collaboration with Gilberto Amado went back to the time when the Statute of the International Law Commission had been drawn up. At that time there had been two conflicting views: Mr. Jessup's view that the Commission should be a permanent and totally independent organ, and Mr. Koretsky's view that it should consist of lawyers playing an active part in the life of States. Mr. Amado had found both those views unacceptable, and it was thanks to his tenacity and adroitness that the Sixth Committee had adopted a compromise Statute based on his ideas. He (Mr. Bartoš) had always thought that Gilberto Amado had then given a great lesson in how a man of experience and a skilful diplomatist fought for what he considered to be the right ideas and succeeded in getting them accepted in practice.

39. As his Government's representative, Mr. Amado had distinguished himself in the Sixth Committee by his individualism and had been guided more by his conscience than his instructions. If his Government had sought to constrain him, he would have arranged to be replaced by his alternate rather than vote himself against what he thought was right.

40. Although he had always refused to be Chairman or Vice-Chairman of the Sixth Committee or the International Law Commission, he had enjoyed the respect of all. He had been particularly attached to the International Law Commission: he had been proud of having contributed so much to its creation, and proud and happy to have been a member from the beginning and to have represented in it the universal science of law and humanistic ideas. As a member of the Commission, Mr. Amado had been a friend of all its members, willing to give help, particularly to the younger ones, to advise them and to give them the benefit of his long and rich experience. He had been the friend of everyone he had worked with. He had loved people and they, whatever their ideas and beliefs, had loved and respected him. He had been greatly attached to the Commission and had always expressed his desire to remain a member until his death. Without him, the Commission would not be quite the same, for he had been its conscience.

41. Mr. USHAKOV said that he had not made the acquaintance of Gilberto Amado until he had become a member of the Commission in 1967, but Mr. Amado had not been unknown to him, for his reputation as an eminent citizen of his country, loved and esteemed by all its people, and an eminent representative of the peoples of Latin America, had been very great. Gifted with

high intelligence and an outstanding mind, Mr. Amado had combined the talents of a jurist, a poet, a man of letters, a philosopher and a historian. His name evoked a whole period of history, not only of his own country but also of the United Nations, of which he had been one of the founders, as he had been a founder of the International Law Commission.

42. Gilberto Amado had been the senior member of the Commission by reason of his age and his length of service, and also by reason of his attitude and his personality; but he had been very young in spirit and had never lost his great vivacity and good humour. A great man of learning and profoundly human, he had been known for his attachment to the Commission, which the Commission had fully reciprocated. He (Mr. Ushakov) had been touched by his kindness and moved by his humanism. In paying homage to his memory, he felt certain that his spirit would abide with the Commission.

43. Mr. REUTER (France) said that although silence was the highest tribute the heart could pay to the dead, it was the custom to honour them in words as well. Did not those who discharged that duty of gratitude and devotion feel deep within themselves some dim irrational hope of thereby restoring the dead to life for a few moments? If that were so, he would like, with the fervour of one of man's remote forbears who believed in magic, to bring Gilberto Amado to life before the Commission by evoking a memory of him.

44. At the first session of the United Nations Conference on the Law of Treaties, at Vienna in 1968, Mr. Amado had invited his colleagues of the International Law Commission to a very sumptuous and friendly dinner. Had he intended it to be a farewell dinner? Perhaps not, but that was the significance it took on today. Never had he spoken with greater brilliance or greater intimacy, distilling in a few sentences the secret of his personality: an immense love of life, an energy deriving from the primitive forces of nature, a creative urge, accompanied by great sensitivity and wrapped in humour—but a humour which, like that of the great artists, had always been close to tears. He had spoken of Brazil, which he adored; in doing so he had paid homage to all who had helped to make it, from the colonizers to the Africans; his Brazil was no longer merely an earthly fatherland, his own, but an incarnation of what a universal civilization, a united humanity could be; and his words had brought to his hearers a secret dream of an ideal which, with less poetry and less warmth, was also the dream of all who devoted themselves to international law.

45. A great intellectual, a great jurist and diplomatist, Gilbert Amado had not become what so many became under the weight of the years. To evoke him it might be appropriate to refer to Dionysos or Erasmus, but it was enough to say that he was quite simply himself and unique, Gilberto Amado.

46. The CHAIRMAN, speaking as a member of the Commission, said he could testify personally to the warm friendship Mr. Amado had shown to younger lawyers. He had been a man of great sensitivity, who had always expressed humanistic views; in particular he had consistently shown sympathy with the Third World. During the

discussion of the question whether work on the law of treaties should take the form of a code or a convention, Mr. Amado had argued in favour of a convention as being the only means of ensuring that treaty law could be effectively improved. He had fought for the inclusion of provisions on *jus cogens* and the *pacta sunt servanda* rule in the Commission's draft. At the first session of the Vienna Conference on the Law of Treaties in 1968, he had spoken little, but had broken his silence to make some forceful statements in defence of the provisions on *jus cogens*, which were being attacked. At the same session of the Conference, he had made a moving speech at the fourth plenary meeting, at which the Conference had paid its tribute to the memory of Mr. de Luna. He (Mr. Elias) had then had a disturbing presentiment that in making that speech Mr. Amado was himself taking leave of his colleagues.

47. Mr. Amado had not attended the Commission's session in 1969. It had been intended to elect him Chairman at the previous session, but he had intimated that, in view of his great age, the Commission should choose a younger Latin American member.

48. Reference had been made to Mr. Amado's gifts as a diplomat and a writer, but he would wish to be remembered as a jurist; not, he would insist with his characteristic modesty, as a great jurist, but simply as a jurist. It would indeed have been difficult to accuse him of egotism. His calm manner, his culture and his sensitivity to injustice had earned Gilberto Amado the love and homage of the Commission.

49. Speaking as Chairman, he informed the Commission that a written statement had been received from Mr. Tabibi, who was unable to be present.

50. In his statement, Mr. Tabibi expressed his deep sorrow at the death of Mr. Amado, who, to him, had been not merely a colleague, but also a great friend and teacher. He had known him since he had begun his career as a young diplomat in the United Nations more than twenty years ago. Their friendship had continued in the Sixth Committee, in the International Law Commission and at the various codification conferences. Mr. Amado had been an experienced diplomat, a practical statesman and a distinguished jurist, but he had always shown respect for his younger colleagues in the United Nations. He had been a man of vision, ready to support new ideas. Many years ago, he (Mr. Tabibi) had submitted a proposal to the Sixth Committee for the provision of technical assistance in the field of international law, a proposal which had received no support except from Mr. Amado. Together, he and Mr. Amado had ultimately secured acceptance of that idea and technical assistance in the field of international law was now a flourishing activity of the United Nations. Mr. Amado's voice would be heard no more in the Commission or elsewhere in the United Nations, but his many outstanding personal qualities and his devotion to the codification and development of international law would always be remembered by the Commission, and particularly by its younger jurists. The United Nations had lost a great diplomat, Brazil a great son, the Commission its devoted and respected doyen and every member a true friend.

Appointment of a drafting committee

51. The CHAIRMAN said it was proposed that a drafting committee of twelve should be appointed, consisting of the First Vice-Chairman, the General Rapporteur and the following members of the Commission: Mr. Ago, Mr. Castrén, Mr. Castañeda (or, in his absence, the Second Vice-Chairman, Mr. Albónico), Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Ruda, Mr. Ushakov, Mr. Ustor and Sir Humphrey Waldock.

It was so agreed.

The meeting rose at 5.25 p.m.

1047th MEETING

Tuesday, 12 May 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227)

[Item 2 of the agenda]

(resumed from the 1045th meeting)

ARTICLE 51 (Establishment of permanent observer missions) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 51.

2. Mr. AGO said he recognized that the rule to be laid down should be fairly simple and should relate to normal cases. However, the position of observers was rather exceptional, for a State was seldom unable or unwilling to be a member of an international organization of a universal character; moreover, the Commission should lay down a rule which did not need to be broken in special cases. In his opinion, the Commission was not required to decide whether or not non-member States had a "right" to establish permanent observer missions to the organization. He therefore suggested that the Special Rapporteur should combine the rule in article 51 with that in article 52, without referring to that "right". The following formula might be adopted:

"The principal function of permanent observer missions to an organization established by States not members of that organization is to provide the desired

liaison between the sending State and the organization.”

3. That wording would suffice, because it would implicitly allow permanent observer missions to be established, without mentioning a problem which was theoretically and politically delicate, but of little practical importance.
4. The CHAIRMAN, speaking as a member of the Commission, said that article 51 was one of the most difficult provisions in Part III, because it raised important political issues. The first was the question of universality, which had loomed large during the Commission's work on the law of treaties. Another was the question whether a non-member State had the right or the power to send an observer mission.
5. It would be very difficult for the majority of States to accept article 51 in its present form, which laid more emphasis on what the sending State could do than on the rights and prerogatives of the organization in regard to determining whether to receive a mission.
6. It was clear from the commentary that an observer mission need not have letters of accreditation. The fact that contact with the organization would therefore be established informally would make it difficult for States to accept the idea of unrestricted access to the proceedings of an organization.
7. If article 51 was to be retained, it must be qualified by including a reference to the consent of the organization. It was not sufficient to point out that, in accordance with article 3, the provisions of article 51 were subject to the relevant rules of the organization: the rules might be silent on the matter, and in order to cover that case it was necessary to safeguard the right of the organization to accept or refuse an observer mission.
8. Another possibility was that suggested by Mr. Ago, namely, to combine articles 51 and 52 so as to avoid any pronouncement on the question whether a sending State had a right in the matter.
9. Mr. YASSEEN said that the discussion had been extremely useful because it had clarified certain points. It seemed that the right to establish a permanent mission to an international organization derived directly from membership in that organization; in the same way, the right to establish observer missions should derive from the status of observer. However, whereas the Charter of the United Nations and the constitutions of the other international organizations defined the conditions for membership of those organizations, no comparable provisions existed in regard to observers. Each international organization would therefore have to decide to admit a particular country as an observer before that status could be valid vis-à-vis the organization; once that had been done, that country would automatically have the right to establish a permanent observer mission.
10. Mr. CASTRÉN said that Mr. Ago's proposal, ingenious though it was, had the drawback of leaving unanswered the extremely important question whether or not States not members of an organization had the right to establish permanent observer missions to that organization and whether that right was absolute or relative. The discussion had shown that opinion was very divided

on that point, but the lack of practice made it necessary to fill the gap. He was therefore unable to support Mr. Ago's proposal.

11. Mr. AGO said he thought article 51 could be dispensed with, because in practice the problem of observers never raised very serious difficulties. It therefore seemed justifiable to leave the practice to develop, without going too far into the “right” of non-member States to establish permanent observer missions. The Commission might get into difficulties if it tried to do too much.

12. Mr. REUTER pointed out that Mr. Ago had presented the Commission with two alternatives: either it wished to solve the problem or it did not. But Mr. Ago had not mentioned article 52, paragraph 2, which raised the same difficulty; and if the logic of his argument was to be respected, that paragraph should be formulated in the passive, so as to read: “Other functions may also be entrusted to permanent observer missions...”.

13. Mr. USHAKOV said he thought it was necessary to retain two separate articles: article 51, stating the principle that non-member States could establish permanent observer missions, and article 52, stating the functions of those missions. He also thought that the functions should be listed in some detail, as had been done in article 7 for the functions of permanent missions.¹

14. Mr. USTOR said the question was very closely connected with the principle of universality and with the definition of an organization of a universal character; consequently, it was also connected with the problem of participation in multilateral treaties.

15. In his view, the principle of the sovereign equality of States required that all States should have a say in matters of universal interest and that participation in general multilateral treaties should accordingly be open to all States. Since the constituent instrument of an international organization of a universal character was a general multilateral treaty, all States had the right to be parties and to become members of the organization.

16. Where an international organization had been established to organize certain activities on a world-wide basis, it should be constituted in such a way as not to exclude any State from membership. Of course, the constituent instrument could lay down special conditions, but those conditions should not exclude any State on unreasonable grounds.

17. The duty of States to co-operate with each other was a principle of the Charter and it should be put into effect in the case of international organizations. The draft of article 51 prepared by the Special Rapporteur was fully in accordance with that principle. If a State could not or did not wish to become a member of an organization of a universal character, it should be entitled to maintain permanent liaison with that organization. The provisions of article 51 were, of course, governed by

¹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 200.

those of article 3,² under which an organization could make the establishment of a permanent observer mission subject to its express consent; but that consent could only be withheld for serious reasons and should be granted on a non-discriminatory basis.

18. Mr. EL-ERIAN (Special Rapporteur) said that the comprehensive and useful exchange of views which had taken place had raised, among other questions, that of the principle of universality, which article 51 sought to recognize as a general or residuary rule.

19. Some of the objections raised had been of a general character and had related to matters such as the position of observer missions; in particular, it had been asked whether a rule of customary law existed with regard to such missions. Since the practice of the United Nations in the matter only went back some twenty years, it was, of course, too early to speak of an established custom. For that reason, he himself would hesitate to speak of a right of the sending State or an obligation of the organization. In the Commission's draft on diplomatic intercourse and immunities, care had been taken not to refer to the right to establish a mission.³ The same attitude had been adopted by several members during the discussion of article 6, on the establishment of permanent missions.⁴ It was significant that some of those members were now drawing a distinction between what they described as the right of a member State to establish a permanent mission and the situation of a non-member State wishing to establish an observer mission.

20. Some of the questions which had been raised during the discussion, such as those of the expulsion of a State and of secession, really related to the implementation of the rule in article 51, not to the rule itself. It must be remembered that international organizations had machinery to deal with such questions. Article 4 of the United Nations Charter did not of itself solve all the problems of admission to the United Nations; at every session of the General Assembly, there was a Credentials Committee and, if more than one entity claimed to represent a member State, that Committee reported to the General Assembly. The same difficulties as arose in regard to member States could also arise in regard to non-member States sending observer missions.

21. Mr. Tsuruoka had said that it was difficult to speak of the relevant rules of the organization, as the commentary to article 51 showed that there were no definite rules. In fact, permanent observer missions existed both at United Nations Headquarters and at Geneva. In New York, the Supreme Court of the State had recognized the representative character of permanent observers (A/CN.4/227, Commentary to article 61, para. (4)), while at Geneva those observers enjoyed, *de facto*, the same privileges as permanent representatives.

22. The practice, both in New York and at Geneva, thus indicated that permanent observers had a legal

status. The main purpose of Part III was to define their legal position more clearly.

23. Sir Humphrey Waldock had objected that article 51 was in contradiction with the Legal Counsel's memorandum of 1962⁵ and, in particular, with the general policy of the United Nations as stated in that document. It was necessary, however, to distinguish between the general policy of an organization and certain discriminatory practices. Sir Humphrey Waldock, in his 1962 draft on the law of treaties,⁶ had included articles on participation and had referred to the notion of a "general multilateral treaty", thereby contradicting certain United Nations practices. It had been a matter for regret to him (Mr. El-Erian) and to many others that those provisions had been dropped in the interests of reaching agreement on the Convention on the Law of Treaties.

24. It was not the purpose of article 51 to solve problems relating to the internal law of the organization concerned, or to tell the organization what machinery it should use. The purpose of the article was to state that, in the light of the definition in article 1, subparagraph (b), of an "international organization of universal character", an organization should not discriminate against certain States. Such a statement in no way prejudiced the right of an organization to establish its own machinery.

25. The problem of the position of the organization concerned and the question whether international organizations would become parties to the draft convention had already been referred to at the previous session by Mr. Tammes, during the discussion of article 22 (General facilities).⁷ As stated in paragraph (2) of the commentary to that article, it had been pointed out by several members that "the Commission was trying to state what was the general international law concerning permanent missions to international organizations. The question whether international organizations would become parties to the draft articles was a separate one to be considered at a later stage." That remark still applied.

26. It had been suggested that the position of the "micro-States" was a matter beyond the Commission's competence. The reference to those States in paragraph (4) of the commentary to articles 51 and 52 had merely been intended as an illustration of one of the possible uses of permanent observers; it did not in any way prejudice the solution of the problem by the Security Council. Nevertheless, in order to avoid any misunderstanding, it might be better to drop that particular illustration altogether.

27. The question of the criterion for determining what constituted a "non-member State" had been raised. It was, of course, a more difficult matter than determining what constituted a member, since the question of membership was dealt with in the constituent instrument of the organization. The purpose of article 51 was to state

² See *Yearbook of the International Law Commission, 1968*, vol. II, p. 197.

³ *Op. cit.*, 1958, vol. II, p. 90, article 2.

⁴ *Op. cit.*, 1968, vol. I, p. 35 *et seq.* and vol. II, pp. 199-200.

⁵ *Op. cit.*, 1967, vol. II, p. 190, para. 169.

⁶ *Op. cit.*, 1962, vol. II, p. 27 *et seq.*

⁷ *Op. cit.*, 1969, vol. I, pp. 16-17, paras. 10-13.

the general rule; it was for the appropriate organs of the organization concerned to decide how to apply it. Each organization would set up the machinery it required. For example, there was no need to deal with the problem of a State which had been expelled by an organization; such action would only have been taken for very serious reasons and it was surely inconceivable that the expelled State would seek to maintain a permanent observer mission. If such a problem ever arose, the organization would set up the necessary machinery to deal with it.

28. Until Mr. Ago had proposed that articles 51 and 52 should be combined, there had been general agreement on the need to include an article on the establishment of permanent observer missions. The majority of members also favoured the inclusion of some qualification that would emphasize the very real difference between the situation of a member State and that of a non-member State. It had been suggested that the qualification should be that the consent of the organization was required. He did not favour that solution, which would create difficulties of interpretation in connexion with article 6. Since article 6 said nothing about the consent of the organization, it might be suggested that a member State had the right to establish a permanent mission even without the consent of the organization. The host State also had to be considered; for instance, there were no permanent missions to the Economic Commission for Africa at Addis Ababa and obviously a member State could not force the Ethiopian Government to accept such a mission.

29. He would be in favour of including a specific reference to the rules in articles 3 and 4, on the clear understanding that the relevant rules of the organization included its practice. Of course, even without such a qualification, article 51 would still be governed by the provisions of articles 3 and 4, but an explicit statement would emphasize the difference between member States and non-member States.

30. His first reaction to Mr. Ago's proposal was that it had some merit although it meant dropping the article on the establishment of permanent observer missions. It would have the advantage of not prejudicing the legal position. But unless there had been a change in the position of members he would conclude that the majority were in favour of retaining article 51, with a qualification.

31. He was not impressed by the objection that articles 3 and 4 did not provide adequate safeguards: no safeguard covered every conceivable situation. All that could be done was to lay down the general rule, accompanied by general safeguards.

32. Sir Humphrey WALDOCK thanked the Special Rapporteur for his explanations which, however, had not disposed of his difficulties regarding the Special Rapporteur's approach in article 51.

33. Throughout the Special Rapporteur's statement there seemed to be a clear appreciation that the element of consent was necessary. Recognition of the fact that an organization must regulate its own affairs and take its own decisions about permanent observers implied the

existence of the element of consent—the need for a certain mutuality.

34. What he and certain other members were trying to do was to protect the right of the organization to make its own arrangements and to take its own decisions, and for that reason he found it impossible to accept the article as it stood.

35. The language of article 51 was that commonly used in all conventions to express a right. It was therefore necessary to make it clear that those provisions were subject to the consent of the organization. Such a proviso would not derogate from the desirability of the principle of universality.

36. In his view, the logical solution of the problem was to add the words suggested by Mr. Castrén. If it proved impossible to arrive at some broader agreement in the Commission, Mr. Ago's suggestion provided an acceptable way out of the difficulty and would have the advantage of making the rule equally applicable to organizations not of a universal character.

37. His views had not been changed by the suggestion that if the principle of consent were included in article 51 it might be necessary to re-examine article 6. It was necessary to arrive at the right formulation; if that meant that article 6 would have to be re-examined, he saw no objection to that course.

38. He did not believe that the problem could be solved by including in article 51 a reference to the relevant rules of the organization, because there might well be cases in which no rules existed. The element of consent and mutuality had to be stressed precisely because such cases might exist.

39. Mr. CASTRÉN said he was grateful to the Special Rapporteur for his very clear explanations, but regretted that, though willing to change the wording of article 51, he had chosen the solution advocated by the minority, instead of the majority view that the organization's consent was required. The Special Rapporteur had, however, recognized that there was a difference between the relations of member States with an organization and those of non-member States, so the Commission could perfectly well amend article 51 without fearing that that would adversely affect the interpretation of article 6, since the two articles did not deal with the same subject-matter.

40. Mr. YASSEEN said that the reason for the difficulty with which the Commission was faced was that some confusion had arisen between a non-member State's capacity to establish a permanent observer mission and its capacity to possess observer status. For a new category of States was now coming into being namely, "observer States". When the Commission had adopted article 6, which applied to member States, it had not taken up the question how a State became a member of the organization, since that question had no place in the topic with which the draft articles were concerned. The same should apply to observers. The right to establish a permanent observer mission was granted only to States which had observer status. To break the deadlock, the Commission should therefore reserve the question what State could be an observer and by whose decision,

by using some such language as: "Every State which has the status of observer to an international organization may establish. . .".

41. Mr. NAGENDRA SINGH said he was a firm believer in the principle of the universality of international organizations, according to which every sovereign State had the right to be represented in such organizations, either as a member or as an observer. Unfortunately, it had to be admitted that no such right existed in current practice. In his own experience, there was the case of the State of Bhutan, which had been denied admission to the Universal Postal Union; and India, even after ratifying the IMCO Convention, had not been accepted as a full member of IMCO, but only as an observer. That had been because the Indian Government had attached a declaration to its ratification, stating its understanding that under the Convention assistance to national shipping was not regarded as discrimination—a declaration which had been interpreted by IMCO as constituting a reservation. The case had ultimately been brought before the General Assembly of the United Nations, which had decided that India's acceptance of the IMCO Convention was complete, since it was merely a declaration, not a reservation, that was attached to it. In those circumstances it was clear that, as a principle of *lex lata*, international organizations were now free to accept or reject the application of a sovereign State for membership, let alone for an observer mission, however regrettable that might be from the point of view of *lex ferenda*. He feared, therefore, that it would be impossible to avoid some reference in article 51 to the consent of the organization, if the drafting was based on considerations of *lex lata*.

42. Mr. BEDJAOUI said that the Commission was considering a difficult question whose obvious political aspects stood in the way of agreement on the legal formulation. Three positions seemed to have emerged from the discussion. Some members were in favour of requiring the express consent of an organization for a non-member State to establish a permanent observer mission; others, including Mr. Ago, would like to avoid the difficulty by keeping silent; lastly, the Special Rapporteur and other members, including himself, believed that the establishment of a permanent observer mission was a right conferred upon a State. The Commission had, at that point, an opportunity of asserting the universal character of international organizations. Although it was true that United Nations law laid down conditions for admission to the Organization, which in practice had unfortunately been given political interpretations, it must nevertheless be emphasized that the aim of the organization was universality; for without universality discrimination between States would continue to be practised and the world revert to a closed international community.

43. Furthermore, a very clear distinction should be made between conditions for the admission of member States and conditions for the sending of permanent observer missions by non-member States. Observer status was a relatively inferior status, carrying with it neither the same rights nor the same obligations as mem-

ber status, so it was all the easier to reconcile with the notion of universality. He could not agree that the express consent of the organization should be required, for that might, in practice, place the sending of an observer mission on the same footing as the admission of member States and might suggest the need for a formal vote, which had no basis in practice. If it was really necessary, he might be able to support Mr. Ago's proposal, though it did not say how observer missions would be established; but if the Special Rapporteur's text was not accepted, he would prefer some more descriptive formula providing that non-member States might establish permanent observer missions "by an agreement concluded with the organization", which did not mean the political approval of the organization, but simply the instrument by which the mission was accredited. He fully appreciated that the organization's interests must be protected, but it was hard to see what would be the interests of an organization which rejected the idea of universality.

44. Mr. ROSENNE said that the discussion had shown there was a danger that observers and permanent observer missions might be divided into too many different categories. In current United Nations practice, for example, there were both permanent observer missions attached to the Organization itself and observers who were attached to organs of limited membership, such as the Economic and Social Council. The latter type of observers were generally from Member States, but in exceptional cases they might be from other States. United Nations practice was by no means uniform; certain States might be represented in the Security Council, for example, without the right to vote, but they were not technically regarded as observers. Hence it was necessary to distinguish carefully between the different categories.

45. It had been suggested that the acceptance of permanent observer missions to the United Nations and other international bodies was not contingent on a formal vote, but surely the reason for that was that, technically, such missions had no legal status at all. As he had pointed out at an earlier meeting, any privileges and facilities enjoyed by them were granted by the organization or by the host State on a purely *ex gratia* basis.⁶ The Commission should bear in mind, therefore, that if it attempted to go further in article 51 than was warranted by present practice, one of the consequences might be the introduction of a greater measure of formality into the process of acceptance, which in turn might lead to the evolution of new types of representation for non-member States.

46. There was some force in Mr. Ago's suggestion that articles 51 and 52 should be combined, but even if that suggestion were adopted, he thought the article, as finally drafted, would have to contain a reference to some kind of consent by the organization.

47. Lastly, though he recognized that the drafting of article 51 was by no means an easy matter, he was confident that the general position would become clearer

⁶ See 1045th meeting, para. 31.

when the Commission had discussed article 52. He proposed, therefore, that for the time being article 51 should be referred to the Drafting Committee.

48. Mr. USHAKOV said that the principle of protection of the rights of the organization, which some members had invoked as a reason for restricting the scope of article 51, was established clearly enough in articles 3 and 4 and even in article 5. If it was argued that the protection thus provided was inadequate, it might well be asked from what and from whom those rights had to be protected. One might suppose that the intention was to defend them against the principle of the universality of international organizations and against the principle of the sovereign equality of all States, including non-member States. The Special Rapporteur's proposal, on the contrary, aimed at protecting the sovereign equality of non-member States and their right to be represented in international organizations of a universal character. In fact, the discussion turned on the choice between those two views.

49. Mr. REUTER said that the first consideration must be the position of the host State and of the States which would have to apply the convention; the matter should be approached in a very practical way in order to produce a text that would guarantee the members of permanent observer missions established by non-member States well-defined rights vis-à-vis States which recognized the privileges and immunities of observers. He could well understand the concern of those who wished the principle of universality to be stated clearly and firmly. All members drew a distinction between the principle and the procedure for its application, but that distinction would not lead to a solution, for it was precisely in connexion with practical implementation that the question of principle arose.

50. So far as the principle was concerned, he agreed that it was not possible to take a stricter position on universality with respect to observers than with respect to admission to an organization. As he was not sure that that principle could be embodied in an article or in a statement in the commentary or that such a solution would satisfy those who wished the principle to be expressly stated, he thought it would be wiser temporarily to suspend the debate on article 51, which could well be referred to the Drafting Committee, and to pass on to the question of practical application, which would arise in connexion with all the articles. It was to safeguard the rights of observers that the Commission was preparing a convention, and their status should be clearly established, in particular, for the courts. Only after it had considered the various practical questions involved would the Commission be in a position to decide what concessions could be made in regard to article 51 and whether it was necessary to state the principle of universality in some form or other in the texts it was preparing.

51. The CHAIRMAN suggested that article 51 should be referred to the Drafting Committee with the request that it bear in mind the points made during the debate and in the Special Rapporteur's summing up, without prejudice to a final decision as to whether that article should be combined with article 52.

52. Mr. EL-ERIAN (Special Rapporteur) supported that suggestion.

*It was so agreed.**

The meeting rose at 1.5 p.m.

* For resumption of the discussion, see 1061st meeting, para. 56.

1048th MEETING

Wednesday, 13 May 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227)

[Item 2 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to consider article 52 in the Special Rapporteur's fifth report (A/CN.4/227).

2.

Article 52

Functions of permanent observer missions

1. The principal function of a permanent observer mission is to ensure the necessary liaison between the sending State and the Organization.

2. Permanent observer missions may also perform *mutatis mutandis* other functions of permanent missions as set forth in article 7.

3. Mr. EL-ERIAN (Special Rapporteur) introducing article 52, said that while the principal function of permanent observer missions was to provide the necessary liaison between the sending State and the organization, they might also perform some of the functions of a permanent mission on an *ad hoc* basis, as explained in paragraph (6) of his commentary. An interesting example was the invitation extended by the Sixth Committee to the permanent observer mission of Switzerland at the twenty-fourth session of the General Assembly.

4. Mr. TAMMES said that the question which arose in his mind, in connexion with paragraph 2 of the article, was who decided what other functions of permanent

missions could be performed by permanent observer missions. It seemed obvious that the functions they could perform should be determined by the organization itself, but, as at present worded, paragraph 2 would give the sending State some freedom of choice among the functions of the permanent mission listed in article 7,¹ in so far as they were not regulated by the practice or rules of the organization. It might therefore be better merely to refer to article 7 and to allow permanent observer missions to perform all the functions which might contribute to the work of the organization, subject, of course, to its rules and to the provisions of article 3.² In his view such a liberal régime could do no harm. Certain examples had been given by the Special Rapporteur in paragraph (6) of his commentary; he would also draw the Commission's attention to rule 30 of the rules of procedure of the General Conference of the International Atomic Energy Agency, which read: "Representatives of States Members of the United Nations or of any of the specialized agencies which are not Members of the Agency shall be invited to attend the General Conference and may participate without vote on matters of direct concern to them."

5. Mr. CASTRÉN said that the Special Rapporteur had been right to include in his draft a provision on the functions of permanent observer missions. He had very properly stressed in paragraph (6) of the commentary that those functions were not identical with those of permanent missions of member States, but it could be objected that he had tried to follow too closely the provisions of article 7, to which article 52 referred *mutatis mutandis*. Moreover, the principal function of a permanent observer mission was not, as stated in paragraph 1, to ensure the necessary liaison between the sending State and the organization, but rather the function specified in article 7 (d), namely to ascertain activities and developments in the organization and report thereon to the government of the sending State. That function should therefore be mentioned in paragraph 1 of article 52.

6. The wording of paragraph 2 was far too general and imprecise; for a mere reference to article 7 *mutatis mutandis* might give rise to confusion, since the functions listed in that article were not applicable as such to permanent observer missions, particularly the one mentioned in sub-paragraph (e). Again, a permanent observer mission could not carry on negotiations in the organization, as provided in article 7 (c), but only with it, since, as the Special Rapporteur had himself acknowledged, a permanent observer was a representative not in the organization but to it. The fact that Switzerland had participated, without the right to vote, in the negotiations on the Convention on Special Missions in the Sixth Committee of the United Nations General Assembly in 1968 and 1969 did not invalidate that contention, since Switzerland had been invited not so much as an observer

to the United Nations, as because of its experience of the subject under consideration. Negotiations between the organization and permanent observer missions were mainly concerned with administrative matters of secondary importance and were part of the function of providing liaison between the sending State and the organization. The representative function was slight, and not worth mentioning separately; it was performed, as it were, in connexion with the liaison function.

7. Article 52 might therefore be recast by deleting paragraph 2 and making paragraph 1 a single paragraph, to which would be added a second sub-paragraph worded like sub-paragraphs (b) and (d) of article 7. The most concise formula, however, would be: "The principal functions of a permanent observer mission are those referred to in sub-paragraphs (b) and (d) of article 7 of the present draft".

8. Mr. USHAKOV said it was hard to distinguish between the principal functions and the secondary functions of any permanent mission, since the nature of those functions varied according to the circumstances. Moreover, the Commission had not done so in the case of diplomatic missions or special missions, or in the case of permanent missions of member States. In any event, it was impossible to list all the functions a mission might perform, and it would therefore be better to state what those functions consisted of "inter alia". Some of them must be mentioned, however, for the sake of clarity, since a mere reference to another article was not very convenient. It was therefore necessary to consider what those functions were. They were virtually the same as those of a permanent mission, as set out in article 7; for the purpose of a permanent observer mission was to represent the sending State in the organization (article 7 (a)), since without representation the necessary liaison between the sending State and the organization, referred to both in article 52 and in article 7 (b), could not be provided. It was self-evident that a further function of a permanent observer mission was to ascertain activities and developments in the organization and report thereon to the government of the sending State (article 7 (d)), since that was precisely the purpose for which it was sent. Similarly, it could not be sent for any purpose other than to promote co-operation with the organization, but in the case of permanent observer missions it might perhaps not be necessary to specify that such co-operation was for the realization of the purposes and principles of the organization, as stated in article 7 (e). On the other hand, it should be stated that another of their functions was to inform the organization of any developments in the sending State and of any measures taken by it which would be of interest to the organization in view of its purposes and activities.

9. It could accordingly be seen that article 7, as a whole, excepting sub-paragraph (c), was applicable to permanent observer missions, and article 52 should be worded just as explicitly and clearly. The great difference between the functions of permanent missions of member States and permanent observer missions was that the permanent representative could represent the member State in the organs of the organization, but that function, which re-

¹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 200.

² *Ibid.*, p. 197.

quired the authorization of the sending State, was a special function not mentioned in article 7.

10. He reminded the Commission that the term "sending State" was not defined in article 1, on the use of terms, and that it had been agreed during consideration of the part of the draft dealing with permanent missions that it meant the State member of the organization which sent the permanent mission. The term was therefore unsuitable for observer missions established by non-member States, and it might perhaps be preferable to say "accrediting State", in order to make it quite clear that, in that case, the sending State was not a State member of the organization.

11. Mr. ROSENNE said that, like other members, he doubted whether the Commission could accept article 52 in its present form. In his opinion, it tended to make the scope of the concept of functional necessity variable, and functional necessity was one of the bases of the privileges and immunities of representatives of States to international organizations, as was explained in paragraph (3) of the Commission's general comments on Part II, section 2 of the draft articles in its report on the work of its last session.³ As he understood article 52, the varying scope of the functional necessity, which would depend on a subjective decision by the sending State, would affect the operation of such articles as 22, 34 and 45, in so far as they applied to permanent observer missions. The functions actually performed by those missions might not be completely identical with those performed by permanent missions, but their nature at least would be very similar to that of the functions listed in article 7. In some cases, there might be some doubt about the precise extent of the representative function, but he himself believed that such a function did exist and that it was brought out reasonably well in article 7.

12. The question of the variable scope of the functional necessity was not a purely theoretical one; at the last session, Mr. Bartoš had said, in connexion with the present article 45, that "it would certainly be wrong to impose on members of permanent missions, in the same way as on diplomatic agents, who were members of regular diplomatic missions, the duty not to interfere in the internal affairs of the host State. Members of permanent missions were occasionally obliged by their functions as members of a mission to criticise the host State, and that had sometimes been regarded by the host State as a breach of hospitality."⁴ The same doctrine should apply to permanent observer missions.

13. As to the drafting, he found the use of the expression "*mutatis mutandis*" in paragraph 2 objectionable. After all, that expression merely meant "that having been changed which has to be changed"; surely it was the duty of the Commission to specify what changes it considered necessary and not to leave them to what might be

a highly subjective process of interpretation and application by sending States.

14. Some qualification would be necessary to show that any list of the functions of a permanent observer mission was not intended to be exclusive; some such expression as "*inter alia*", which was used in article 7, should be introduced.

15. The word "ensure" in paragraph 1 seemed too strong and should be replaced by the word "keep", as in article 7(b).

16. Greater importance should be attached to the function referred to in sub-paragraph (e) of article 7; if a non-member State decided to send a permanent observer mission to an organization, the least that could be expected of it was that it would do its part in promoting co-operation for the realization of the purposes and principles of the organization.

17. With regard to paragraph (6) of the commentary, he drew the Special Rapporteur's attention to the fact that during the Sixth Committee's discussion of the draft convention on special missions, at the twenty-third and twenty-fourth sessions of the General Assembly, Switzerland had not been represented by its permanent observer at Headquarters, but by representatives sent direct from Berne. A careful distinction was made in the Secretariat Study between the capacity of a permanent observer at United Nations Headquarters and that of a plenipotentiary at a conference or meeting.⁵

18. Lastly, he considered that article 52 should either contain a general reference to article 7 or give a detailed list of the main functions of permanent observer missions. That point could be left to the Drafting Committee.

19. Mr. KEARNEY said he agreed with those speakers who thought that article 52 was in need of considerable revision. Mr. Ushakov had been quite right in pointing out the difficulty of singling out any one function of the permanent observer mission as its "principal" function: the views of the sending State on the subject might be entirely different from those of the organization. He therefore considered that article 52 should be revised to include a list of the functions; he could not agree with Mr. Rosenne that that need could be met by including a general reference to the functions set out in article 7.

20. As Mr. Castrén and Mr. Ushakov had said, there were substantial differences between the functions of a permanent observer mission and those of a permanent mission; in particular, the function of representing the sending State in the organization, referred to in article 7 (a), hardly applied in the case of permanent observer missions. In his opinion, it would be better to specify in article 52 the kind of representative functions performed by permanent observer missions and then to determine on that basis the facilities, privileges and immunities to which they should be entitled.

21. A permanent observer mission did not carry on negotiations "with or in" the organization; it might carry on negotiations with individual members of the organi-

³ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, p. 4.

⁴ See *Yearbook of the International Law Commission, 1969*, vol. I, p. 175, para. 45.

⁵ *Op. cit.*, 1967, vol. II, p. 190, para. 173.

zation, but that was a different type of representation from that envisaged in article 7 (c).

22. Like Mr. Rosenne, he thought that the revised version of article 52 should include some such expression as "*inter alia*".

23. Mr. AGO said he wished, first of all, to make it quite clear that he approved of the principle underlying article 52 and his comments would be confined to the drafting of the provisions concerning functions, irrespective of whether the Commission decided to retain article 51 or to combine articles 51 and 52. Like other speakers, he thought that a mere reference to article 7 would not be satisfactory, since the functions of permanent missions of member States and those of permanent observer missions were not strictly analogous and the differences between them needed to be brought out. It remained to be decided whether to adopt a concise synthetic formula, which would have the advantage of covering the matter adequately without giving too much weight to permanent observer missions, or an analytic formula listing their functions as in article 7, but with the necessary changes. Like Mr. Ushakov, and for the same reasons, he thought that no distinction should be made between principal functions and secondary functions, and that the words "*inter alia*" should be inserted in the introductory phrase.

24. With regard to the functions themselves, article 52 did not mention the one which was inherent in the very nature of the mission, namely, to represent the sending State at the organization; the whole purpose of a permanent observer mission, for a non-member State, was to have a representative on the spot. That function was self-evident and did not need to be specially mentioned. But it was mentioned, for permanent missions, in article 7, and if that reference to it was retained, it should also be mentioned in article 52, in order to prevent wrong interpretations. Moreover, the Special Rapporteur agreed that permanent observer missions had a representative character, since he had recognized that sending such missions came within the sphere of bilateral diplomacy.

25. The function referred to in sub-paragraph (b) of article 7 could also be mentioned as one of the functions of permanent observer missions, but the wording should be slightly changed, for while liaison between a member State and the organization might be regarded as necessary, the same was not true of a non-member State, which might wish to confine itself to mere observer functions. The right to carry on negotiations with the organization, referred to in article 7 (c), was a direct consequence of the representative function and should be granted to permanent observer missions, except that the negotiations could be carried on only with the organization, not in it. The function listed in article 7 (d) was a normal function of permanent observer missions and could be carried out in both directions, as Mr. Ushakov had said, but the wording should not make it mandatory. Lastly, he was not sure that the functions of permanent observer missions could include promoting co-operation for the realization of the purposes and principles of the organization, as article 7 (e) provided in the case of permanent missions of member States. A distinction should be

made, in that regard, between member and non-member States. The Commission would be going rather too far if it provided for the same obligations, in the same terms, for both classes of State.

26. As Mr. Rosenne had observed when referring to the penultimate sentence of paragraph (6) of the commentary, the Commission should take care not to confuse permanent observer missions with observers whom a non-member State might send to an organ of an organization on a particular occasion. A State which had not even established a permanent observer mission to an organization might well wish to be represented, in a specific case, in an organ which was dealing with a question in which it was particularly interested; or again, a State which had established a permanent observer mission might be represented at a meeting by an *ad hoc* representative other than its permanent observer.

27. The term "sending State" was a convenient one, for it applied to both member and non-member States, and he was not sure that any other expression would remove the ambiguity which Mr. Ushakov had mentioned. That was a question which the Commission could consider when it reviewed the terminology of the draft as a whole. Incidentally, the French for "permanent observer missions" should be "*missions permanentes d'observateurs*" not "*missions d'observateurs permanents*".

28. Mr. BEDJAOUI said he fully approved of the substance of article 52 as drafted by the Special Rapporteur. He wished, however, to make two comments on the drafting. First, he did not think the expression "necessary liaison" in paragraph 1 was satisfactory, even though it was taken from article 7 on the draft. Secondly, he doubted whether the reference to the "principal function" of a permanent observer mission was justified, since it implied that there were secondary functions, and it was not certain that the other functions would always be secondary. He also noted that paragraph 2 contained the word "may", which had already given rise to difficulties because it meant both a subjective right of the sending State and permission granted to the sending State by a subject of indeterminate identity, which might be the host State or the organization.

29. The main difficulty with article 52 was its division into two separate paragraphs, the first defining the principal function of permanent observer missions and the second stating that such missions might perform other functions of permanent missions; for there was some danger of the Commission's being divided into two schools of thought, one blaming the Special Rapporteur for assimilating permanent observer missions too closely to permanent missions of member States, and the other blaming him for doing exactly the opposite. To remove that danger, Mr. Ago had suggested using the text of article 7, with certain changes. Personally, he thought that such a list might perhaps be too rigid in some cases, and he would prefer to leave it to time and experience to mould permanent observer missions into their final form. He was therefore in favour of a concise formula based on the criterion of function, which might read: "The role of a permanent observer mission is to main-

tain the necessary relations between the sending State and the Organization by performing all the functions which the sending of such a mission may entail." That wording, which would have the advantage of flexibility, could cover both the function of representation and that of negotiation.

30. Mr. NAGENDRA SINGH said that while he approved of the substance of article 52, he agreed that some attempt should be made to reformulate the text. The Drafting Committee should be asked to find some expression, such as "among others" or "*inter alia*", to replace the unsatisfactory adjective "principal" which qualified the word "function". It would also be necessary either to refer back to the provisions of article 7 or to reproduce the contents of that article. The first course was undesirable because the functions of a permanent observer mission, though similar to those of a permanent mission, were not identical. He would therefore suggest that article 52 should specify some of the main functions of a permanent observer mission.

31. Although the representative function certainly existed and was important in the case of permanent observer missions, it had only a very limited sphere of application. As far as the sending State was concerned, the extent of the representation was the same for both types of mission, but in relation to the work of the organization it was much more restricted in the case of a permanent observer mission. Unlike a permanent representative, a permanent observer was not entitled to participate in the organization's deliberations or cast a vote. Consequently, it would be preferable not to stress the representative function in article 52, but to mention it in article 0 (Use of terms). If the representative character of permanent observer missions was brought out fully and effectively in article 0, there would be no need to refer to it again in article 52.

32. He agreed that the liaison function, which was the subject of article 7 (b) relating to permanent missions and of article 52, paragraph 1, relating to permanent observer missions, was more characteristic of a permanent observer mission. The function of carrying on negotiations would not be performed "with or in the Organization" as in the case of permanent missions. In the first place, a permanent observer mission would carry out negotiations only "with" and not "in" the organization, since the sending State was not a member of it. In the second place, it was necessary to qualify the statement of the function by using some such formula as "if duly empowered by the sending State". Clearly, special instructions were necessary to enable a permanent observer to engage in negotiations, even with the organization.

33. An examination of the functions set out in article 7 showed that it would be wrong to include all of them in article 52. And the functions that would be included would have to be adequately described, so that article 52 would be self-contained. It was important that the qualification "as empowered by the sending State" should be introduced, because it was the sending State which decided what use it wished to make of its observer missions, consistent with its position as a non-member. It

would be right to state that the onus was on the sending State in a matter in which the organization had little responsibility.

34. Mr. RAMANGASOAVINA said that while he approved of the substance of article 52, he found the drafting not wholly satisfactory. In paragraph 1 the Special Rapporteur had found the best form of words to bring out the difference in nature between the functions of permanent representatives and those of permanent observers. The paragraph made it quite clear that, unlike permanent representatives, permanent observers had no representative function, and the reason why the Special Rapporteur had stressed the liaison function was, precisely, to exclude the representative function.

35. If the Commission decided not to use the expression "*mutatis mutandis*" in paragraph 2, it would have to find an equivalent expression, for the Special Rapporteur had rightly tried to bring out in that way the difference between the functions of permanent representatives and those of permanent observers. In view of those considerations he thought the text of article 52 might include some parts of article 7, namely, subparagraphs (b), (c)—but with the deletion of the words "or in"—(d) and (e), all of which stated functions which permanent observer missions could perfectly well perform.

36. Mr. REUTER said that in view of the general consensus of opinion which seemed to be emerging, the Drafting Committee should be asked to revise article 52. There were, however, two comments he wished to make.

37. Mr. Bedjaoui had once again raised a question which had been discussed at previous meetings; but he himself was still sure that the Commission would succeed in finding wording on which it could agree, and all the more easily because, in paragraph (6) of his commentary to article 52, the Special Rapporteur seemed to point the way by saying "The functions of representation and negotiation can be performed in particular by permanent observers...". The problem of representation was primarily semantic, and general agreement might perhaps be reached by adopting a formula which made it clear that permanent observers represented the sending State in the performance of their functions, for that would bring out their representative function without contrasting it with their other functions. Accordingly, article 52 might simply say that a permanent observer mission, in principle, represented the sending State in the relations established between it and the organization. That formula would have the advantage of avoiding the question of the nature of those relations by simply saying that they were established. For there was no need to specify what the relations were; it would be better to let that emerge from practice, as Mr. Bedjaoui had maintained.

38. Mr. TSURUOKA said he agreed with Mr. Reuter on the question of representation. If a permanent observer performed functions, he did so on behalf of the sending State, and to that extent he certainly represented it. As to the question whether it was necessary

to mention the representative character in article 52, he was inclined to think it was not: silence on the matter would obviate misunderstanding.

39. He also doubted whether negotiating was one of the proper functions of permanent observer missions. If a permanent observer carried out negotiations with an organization, it would probably not be solely in his capacity as permanent observer: he would have to have been given additional powers by the sending State. That was precisely that differentiated a permanent observer from a permanent representative, who was empowered to negotiate with the organization to which he was accredited. Consequently, although he agreed with the Special Rapporteur that it was generally necessary to let the practice develop freely, he thought that in view of article 7, which would inevitably invite comparison, article 52 should be modelled on sub-paragraphs (b), (d) and (e) of that article.

40. Sir Humphrey WALDOCK said the Special Rapporteur had been right to try to make it plain in article 52 that there was no intention of inflating the functions of permanent observer missions in a way that might alarm the States which would in due course be invited to adopt the draft convention. The Commission should not suggest that permanent observer status was something close to membership of the organization without the right to vote. What now had to be decided was whether the wording of article 52 was the wording best calculated to achieve those ends. In that respect, he found himself in agreement with several other speakers who had suggested changes.

41. In the first place, he too thought it undesirable to refer to a "principal" function. In that connexion, his own view was that the basic function was to watch over the interests of the sending State in regard to the activities of the organization.

42. He could not agree to the introduction of a reference to representation as one of the main functions of a permanent observer mission. During the discussion on article 0 (Use of terms)⁶ it had been agreed that, in the description of the use of the term "permanent observer mission", reference would be made to the representative character of such a mission. That reference should suffice and there was no need to give prominence to representation in article 52.

43. He was not very enthusiastic about the use of the term "liaison". The intention was to refer to the fact that a permanent observer mission would act as an authorized channel of communication between the sending State and the organization, as and when required.

44. If the various functions were to be specified in article 52, care should be taken to indicate the existence of some difference between the position of a permanent observer mission of a non-member State and that of a permanent mission of a member State.

45. He had not yet reached a firm view on the choice between a text which would specify the various functions

and a more concise formula which would be based essentially on the function of watching over the interests of the sending State in regard to the organization's activities. An extended statement on functions had been included both in the Convention on Diplomatic Relations⁷ and in the Convention on Consular Relations⁸ and, if desired, it should be possible to arrive at a similar statement for permanent observer missions, provided that the qualification "*inter alia*" was introduced.

46. He was glad to note that Mr. Ushakov had referred to an "accrediting State", because that approach implied recognition of the need for the organization's consent. Recognition of that need would dispose of many of the difficulties encountered by the Commission in dealing with permanent observer missions.

47. Mr. USHAKOV, in support of the arguments he had already put forward, drew attention to a difference between the French and English texts of article 7 (a) of the draft: the French version used the phrase "*auprès de l'Organisation*" and the English "in the Organization". To bring the English version into line with the French, he thought it should be amended to read "to the Organization".

48. He agreed with Mr. Ago that if the wording of article 7 was reproduced in article 52, the words "or in" in sub-paragraph (c) should perhaps be deleted.

49. The Special Rapporteur should note that if he decided to include a provision similar to article 14⁹ in his draft article on permanent observers, it would have to specify that a permanent observer was not authorized, in virtue of his functions and without having to produce full powers, to carry on negotiations with the organization to which he was sent; he would have to obtain full powers. That was another difference between the functions of representatives of member States and those of representatives of non-member States.

50. Mr. AGO said that if it were possible to adopt a synthetic formulation combining articles 51 and 52, he thought that would be the best solution. But assuming that the Commission would prefer the opposite idea, namely, to keep the two articles separate and include an enumeration, he doubted whether it would be wise to omit all reference to the representative function of permanent observer missions, as Mr. Tsuruoka had suggested. For article 7 stated explicitly that a permanent mission had a representative function, whereas it might very well not have done so. Consequently, unless it was decided to amend article 7, the comparison which would inevitably be made between article 52 and article 7 would lead to the conclusion that permanent observer missions did not have a representative character. The question whether the representative character of permanent observer missions should be mentioned in article 52 should therefore be considered very carefully.

The meeting rose at 1 p.m.

⁷ United Nations, *Treaty Series*, vol. 500, p. 98, article 3.

⁸ *Op. cit.*, vol. 596, pp. 268-270, article 5.

⁹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 206.

⁶ See 1043rd meeting, paras. 32-46 and 1044th meeting, paras. 1-23.

1049th MEETING

Thursday, 14 May 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227)

[Item 2 of the agenda]

(continued)

ARTICLE 52 (Functions of permanent observer missions) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 52 (A/CN.4/227).
2. Mr. USTOR said he could accept the underlying idea of article 52 which, as he understood it, was that the functions of a permanent observer mission were essentially the same as those of a permanent mission.
3. With regard to the function of representation, difficulties had also arisen in connexion with permanent missions when the Commission had discussed article 7 (formerly article 6).¹ It had been pointed out at that time that some States made their permanent missions responsible for all functions, while others only entrusted their missions with routine duties and appointed special representatives to the organs of the organization; those representatives were sometimes permanent. The problem had been solved by adopting the language used in subparagraph (a) of article 7,² on the understanding that it would be read together with article 13.
4. Article 13 provided that a member State could specify, in the credentials submitted, that its permanent representative would represent it in one or more organs of the organization. In addition, a presumption was established in paragraph 2 that the permanent representative could represent the member State in the organs for which there were no special requirements regarding representation. Where such requirements existed, special credentials had to be produced. The function of representation specified in article 7 (a) was automatic in those organs for which there were no special requirements.
5. In the case of permanent observer missions, perhaps the largest body of practice concerned the observer mis-

sion of the Federal Republic of Germany at United Nations Headquarters. His impression was that that mission had very nearly the same representative functions vis-à-vis the Secretariat as a permanent mission. The same applied to the observer mission of the Holy See at Geneva.

6. The head of a permanent observer mission carried on negotiations, made representations and, on occasion, contacted the highest officials of the Secretariat. When carrying out those duties, he represented the sending State in precisely the same way as a permanent representative.

7. Representation in the organs of an organization was subject to the rules of the organization, just as it was in the case of permanent representatives. The rights and faculties of observers were also governed by the requirements laid down in those rules. It was difficult to see any difference between permanent observer missions and permanent missions in that respect. When it came to representation on solemn occasions, the heads of permanent observer missions were placed on the same footing as the heads of permanent missions.

8. It seemed to him that the only differences were really drafting matters. For example, the word "necessary" might not be needed before the word "liaison" in article 52. As to carrying on negotiations, they could take place either with the organization or with another State "in the organization". He felt sure that some language could be found to make it clear that the functions of permanent observer missions did not differ materially from those of permanent missions.

9. The CHAIRMAN, speaking as a member of the Commission, said that there appeared to be a wide measure of agreement that, in paragraph 1, the adjective "principal", before "function", and the word "necessary", before "liaison", should be omitted. There was also general agreement on the desirability of merging the two paragraphs of the article.

10. With regard to the question of representation, he agreed that the representative character of a permanent observer mission was slightly different from that of a permanent mission. The duties of a permanent observer were more limited than those of a permanent representative: he was not called upon to act generally as a representative unless there was a special agreement to that effect between the sending State and the organization.

11. Members should consider whether the term "liaison" sufficiently expressed the main purpose of an observer mission.

12. When the Commission had discussed article 1, on the use of terms, it had been agreed that some kind of mutuality of consent should exist between the sending State and the organization. The Drafting Committee should be asked to find some form of words that would introduce that notion into the definition of a "permanent observer mission", for that would dispose of much of the controversy which had arisen about the representative character of permanent observer missions.

13. Consideration should also be given to defining the

¹ See *Yearbook of the International Law Commission, 1968*, vol. I, pp. 42-50 and 214-216.

² *Op. cit.*, 1968, vol. II, p. 200.

term "sending State" so as to make a distinction between permanent observer missions and permanent missions.

14. The Drafting Committee should take account of all the views expressed and consider recasting article 52 in a single paragraph, which would not unduly stress the representative element and would indicate that the basic function of a permanent observer mission was to watch over the interests of the sending State relating to the organization.

15. Mr. CASTAÑEDA said he was afraid he could not agree with some members of the Commission on the extent and nature of the functions of permanent observers. Moreover, the other members of the Commission were not in agreement as to which of the functions listed in article 7 was the most important in the case of permanent observer missions. Nevertheless, article 52 should state, not the principal function of those missions in the sense of the most important one, but the function which by its nature was their special sphere of competence. In his opinion, that function was observing and ascertaining activities and developments in the organization, so that was the one that could be stressed.

16. With regard to the other functions of permanent observer missions, it would be wrong to assimilate them to the functions of the permanent missions of member States; for although the function of representation was performed by means of similar formal and manifest acts, its content and character differed radically in the two cases. In the sense used in article 7, the representation of a member State in an organization meant chiefly representation in the organs of that organization; and since the activities of the organization were nearly all conducted through its organs, if the permanent observer was not accredited to them, there would be very little left of his representative function and it need not be mentioned in an article. The same applied to the functions of negotiation and co-operation, which only concerned related questions. As the Special Rapporteur had stressed, the function which indicated the real character of permanent observer missions was that of providing the necessary liaison, and it was that function which should be stressed, together with the function of observing and ascertaining activities and developments in the organization.

17. Mr. ROSENNE said he would like to have some information on the position with regard to the credentials of the representative of a non-member State to an organ of the United Nations for which special credentials were required. Had any particular form of credentials been required when Jordan had participated without the right to vote in certain Security Council discussions before 1956, when Jordan had not then been a member of the United Nations? To obtain a reply to that question, it might be necessary to consult United Nations Headquarters.

18. Mr. AGO said he did not entirely agree with Mr. Castañeda on the representative character of permanent observer missions. Either a mission had a representative character or it did not, but it could not have that character to a greater or lesser degree. An observer

mission sent to an organization by a non-member State necessarily had a representative character. Moreover, it could not be said that the essential element of the representative character of the permanent mission of a member State was that it represented the sending State, not in the organization, but in its organs. The head of a permanent mission sent by a Member State did not himself automatically represent the sending State in organs of the organization. The best proof of that was that, when considering the draft articles relating to permanent missions, the Commission had deemed it necessary to provide in a separate article—article 13—for accreditation to organs of the organization, and even to establish a presumption of such accreditation in cases where there was no formal accreditation. Thus there was a difference between representation in the organization as such, which involved a bilateral relationship between two subjects of international law, and representation in organs of the organization, which involved multilateral relationships between States. He saw no objection to omitting to state that the permanent observer mission of a non-member State represented that State in the organization, since that was self-evident, but then the reference to that function of the permanent missions of member States would have to be deleted from article 7, so as to avoid misunderstandings.

19. Mr. YASSEEN said he did not share Mr. Castañeda's opinion either. Representation was the essential function of a permanent observer mission. A permanent observer must necessarily represent the State by which he was sent; otherwise, on whose behalf was he acting as an observer? It was only the scope, not the nature of the representation that was different in the two cases. Furthermore, representation as such should not be confused with accreditation, that was to say, the credentials for representation, which did not create the representation, but were evidence of it.

20. Mr. BARTOŠ observed that the practice of presumed representation existed, particularly in the Security Council, where representatives were generally required to submit proof of their powers in advance, but where in certain emergencies persons having the status of representatives or observers accredited to the Organization had sometimes been authorized to take part in the debates, subject to subsequent confirmation of their credentials. The Special Rapporteur should therefore be asked to reflect on that question and submit appropriate wording to the Drafting Committee.

21. Mr. TSURUOKA said that if it were stated that observers represented the sending State in the organization and that their functions were similar in scope to those of permanent representatives, the only difference between observers and permanent representatives would be that permanent representatives were sent by member States and observers by non-member States. But that was not the case. It should therefore be decided whether the Commission intended the draft articles to confer a specific status on permanent observers or whether it wished to leave that question to be settled by the organization.

22. Some members had objected to the term "perma-

nent observers” and proposed the use of the term “permanent mission of observers”, on the ground that any given observer was not permanently on the spot and only the mission was permanent. As in the case of “permanent representatives” and “permanent missions” of member States, however, the word “permanent” should be understood as the opposite of “special”, so it was not anomalous to refer to permanent observers.

23. Mr. CASTAÑEDA, replying to the objections raised by Mr. Ago and Mr. Yasseen, said he quite understood that an observer represented the State which sent him and that there was a theoretical difference between general representation in the organization and representation in its organs. But that was a theoretical concept. Article 52 was not concerned with the question of recognizing or not recognizing the representative character of permanent observer missions, which was settled by article 0, but with stressing some of their functions in order to distinguish them from the permanent missions of member States, and with ascertaining which of the functions listed in article 7 were normal, regular and permanent functions of an observer mission. In his view, representation was not such a function, since, despite the representative character conferred on the observer by his official status, it amounted to very little, because the observer was not accredited to the organs of the organization. Accordingly, as in reality the content of the function was less than that of the representation function exercised by the permanent missions of member States, there was no justification for giving it prominence.

24. Mr. KEARNEY maintained that it was not enough to say that an observer was a representative of the sending State; the problem was to determine what functions he performed in that capacity. Consideration should be given to the inclusion of an article stating what an observer was entitled to do in so far as the organization was concerned—such functions as attending meetings, both public and private, and speaking at those meetings. It would then be possible to decide what privileges and immunities should be granted to permanent observers, since clearly the privileges and immunities they needed depended upon the functions they performed.

25. Mr. ALBÓNICO pointed out that the question of the representative character of permanent observer missions had already been dealt with in article 0 (Use of terms) (A/CN.4/227), which described a “permanent observer mission” as “a mission of representative and permanent character”. No one denied that a permanent observer represented the sending State.

26. The real problem arose in connexion with the functions performed by the observer. One of his main functions was that of ascertaining activities and developments in the organization and reporting thereon to the government of the sending State; there was no element of representation in the performance of that function. But the function of maintaining liaison with the organization and carrying on negotiations did contain such an element. It was important to clarify that issue because the question of the privileges and immunities of observers was closely

connected with the representative character of the functions they performed. The representative element in the permanent observer’s functions should be neither exaggerated nor minimized; it should be borne in mind that the essential functions of the observer were observation and liaison.

27. Mr. USTOR said it was quite true that if a permanent observer did not represent the sending State in the organs of the organization he would have little to do, but the same was true of a permanent representative. The legal situation of the two was exactly the same; the only difference was in the extent of the activities performed.

28. Sir Humphrey WALDOCK said that the main purpose of article 52 was to define the minimum functions attached to the notion of a permanent observer mission. There would be a danger of confusion if an attempt were made to deal with all the possible situations that could arise.

29. Some of the difficulty was caused by the fact that the draft articles had been couched in terms which seemed to suggest that the appointment of a permanent observer mission was wholly unilateral. In fact, there was an element of mutual consent, in that the observer appointed by the sending State was accepted by the organization. That being so, the legitimate purpose of article 52 was to say what minimum functions would be attributed to a permanent observer mission once it had been accepted by the organization. It was a problem that could be solved either by means of a synthetic formula or by adapting the provisions of article 7, without attempting to solve all possible problems.

30. Mr. MOVCHAN (Secretary to the Commission) said he wished to make some preliminary remarks on the question raised regarding credentials. That question was dealt with in General Assembly resolution 257 A (III) of 3 December 1948. Under that resolution, the mere fact of the establishment of a permanent mission or the appointment of a permanent representative did not dispose of the problem of representation in the various organs of the United Nations. Operative paragraph 4 recommended that “Member States desiring their permanent representatives to represent them on one or more of the organs of the United Nations should specify the organs in the credentials transmitted to the Secretary-General”. The setting up of a permanent mission at United Nations Headquarters served, as stated in the standard form of credentials, “to maintain necessary contact with the Secretariat of the Organization”.

31. The practice in the United Nations was that many permanent representatives produced credentials which authorized them to represent the Member States concerned in all organs of the Organization. In some cases, however, the credentials specified the particular organs in which the representations were authorized to appear. A problem had arisen in connexion with the 1969 session of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. One of the States members of that Committee had been represented by a permanent representa-

tive whose credentials specified the organs in which he was entitled to appear; special credentials had therefore been requested for that representative to enable him to participate in the work of the Special Committee.

32. With regard to the Security Council, it was only the Head of Government or the Minister for Foreign Affairs of each member of the Council who was entitled to sit in it without submitting credentials. According to rule 14 of the Provisional Rules of Procedure of the Security Council "Any Member of the United Nations not a member of the Security Council and any State not a Member of the United Nations, if invited to participate in a meeting or meetings of the Security Council, shall submit credentials for the representative appointed by it for this purpose." If any doubt arose with regard to the credentials of a representative of a non-member State, the practice was to allow him to continue to attend the proceedings until the Security Council decided the matter.

33. Mr. ROSENNE pointed out that resolution 257 A (III) related to permanent missions of Member States, whereas the present discussion related to permanent observers of non-member States. It was to be noted that Part III of the draft did not contain any provision corresponding to article 13 in Part II.

34. Mr. EL-ERIAN (Special Rapporteur) summing up the discussion, said that article 52 had given rise to two main difficulties: one was the concept of a "principal" function of a permanent observer mission and the other related to the representative function of the permanent observer.

35. At the twentieth session, when the Commission had discussed the development of the institution of permanent missions, he had pointed out that there had been no permanent representatives at the first two sessions of the General Assembly in 1946 and 1947.³ Subsequently, with the increasing number of meetings, the institution of permanent missions had emerged; that development had occurred on a purely practical basis. It was therefore in the light of the development of the practice with regard to permanent observer missions that the problems raised by article 52 should be considered.

36. The use of the adjective "principal" in paragraph 1 had given rise to criticism on the ground that it was not possible to distinguish between the principal function and lesser functions. It had also been argued that no such distinction had been made in the case of permanent representatives and that, consequently, it should not be made in the case of permanent observers either. There was, however, an essential difference between permanent representatives and permanent observers: the function of a permanent representative was to represent, while the function of a permanent observer was to observe.

37. In the light of those remarks, he believed that it was not inappropriate to speak of a "principal" function, that was to say the function of maintaining liaison with the organization. It was simply a statement of the fact

that a permanent observer's basic function was to observe the activities of the organization.

38. The function of observation included maintaining the necessary liaison between the sending State and the organization, and ascertaining activities and developments in the organization and reporting thereon to the government of the sending State. The purpose was to establish an association between the sending State and the organization. Beyond that, any other function that might be exercised by a permanent observer mission was purely incidental.

39. The starting point should be that the functions of a permanent observer mission could not be assimilated to those of a permanent mission. As far as legal status was concerned, a permanent observer mission had the official capacity to represent the sending State. But since the State in question was not a member of the organization, the permanent observer mission would not have to represent it in the organs of the organization.

40. The Drafting Committee should accordingly be asked to draw a careful distinction between the representative character of a permanent observer mission and the function of representation in the organs of the organization. In that connexion, he drew attention to the residuary rule in article 13, paragraph 2, the purpose of which, as stated in paragraph (4) of the commentary to that article, was "to develop the practice in favour of granting to the permanent representative general competence to represent his country in the different organs of the organizations to which he is accredited".⁴ In the example given by the Secretary, the permanent representative who had wished to sit in the Special Committee had been accredited to certain specific organs of the United Nations. In a case of that kind, in which a specific provision was made by the State concerned, the presumption established in article 13, paragraph 2, would not apply.

41. He had not included any article on credentials in Part III, because permanent observers did not normally submit credentials. Of course, a permanent observer needed some evidence that he was the official representative of his State, but no credentials were required of him unless he was called upon to appear in an organ of the organization, in which case special accreditation was necessary.

42. In the discussion at the previous meeting the Commission had come close to agreement on the substance of article 52, and the only question which remained to be decided was whether the formulation should be in general terms or should contain a non-exhaustive enumeration on the lines of article 7.

43. Several members had emphasized that the functions set out in sub-paragraphs (b) and (d) of article 7 had particular relevance to permanent observer missions. With regard to the function mentioned in sub-paragraph (c), a permanent observer would be called upon to carry on negotiations "with" rather than "in" the organization. As to sub-paragraph (e), it was impossible to draw an

³ See *Yearbook of the International Law Commission, 1968*, vol. I, p. 41, para. 10.

⁴ *Op. cit.*, 1968, vol. II, p. 205.

analogy with permanent representatives, because a permanent observer represented a non-member State, in other words a State which had not signed the constituent instrument of the organization and had therefore not committed itself to the "realization of the purposes and principles" of the organization. That statement did not, of course, detract from the provisions of Article 2 (6) of the Charter, which laid down certain minimum obligations the performance of which could be demanded of non-member States of the United Nations as members of the international community.

44. He was quite willing to drop the adjective "necessary" before "liaison". As to the criticism of the verb "to ensure" in paragraph 1, he pointed out that there was a nuance. In the case of a member State, it was appropriate to refer to its permanent mission as "keeping" the necessary liaison with the organization, because a member State already had a relationship with the organization by virtue of its membership. In the case of a non-member State, no such relationship existed and the function of the permanent observer mission was to "ensure" such a liaison. Nevertheless, if some members felt that the verb "to ensure" was unduly strong, he would be prepared to replace it by "to keep".

45. The use of the term "sending State" should not give rise to any difficulty, as it had not been defined in article 1; since it was not defined in terms of membership of the organization, it could equally well be applied to a non-member State sending a permanent observer mission as to a member State sending a permanent mission.

46. He did not favour the expression "representing the interests of the sending State", which was normally used in the case of severance of relations.

47. He was surprised at the objection made to the words "*mutatis mutandis*", which had been used in the Commission's drafts in the past. That expression was a necessary tool of drafting. In the present instance it had been used to indicate that the list of functions in article 7 would need some adaptation.

48. He still thought it possible to merge the two paragraphs of article 52 in the form of a synthetic general statement of the rule. He did not favour an enumeration of functions, because the omission of some of those set out in article 7 might lead to difficulties of interpretation. Nevertheless, he was prepared to submit two texts to the Drafting Committee, the one synthetic and the other containing an enumeration.

49. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 52 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁵

⁵ For resumption of the discussion, see 1061st meeting, para. 76.

ASSIGNMENT TO TWO OR MORE INTERNATIONAL ORGANIZATIONS OR TO FUNCTIONS UNRELATED TO PERMANENT MISSIONS

50. Mr. EL-ERIAN (Special Rapporteur), referring to paragraph 1 of his "Note on assignment to two or more international organizations or to functions unrelated to permanent missions" (A/CN.4/227), said that information subsequently received from the specialized agencies showed that permanent observers had been sent by the Republic of San Marino to the ILO and on some occasions to UNESCO. Apart from the cases of San Marino and the Holy See, such observers had been sent only to United Nations Headquarters in New York and to the United Nations Office at Geneva. Nevertheless, as other cases might arise in the future he had submitted the provision in paragraph 2, which was modelled on article 8. In paragraph 3 he had submitted a provision modelled on article 9, to cover the situation in which a sending State might assign to one of the members of its permanent observer mission functions unrelated to permanent missions.

51. Mr. AGO said that the Special Rapporteur's idea was worth taking up. He would be grateful to him, however, if he would verify the position of permanent observer missions at Geneva, since he was not at all sure that observers accredited to the Geneva Office of the United Nations were not also accredited to the specialized agencies having their headquarters at Geneva. It was also necessary to avoid the ambiguity arising from the fact that the term "permanent observers" covered a number of quite different situations. There was always a danger of confusing permanent observer missions to the organization with observers in organs of an international organization. Hence it was essential to determine exactly what the position was in each case.

52. Mr. ROSENNE said that at the present stage the Commission should simply draw attention to the problems referred to in the Special Rapporteur's note; on second reading, it might consider to what extent his ideas could be combined with articles 8 and 9.

53. He suggested that in both of the texts proposed by the Special Rapporteur the word "accredit" should be replaced by the word "appoint", which was used in article 57, or by the word "assign".

54. Paragraph 4 of the second text, in paragraph 3 of the note, did not quite correspond to what was laid down in paragraph 1. The latter text differed from the corresponding paragraph of article 9—which referred only to the accreditation of a permanent representative as head of a diplomatic mission—in that it referred also to the appointment of a permanent observer as a permanent representative. Since paragraph 4 did not cover the latter case, the Drafting Committee should consider the possibility of transferring everything relating to permanent representatives to the article corresponding to article 8, and of leaving the article corresponding to article 9 substantially identical with that article.

55. Mr. CASTRÉN said he was in favour of including a provision on the lines of article 8 in the draft articles

on permanent observers. He agreed with Mr. Rosenne, however, that it would be better to use the word "appoint" or "assign", rather than "accredit", in paragraph 1 of the first provision submitted by the Special Rapporteur; the word "appoint" was also used in article 53. As to the provision modelled on article 9, he rather doubted whether, from the point of view of drafting, there was any justification for reproducing the text of that article; there was no reason why permanent observers should not be entrusted with other tasks, since the same principles held good for both permanent missions of member States and permanent observer missions. Article 9 could therefore be applied to permanent observer missions by analogy.

56. Mr. BARTOŠ said that, in principle, he approved of the texts submitted by the Special Rapporteur. Reverting to Mr. Ago's question, he said that the mission of the Holy See at Geneva acted both as a permanent mission and an observer mission, since the Holy See was a member of some specialized agencies, such as ITU, UPU and WHO, and even of a quasi-specialized agency of the United Nations concerned with refugees. The status of that mission was all the less clear because, on the list of missions at Geneva, it only appeared as a mission from a non-member State, whereas the mission itself considered that it represented the Holy See in all the international organizations at Geneva. He therefore requested the Special Rapporteur to ask the mission of the Holy See what its precise status was, for if the text prepared by the Commission was to be authoritative, it was necessary to make sure that it contained no errors.

57. Mr. NAGENDRA SINGH said that the possibility that a permanent observer might serve in a dual capacity was a very real one in modern international life; the Special Rapporteur had been right to attempt to regulate it. He was not entirely happy, however, about the idea of drafting parallel articles on permanent observer missions and permanent missions; it would perhaps be better if the texts proposed by the Special Rapporteur could be incorporated in article 9. He proposed that the matter should be referred to the Drafting Committee.

58. Mr. CASTAÑEDA said he agreed with the Special Rapporteur. He would suggest, however, that the Drafting Committee might try to follow the course suggested by Mr. Castrén and Mr. Nagendra Singh and incorporate the two provisions in a single one which would refer to articles 8 and 9 of the draft.

59. Mr. USHAKOV said he was in favour of the Special Rapporteur's suggestion that an article modelled on article 8 should be included in the draft, but he wished to raise certain questions which he thought were very important. He had no doubt at all that a permanent observer appointed to one international organization could be appointed as permanent observer to another international organization, but if that permanent observer was appointed a member of a permanent mission, the question arose what his privileges and immunities would be. If the Commission decided that permanent observer missions should enjoy the same privileges and

immunities as permanent missions of member States there would be no difficulty; but if it did not, a problem would arise. He would therefore prefer the words "*missions permanentes*", in the French text of the new provision, to be replaced by the words "*missions permanentes d'observateurs*".*

60. Paragraph 2 of the new provision proposed by the Special Rapporteur dealt with a case similar to that covered by articles 8 and 9; moreover, the position of members of the staff of permanent missions was already governed by certain conventions in force.

61. A permanent observer or a member of the staff of a permanent observer mission could be appointed a member of a special mission of the sending State—a case already provided for in the Convention on Special Missions.⁴ He wished to make a point he had already made in connexion with article 8, namely, that it was rather discourteous to state in paragraph 2 of that article that a member of the staff of a permanent mission, who might be the permanent representative himself, could be assigned to another permanent mission as a member of that mission, since the staff of a permanent mission included members of its service staff. It would be better to say that the person concerned could be assigned to another permanent mission as a member of its diplomatic staff.

62. Mr. BEDJAOUI said he was grateful to the Special Rapporteur for drawing the Commission's attention to the problems it was discussing. He thought the draft articles on permanent observers should contain a provision modelled on articles 8 and 9, but he agreed with Mr. Castañeda that it would not be sufficient merely to reproduce articles 8 and 9. Perhaps the Drafting Committee could find a very brief formula reproducing the substance of those two articles.

63. Mr. Ushakov had raised a very interesting theoretical question, but he doubted whether it was useful at the present stage in the work to go into such details, which any case were fairly easily settled in practice. It was evident that if a person had more than one function, the international organization should give him the benefit of the most favourable treatment, though the problem might become more complicated if he was appointed to international organizations whose headquarters were in different States. But, after all, those were relatively unimportant problems.

64. Mr. BARTOŠ said he would like to revert to the question whether a permanent observer could be a member of a special mission. He himself had no doubt that that was permissible under the Convention on Special Missions, since one of the main characteristics of a special mission was that it was temporary.

65. Mr. USTOR said he agreed that something should be said in the draft articles about the possibility of

* This proposal corrects an error in the French text of document A/CN.4/227, which has been rectified in the printed version appearing in volume II of this Yearbook.

⁴ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 99 *et seq.*, Annex to resolution No. 2530 (XXIV).

multiple assignments. It would be remembered that paragraph (5) of the commentary to article 8 referred to article 6 of the Vienna Convention on Diplomatic Relations, which provided that "Two or more States may accredit the same person as head of mission to another State..."⁷ The Commission had decided not to include an article on that matter in the draft articles on permanent missions, but since the problem posed by permanent observer missions was rather similar, he thought the Special Rapporteur should at least include a reference to it in his commentary. Article 6 of the Vienna Convention had presumably been designed to meet the needs of developing States with insufficient means to maintain permanent missions; the same reasons might well make it necessary to make similar provision for joint permanent observer missions.

66. The CHAIRMAN, summing up the discussion, said that members were in general agreement that the Special Rapporteur had been right in submitting the draft provisions in paragraphs 2 and 3 of his note to the Commission. It also seemed to be generally agreed that the idea expressed in those provisions should be included in a short article which would not repeat the language of articles 8 and 9 and would make no reference to accreditation. At the present stage, it was unnecessary to consider the question of facilities, privileges and immunities, which could be dealt with in connexion with article 60. He suggested, therefore, that the Special Rapporteur's note should be referred to the Drafting Committee.

*It was so agreed.*⁸

67. Mr. EL-ERIAN (Special Rapporteur) said he would take steps to ascertain the present situation of permanent missions and permanent observer missions at Geneva and to bring his comments up to date. He thanked Mr. Ustor for his suggestion concerning article 6 of the Vienna Convention on Diplomatic Relations.

The meeting rose at 1 p.m.

⁷ United Nations, *Treaty Series*, vol. 500, p. 100, article 6.

⁸ For resumption of the discussion, see 1062nd meeting, para. 4.

1050th MEETING

Friday, 15 May 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227)

[Item 2 of the agenda]

(continued)

ARTICLES 53 and 54

1. The CHAIRMAN invited the Commission to consider articles 53 and 54 in the Special Rapporteur's fifth report (A/CN.4/227).

2.

Article 53

Appointment of the members of the permanent observer mission

Subject to the provisions of articles 54 and 56, the sending State may freely appoint the members of the permanent observer mission.

Article 54

Nationality of the members of the permanent observer mission

The permanent observer and the members of the diplomatic staff of the permanent observer mission should in principle be of the nationality of the sending State. They may not be appointed from among persons having the nationality of the host State, except with the consent of that State which may be withdrawn at any time.

3. Mr. EL-ERIAN (Special Rapporteur), introducing articles 53 and 54, explained that their provisions were derived from those of articles 10 and 11 on permanent missions,¹ which were themselves based on the corresponding provisions of the Vienna Convention on Diplomatic Relations² and the Convention on Special Missions.³ Those provisions were now standard texts and he did not think they would give rise to any difficulty.

4. In paragraph (3) of the commentary to the two articles, he had mentioned the fact that his original idea had been not to submit a general provision on the nationality of members of permanent missions, but to leave the matter to be dealt with in terms of the immunities conceded to them. The Commission, however, had preferred a different approach and article 11 had been adopted. He had included article 54 on the assumption that the Commission would adopt the same approach with regard to permanent observer missions.

5. Mr. KEARNEY said he had no objection to the principle, followed in article 53, that the host State was not entitled to require *agrément* for the appointment of members of permanent observer missions. The article raised, however, in rather acute form a question already discussed by the Commission in connexion with articles 51 and 52, namely, the question how a permanent observer mission was established. Unless there was an

¹ See *Yearbook of the International Law Commission, 1968*, vol. II, pp. 202-203.

² United Nations, *Treaty Series*, vol. 500, p. 100, articles 7 and 8.

³ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 100, articles 8 and 10.

orderly procedure and reasonable requirements were laid down regarding what constituted an observer mission of a non-member State, article 53 would place a very heavy burden on the host State.

6. It had to be remembered that, once a permanent observer mission was established, the host State would have to issue special visas for the long-term residence of the permanent observer and his staff; thus the host State had to take a decision about the presence of the members of such a mission and it should be given some guidelines. The host State was entitled to require an assurance that a person could not establish a permanent observer mission on the basis of a mere claim to represent a non-member State.

7. Mr. TSURUOKA said that the expression "diplomatic staff" in article 54 immediately brought to mind persons belonging to the diplomatic staff of permanent missions of member States and, consequently, the privileges and immunities they enjoyed. It would be better not to use that expression before it had been decided what status was to be accorded to members of permanent observer missions.

8. Mr. USHAKOV said he approved of the text of articles 53 and 54. As to the position of the host State, no matter whether permanent missions of member States or permanent observer missions of non-member States were concerned, it must bear all the consequences of the presence of the international organization in its territory, and must therefore grant the requisite visas to the members of permanent observer missions. In any event, that was a problem to be settled by the tripartite consultations provided for in article 50.⁴

9. Sir Humphrey WALDOCK said he would have no difficulty over articles 53 and 54 provided that the question of the consent of the organization was settled. He had the same doubts as Mr. Kearney and thought it was only if the organization's consent to the establishment of a permanent observer mission was given, in one form or another, that the host State could reasonably be called upon to grant visas and privileges and immunities.

10. Mr. EL-ERIAN (Special Rapporteur) said it was not necessary to relate articles 53 and 54 to article 51, which dealt with conditions for the establishment of a permanent observer mission. It was assumed in articles 53 and 54 that such a mission had already been established. There was no need to make the discussion of those articles, or the subsequent ones, more complicated by raising once again the doubts and difficulties which had beset the Commission in regard to article 51. It should also be remembered that all the provisions of the draft would be governed by article 50, on consultations between the sending State, the host State and the organization.

11. Mr. YASSEEN said that if the question of the right to establish permanent observer missions could be left aside for the time being, it should be possible to

adopt article 53, for the sending State's freedom of choice must be safeguarded.

12. Mr. AGO said that in principle he approved articles 53 and 54, but he thought the present text presupposed that the problem of the establishment of permanent observer missions was to be dealt with explicitly; for if it was treated implicitly, as he had himself suggested, it would be necessary to consider the consequences for those two articles.

13. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer articles 53 and 54 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁵

THE QUESTION OF CREDENTIALS IN RELATION TO PERMANENT OBSERVERS

14. Mr. EL-ERIAN (Special Rapporteur) said that he had included in his report (A/CN.4/227) a note explaining why he had not drafted an article on the question of credentials in relation to permanent observers. In United Nations practice, permanent observers did not submit credentials, but simply sent a letter to the Secretary-General informing him of their appointment. The standard form of letter was reproduced in paragraph 2 of his note; it would be seen that it differed from the credentials submitted by permanent representatives.

15. It should be remembered that the fact that permanent observers did not submit credentials did not in any way detract from their representative character. A permanent representative's credentials mentioned the organs of the organization in which he was entitled to represent the sending State. The situation of a permanent observer was different and it would be better not to turn the existing practice into something more formal. The whole subject was, of course, governed by the provisions of articles 3 and 4,⁶ under which the organization could insist on credentials if it wished.

16. Mr. TAMMES said it seemed rather inconsistent to require credentials from permanent representatives but to adopt a very informal attitude towards permanent observers. The fact that the credentials of a permanent representative could specify the organs to which he would be assigned did not really justify making a difference in the case of permanent observers. In practice, little use was made of the possibility of limiting the assignment of permanent representatives to specific organs.

17. Under the Special Rapporteur's proposal, a mere letter informing the organization of the appointment of a permanent observer would set in motion the whole system of privileges, immunities and facilities. In the circumstances, it would be better to lay down a more formal requirement for the commencement of the observer's functions.

⁵ For resumption of the discussion, see 1062nd meeting, para. 11.

⁶ See *Yearbook of the International Law Commission, 1968*, vol. II, pp. 197-198.

⁴ *Op. cit.*, Supplement No. 10, p. 18.

18. Mr. ROSENNE said he agreed with the Special Rapporteur's approach. The requirement of notification laid down in article 57 would be adequate for the purposes of a permanent observer mission. He thought the Special Rapporteur's note, with the possible exception of paragraphs 3 and 4, should be included in the Commission's report to explain the absence of an article on credentials.

19. With regard to Mr. Tammes's point about privileges and immunities, he did not think credentials were an important factor. Article 42 (Duration of privileges and immunities) placed the emphasis on notification, not on credentials.

20. Mr. USHAKOV said that if it was accepted that a permanent observer mission had a representative character and that, consequently, its head, the permanent observer, represented the sending State in the organization, it was hard to see how the organization could be informed that the observer did in fact represent the non-member sending State, or who could authorize the observer to represent the sending State in the organization. Those points must be cleared up. An article similar to article 12 would therefore have to be drafted for permanent observer missions, perhaps omitting the reference to credentials; the term "appoint" or "assign" should be used instead of "accredit".

21. A provision corresponding to article 13 should also be included in the draft articles on permanent observers, so that they would not be required to produce credentials in order to attend meetings of organs of international organizations. Furthermore, when it was desired to empower permanent observers to negotiate, it would be necessary to give them full powers; hence an article dealing with the same subject as article 14 should be included in the draft articles on permanent observers; it would provide that a permanent observer, unlike a permanent representative, was not regarded as a representative of his State for the purpose of adopting a treaty.

22. Mr. CASTRÉN said he was inclined to agree with the Special Rapporteur's view, which was based on the practice of international organizations. If the Commission did not wish to give permanent observers undue importance, it should confine itself to the notification provided for in article 57. The essential point was that the question of the establishment of permanent observer missions should be governed by the relevant rules of the international organization, including the practice, or by the express consent of the organization concerned. He did not think it necessary to include an article similar to article 13, as suggested by Mr. Ushakov, for as he had just said, the consent of the organization would suffice. He would not, however, object to the inclusion of such an article, or to the inclusion of an article dealing with the same subject as article 14, if greater precision was desired.

23. Mr. YASSEEN said that the essential question was that of evidence: it was inconceivable that a person should be able to perform functions on behalf of a State in an international organization without being

required to produce evidence of his authority to do so. In that connexion the difference in importance between permanent observers and permanent representatives did not justify the omission of any reference to the credentials of permanent observers; it only justified a difference in the degree of formality. Consequently, the question of credentials should be regulated in the draft articles on permanent observers, but a simplified procedure should be established.

24. Mr. KEARNEY pointed out that in other respects regarding observers the Commission had departed from existing practice and had introduced greater formality than was at present required. He therefore agreed with Mr. Yasseen that it was desirable to introduce a more formal element into the procedure for accrediting permanent observers.

25. On the other hand, he did not favour the introduction into Part III of a provision on the lines of article 13. It would be very unusual for an observer to appear before an organ of an organization and the matter could safely be left to the rules of the organization itself.

26. The position with regard to a provision corresponding to article 14 was similar. The circumstances, although a little less unusual than those contemplated in article 13, would still be exceptional, and there was therefore no need for a special article on that point relating to permanent observer missions.

27. Mr. RAMANGASOAVINA said that the difference of opinion on the question whether permanent observers must present credentials, or whether a notification would suffice, derived from the difference of opinion on article 51. If it was decided that a permanent observer mission could be established without the consent of the international organization concerned, credentials would be essential; but if the consent of the international organization was required, that would serve as a standing authorization to the sending State, which would then not need a special authorization to appoint the members of the mission.

28. In the light of those considerations, he was in favour of a compromise solution such as that suggested by Mr. Yasseen: the permanent observer would be the bearer of a letter of notification which he would present to the secretary-general of the organization, who would give him a letter taking note of his appointment.

29. Sir Humphrey WALDOCK said that his position was very close to that of Mr. Yasseen. The Commission's draft articles would have the effect of raising the legal status of permanent observer missions. It was understandable that there should have been informality in the past, because those missions were not held to have an official status vis-à-vis the organization.

30. The United Nations practice mentioned in the Special Rapporteur's report showed that credentials of some kind were in fact required for permanent observers. The letter reproduced in paragraph 2 of the note in fact constituted credentials in simplified form. Some document emanating from the responsible authorities of the Sending State was clearly essential; the Secretary-General could not be expected to act on anything else. Consequently, he

thought that a provision requiring at least credentials in simplified form should be included in the draft.

31. On the other hand, he did not consider that there was any need for an article in Part III on the lines of article 13, because the position of a permanent observer was different from that of a permanent representative where meetings of organs of the organization were concerned.

32. With regard to negotiations and the conclusion of treaties, he drew attention to paragraph 2 of article 7 (Full powers) of the Vienna Convention on the Law of Treaties,⁷ which established a presumption of full powers in the case of Heads of State, Heads of Government and Ministers for Foreign Affairs "for the purpose of performing all acts relating to the conclusion of a treaty" and in the case of heads of diplomatic missions "for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited". That paragraph established the same presumption in the case of representatives accredited by States to an international conference or "to an international organization or one of its organs", but only for the purpose of "adopting the text of a treaty in that conference, organization or organ". The expression "representatives accredited by States" meant that the provision in the Vienna Convention was not limited to permanent representatives; it was wide enough to cover permanent observers, but only if they were accredited to the organ concerned for the purposes indicated. The Commission should therefore take care not to make the provisions on the need for accreditation of permanent observers any looser than those governing permanent representatives, as far as the conclusion of treaties was concerned.

33. The CHAIRMAN, speaking as a member of the Commission, said that his first reaction had been to accept the Special Rapporteur's conclusion in paragraph 5 of his note, but he now had some doubts. If no credentials were required and the matter were left to be settled by a mere letter of appointment, the implication would seem to be that the permanent observer would have to carry on his person, for purposes of identification, a copy of the notification of his appointment made in accordance with article 57.

34. He was inclined to think that a provision on the lines of article 12 was not necessary for permanent observers, provided that the whole question of the relationship of such observers to the organization was seen in the context of some kind of mutual agreement between the sending State and the organization. A permanent observer certainly should not have the right to be present in an organization without its consent. He thought the whole matter should be referred to the Drafting Committee.

35. Mr. USHAKOV said that article 57, on notifications, had the same role as article 17 of the draft: both

in the case of a permanent observer and in that of a permanent representative, a State could send the notifications referred to in those articles to the international organization; but there was a great difference between those notifications and the authorization given by the competent organ of the sending State to a permanent observer to act in that capacity. A permanent observer must therefore be given credentials, even though in simplified form.

36. Mr. BEDJAOUI said he agreed with the Special Rapporteur that there was no need for a special article on the credentials of permanent observers. A notification in the simplest form was sufficient for an observer, for example, official communication of the document appointing him. The difference of opinion in the Commission was only apparent, since what some members considered to be simply a notification was regarded by Sir Humphrey Waldock as express credentials. The real point at issue in the whole discussion had been the mode of establishing permanent observer missions. It might be well, therefore, before taking a final position on the question of credentials, to await the reformulation of article 51, on the establishment of permanent observer missions. He appreciated the argument that the Commission's aim should be to raise the status of observers, but in that connexion it was also dealing with another idea: that of the functions of permanent observer missions. The essential point was that a permanent observer should ascertain and report what was happening in the organization, and it could almost be said that that was a function which anyone could perform without needing credentials. Hence a simple notification would be enough. Cases in which a permanent observer engaged in negotiations for a treaty would be settled by the Convention on the Law of Treaties or by an article dealing with the same subject-matter as article 14 of the draft.

37. Mr. NAGENDRA SINGH said that clearly the permanent observer must, for purposes of identification, carry some document issued by a responsible authority in the sending State. A copy of the notification would not be sufficient, since anyone could carry such a copy on him. He therefore suggested that the Drafting Committee should look into the question and consider the need for evidence, which could take the form of a letter constituting credentials.

38. Mr. USTOR said that the permanent observer, like the permanent representative, represented the sending State and must therefore be able to produce evidence of his authority to act in that capacity. Consequently, he thought that Part III should include a provision on the lines of article 12, subject to the overriding character of the rules of the organization itself, if those rules prescribed less formality in the case of observer missions.

39. He was also in favour of including in Part III a provision on the lines of article 13. The mere existence of a permanent observer mission did not in itself entitle a person to make statements on behalf of that mission in an organ of the organization.

40. As to the suggestion that a provision on the lines of article 14 should be included, it was really a matter for

⁷ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/27* (United Nations publication, Sales No.: E.70.V.5).

the law of treaties. Clearly, the Commission did not intend to give permanent observers the same powers as permanent representatives, and it was desirable to say so explicitly.

41. Mr. AGO observed that the Commission was discussing the matter in the abstract, since it had not come to a decision on preliminary questions such as that of article 0 and that of the functions of permanent observer missions. If those functions were of limited extent, then clearly the heads of permanent observer missions would not need credentials; but if, on the contrary, the Commission granted them the capacity to negotiate, they would have to be given full powers. It was a question that would need to be settled in the case of permanent observer missions, just as it had had to be settled in the case of permanent missions.

42. Mr. EL-ERIAN (Special Rapporteur) said he had made it clear in his note that a permanent observer must be empowered to act by a letter of authorization from the Head of State or the Minister for Foreign Affairs of the sending State. It was entirely out of the question that such a letter of authority should be signed by the permanent observer himself.

43. Some provision would have to be added to article 57 to specify that the notification must be signed by the Head of State or the Minister for Foreign Affairs. Another way would be to include a separate provision on the letter of authorization.

44. He agreed with Mr. Ago that the question of including in Part III provisions on the lines of articles 13 and 14 should be considered after the articles on functions had been settled.

45. The CHAIRMAN said that, if there were no objections, he would assume that the Commission agreed to refer the question of credentials in relation to permanent observers to the Drafting Committee, for consideration in the light of the discussion.

*It was so agreed.**

ARTICLES 55, 56 and 57

46.

Article 55

Composition of the permanent observer mission

In addition to the permanent observer, a permanent observer mission may include members of the diplomatic staff, the administrative and technical staff and the service staff.

Article 56

Size of the permanent observer mission

The size of the permanent observer mission shall not exceed what is reasonable and normal, having regard to the functions of the Organization, the needs of permanent observer missions and the circumstances and conditions in the host State.

Article 57

Notifications

1. The sending State shall notify the Organization of:

(a) The appointment of the members of the permanent observer mission, their position, title and order of precedence, their arrival and final departure or the termination of their functions with the permanent observer mission;

(b) The arrival and final departure of a person belonging to the family of a member of the permanent observer mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the permanent observer mission;

(c) The arrival and final departure of persons employed on the private staff of members of the permanent observer mission and the fact that they are leaving that employment;

(d) The engagement and discharge of persons resident in the host State as members of the permanent observer mission or persons employed on the private staff entitled to privileges and immunities.

2. Whenever possible, prior notification of arrival and final departure shall also be given.

3. The Organization shall transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

4. The sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

47. Mr. EL-ERIAN (Special Rapporteur) said that articles 55, 56 and 57 were modelled on the corresponding articles on permanent missions.⁹ Since the requirements of permanent missions might vary, article 16 referred to "the needs of the particular mission", but in article 56 he had considered it sufficient to refer to "the needs of permanent observer missions".

48. Mr. USHAKOV said he approved of the wording of articles 55 and 56 proposed by the Special Rapporteur, except that he did not think the reference in article 56 to "the functions of the Organization" was justified, since those functions did not have the same influence on the staff requirements of permanent observer missions as they did on the staff requirements of permanent missions of member States. He therefore proposed that the words "the functions of the Organization" should be deleted.

49. Mr. EL-ERIAN (Special Rapporteur) said he agreed with Mr. Ushakov that there was no need to refer to "the functions of the Organization" in article 56, since they were implicit in the words "the needs of permanent observer missions".

50. Mr. CASTRÉN said that he had no objections to the Special Rapporteur's text of articles 55, 56 and 57. With regard to Mr. Ushakov's proposal which the Special Rapporteur had just accepted, he observed that if the function mentioned in article 7 (e)—"promoting co-operation for the realization of the purposes and principles of the Organization"—was not deleted from the list of recognized functions of permanent observer missions, as he himself had proposed,¹⁰ the reference to the functions of the organization would have to be retained in article 56.

⁹ See *Yearbook of the International Law Commission, 1968*, vol. II, pp. 207-209, articles 15, 16 and 17.

¹⁰ See 1048th meeting, paras. 6 and 7.

* For resumption of the discussion, see 1062nd meeting, para. 15.

51. Mr. AGO said that he approved of articles 55, 56 and 57 in principle, but it seemed to him to be going too far simply to assimilate heads of permanent observer missions to heads of permanent missions of member States. He would like the Drafting Committee to see whether the wording of those articles could not be more closely adapted to the position of permanent observer missions.

52. Mr. ROSENNE said he was prepared to accept articles 55, 56 and 57 as they stood, subject to their being reviewed by the Drafting Committee. He would hesitate to make any changes which departed from the original articles adopted in 1968, though the phrase "having regard to the functions of the Organization, the needs of permanent observer missions and the circumstances and conditions in the host State" in article 56, and the corresponding phrase in article 16, should be given careful consideration on second reading. It was his impression that there were a number of articles in the present report which were in effect mere repetitions of rules which already appeared elsewhere; on second reading, it should be possible to rearrange the draft articles as a whole in such a way as to avoid those repetitions.

53. Mr. YASSEEN said he was not convinced that the subjective criterion adopted for the needs of any mission ought to be discarded in favour of an abstract criterion peculiar to the needs of permanent observer missions; such missions were not all alike, for the number of matters they were concerned with differed and their needs differed accordingly. The Drafting Committee should consider that point carefully.

54. Mr. NAGENDRA SINGH said he agreed with previous speakers that, *prima facie*, the functions of the organization referred to in article 56 did not seem to be of paramount importance. However, he would hesitate to say that the nature of the organization had no influence at all on the size of the permanent observer mission and for that reason he would prefer to keep the criteria as they stood.

55. The CHAIRMAN said that the Commission appeared to be unwilling, at the present stage, to take any definitive decision about the wording of the three articles, in particular article 56. He suggested, therefore, that articles 55, 56 and 57 should be referred to the Drafting Committee, on the understanding that it might be necessary to recast them, on second reading, to avoid unnecessary repetitions.

*It was so agreed.*¹¹

56. Mr. USHAKOV pointed out that, since article 57, paragraph 1 (a) contained a reference to order of precedence, article 19 (Precedence) should be mentioned in the commentary as a corresponding article, as well as article 17. If article 19 were deleted from the part of the draft concerning permanent missions, the reference to order of precedence should also be deleted from article 57.

57. The part of the draft dealing with permanent observer missions should contain a provision similar to article 18, on the appointment of a *chargé d'affaires ad interim*, to provide for cases in which the post of permanent observer was vacant or the permanent observer was unable to perform his functions. The Drafting Committee should consider that possibility.

ARTICLES 58 and 59

58.

Article 58

Offices of permanent observer missions

1. The sending State may not, without the prior consent of the host State, establish offices of the permanent observer mission in localities other than that in which the seat or an office of the Organization is established.

2. The sending State may not establish offices of the permanent observer mission in the territory of a State other than the host State, except with the prior consent of such a State.

Article 59

Use of flag and emblem

1. The permanent observer mission shall have the right to use the flag and emblem of the sending State on its premises. The permanent observer shall have the same right as regards his residence and means of transport.

2. In the exercise of the right accorded by this article, regard shall be had to the laws, regulations and usages of the host State.

59. Mr. EL-ERIAN (Special Rapporteur) pointed out that articles 58 and 59 were modelled on the corresponding articles on permanent missions.¹² The question of the use of the flag and emblem (article 59) had given rise to some difficulty, but he had decided to include the article because a permanent observer mission did have a representative character and represented a sovereign State.

60. Mr. KEARNEY said he had no objection to article 58. Article 59, however, raised the question whether permanent observer missions were to be equated in all respects with permanent missions and thus, in effect, with diplomatic missions. It was necessary to consider carefully whether the mere fact that an individual or group of individuals represented a State placed them on the same level as a diplomatic mission. He did not think that was true, either in fact or in practice, since there were many types of mission, including military and trade missions, which clearly represented a State, but were not given the status of full diplomatic missions. By way of compromise, however, he would be prepared to agree that a permanent observer mission should have the right to use the emblem, but not the flag, of the sending State.

61. Mr. USHAKOV said he approved of the wording of article 58, but had some reservations about article 59. He did not think a permanent observer should be granted the right to use the flag and emblem of the

¹¹ For resumption of the discussion, see 1062nd meeting, para. 42.

¹² See *Yearbook of the International Law Commission, 1968*, vol. II, p. 212, articles 20 and 21.

sending State on his residence and means of transport. He therefore proposed that the second sentence of paragraph 1 should be deleted, in order to show the difference between permanent representatives of member States and permanent observers of non-member States.

62. Mr. EL-ERIAN (Special Rapporteur) said that the objections made by Mr. Kearney and Mr. Ushakov raised the question whether the Commission should approach article 59 from the formal or the functional point of view. From the formal point of view, Mr. Kearney was right, since even permanent missions did not have a diplomatic character, inasmuch as they were not sent by one State to another; but from the functional point of view, there was a case for retaining article 59 as it stood.

63. The CHAIRMAN suggested that articles 58 and 59 should be referred to the Drafting Committee, together with the two proposals concerning article 59, paragraph 1.

*It was so agreed.*¹³

The meeting rose at 12.50 p.m.

¹³ For resumption of the discussion, see 1063rd meeting.

1051st MEETING

Tuesday, 19 May 1970, at 3.5 p.m.

Chairman: Mr. Taslim O. ELIAS

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227)

[Item 2 of the agenda]

(continued)

ARTICLES 60 and 61

1. The CHAIRMAN invited the Commission to consider articles 60 and 61 in the Special Rapporteur's fifth report (A/CN.4/227).

2.

Article 60

Facilities, privileges and immunities

The permanent observer mission and its members shall enjoy the same facilities, privileges and immunities as are accorded to the permanent mission and its members in accordance with articles 22 to 44.

Article 61

Conduct of the permanent observer mission and its members and end of functions

The rules relating to the conduct of permanent missions and their members and to the end of functions as laid down in articles 45 to 49 shall apply *mutatis mutandis* to permanent observer missions and their members.

3. Mr. EL-ERIAN (Special Rapporteur), introducing articles 60 and 61, said he had drafted those articles on the assumption that the legal status of members of permanent observer missions was the same as that of members of permanent missions. He drew particular attention to the case of *Pappas v. Francini*, discussed in paragraph (4) of the commentary, in which the Supreme Court of the State of New York had interpreted the International Organizations Immunities Act as applying to permanent observers.

4. Mr. AGO said that the Commission should beware of the danger of simply equating the status of heads of permanent observer missions of non-member States with that of heads of permanent missions of member States. Article 60 was one of the most important in the part of the draft under consideration, as it gave the Commission an opportunity to consider whether it wished to indicate a difference in status and whether recognition of the representative character of a permanent observer mission led *ipso facto* to the conclusion drawn in article 60. It was a question to which some thought should be given; it had already arisen during the consideration of previous articles, in particular when the Commission had been determining the respective functions of a permanent mission and a permanent observer mission. If the Commission adopted an article as liberal as the article 60 on facilities, privileges and immunities submitted by the Special Rapporteur, it might destroy the effect of the cautious position it had taken in regard to the preceding articles. He therefore urged the Commission to reflect on the scope of article 60 itself and on the relationship between it and the preceding articles.

5. Mr. USHAKOV said that the suggestion in the Special Rapporteur's report was that the Commission should draft the articles on permanent observer missions on the basis of the corresponding articles on permanent missions of member States. He supported that suggestion. It was self-evident that articles 22 to 49 could not be applied to permanent observers without change. For instance, a permanent observer mission could not be temporarily recalled, as article 47¹ provided for a permanent mission, and there might perhaps be no justification for granting permanent observer missions the right

¹ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, p. 17.

to communicate with the various missions and consular posts of the sending State "wherever situated", as provided in article 29² for permanent missions. Some changes were therefore essential, and perhaps the Special Rapporteur should be asked to suggest appropriate wording for the articles in question to the Drafting Committee.

6. At its previous session the Commission had decided to postpone examination of the possible effects of exceptional situations on the representation of States in international organizations.³ It might be worth considering whether it would not be advisable to do likewise in regard to permanent observer missions, for example, by deferring consideration of the question until the second reading of the draft articles.

7. Mr. KEARNEY said he shared Mr. Ago's doubts about the propriety of equating permanent observer missions with permanent missions. He did not think the *Pappas v. Francini* case, which was admittedly a complicated one, represented the final thinking of American jurisprudence on the subject, since the judgment in that case had been delivered by what actually, in spite of its name of "Supreme Court", was not one of the higher ranking tribunals, being third in rank among the New York State courts. Moreover, the defendant's motion to dismiss the complaint had been denied partly on the ground that the immunity of an observer had not been established by adequate evidence for the purpose of a preliminary motion, and the final outcome of the case was not on record. In the event, the case was hardly one that could be cited as establishing the broad principle of the immunity of observers to the United Nations.

8. He had additional information regarding the use of the national emblem. The six States which were accredited to United Nations Headquarters as observers displayed such emblems only on their office doors. The Federal Republic of Germany, on special occasions, had also displayed its flag on a building which it owned. None of the observer missions used the flag on mission vehicles.

9. He found it difficult to believe that the nature of the representative function of permanent observer missions was such as to place them on the same level as permanent missions. At the present stage, however, pressure of time made it difficult to consider in detail each of the privileges and immunities to which such missions would be entitled on a functional basis.

10. He proposed, therefore, that instead of attempting to model articles 60 and 61 on the corresponding articles on permanent missions, the Commission should give serious consideration to modelling them on the corresponding provisions of the Vienna Convention on Consular Relations.⁴ Consular missions performed functions on behalf of the sending State which were at least as important as, if not more important than, those of an observer mission, as article 5 of the Consular Con-

vention made clear: protecting the interests of the sending State in the receiving State, furthering the development of commercial, cultural and economic relations and issuing visas certainly involved a representative capacity.

11. Mr. YASSEEN said that the basis for the facilities, privileges and immunities granted to the permanent missions of member States was the Vienna Convention on Diplomatic Relations.⁵ In the case of permanent observer missions, the Special Rapporteur was proposing to take as a basis, *mutatis mutandis*, the rules applied to permanent missions. That seemed to be going too far, because there was a difference in kind between the two sorts of mission. A distinction should therefore be made between the two situations. The Vienna Convention on Diplomatic Relations had been based both on the representational theory and on the functional theory. But the notion of representation, which had formerly meant representation of the sovereign and hence led to the granting of excessive immunities, had evolved; it was confined to a simple function, and it might be said that nowadays even consuls had a representative character. In the case of permanent observer missions, the Commission should not let itself be drawn into a series of analogies which would take it too far, but should adhere strictly to the functional theory. For permanent observers were in the territory of the host State in order to perform certain functions, and that alone should be the reason for the facilities, privileges and immunities granted to them. The Commission should therefore review the facilities, privileges and immunities granted to the permanent missions of member States, with a view to determining, by the criterion of function, which of them might be granted to permanent observer missions. It should be noted that article 61 was in fact based on the functional theory.

12. Mr. RAMANGASOAVINA stressed the importance of article 60, which was intended to grant facilities, privileges and immunities to permanent observers who had hitherto enjoyed them only by courtesy of the organization or the host State. It was undeniable that certain facilities, privileges and immunities were essential to permanent observers, for once their existence was recognized they must be given the means to perform their functions. As Mr. Yasseen had observed, it was in fact the performance of functions that justified the granting of facilities, privileges and immunities. But it was primarily the host State which granted them, and, as far as it was concerned, there was hardly any difference between the functions performed by a permanent observer mission and those performed by a permanent mission; it was within the organization that there was a difference between the status of observers and that of permanent missions.

13. Since it was impossible completely to equate the two kinds of mission, some middle course must be found between granting permanent observers all the advantages granted to permanent missions and refusing them all privileges and immunities. Perhaps some such phrase as "*mutatis mutandis*" or "to the extent necessary for the

² See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, pp. 7 and 8.

³ *Ibid.*, p. 3, para. 18.

⁴ United Nations, *Treaty Series*, vol. 596, p. 262.

⁵ *Op. cit.*, vol. 500, p. 96.

performance of their functions” might solve the problem, unless the Commission wished to make a detailed analysis of the differences between the functions of diplomatic missions and those of consular missions; but he doubted that the respective functions of permanent observers and permanent representatives could be precisely delimited in an article. He approved of articles 60 and 61, subject to the changes he had proposed or similar changes.

14. Mr. ROSENNE said he fully shared the doubts expressed by Mr. Ago and Mr. Kearney concerning articles 60 and 61. Despite those doubts, however, he was of the opinion that the Commission should put forward a definite text, along the lines proposed by the Special Rapporteur but perhaps rather more tautly, and that it should draw the attention of governments and the General Assembly to the elements of novelty which the peculiar position of permanent observer missions presented in modern international relations.

15. He thanked Mr. Kearney for his comments on the *Fappas v. Francini* case referred to in paragraph (4) of the Special Rapporteur’s commentary; those comments should do much to clear up the misunderstanding of that case which was apparent in the Secretariat’s study.⁶ Mr. Kearney’s suggestion that articles 60 and 61 should be modelled on the corresponding articles of the Vienna Convention on Consular Relations deserved careful consideration, but he personally believed that permanent observer missions had more in common with diplomatic than with consular missions.

16. The Commission should also consider how article 44 (Non-discrimination) would apply to permanent observer missions. Would it mean that there should be no discrimination as between permanent observer missions attached to a particular organization? Or would it mean that there should be no discrimination as between permanent missions and permanent observer missions? It should be borne in mind that at Geneva there were instances of States maintaining permanent observer missions to the United Nations which were at the same time permanent missions to other organizations.

17. Mr. USTOR said that the practical implications of article 60 were rather limited. There were very few permanent observer missions and the number was not expected to increase. Since the problem was therefore more theoretical than practical, it would be appropriate to rely on theory in dealing with it.

18. As the preamble to the 1961 Vienna Convention on Diplomatic Relations showed, there were two theories to be considered: that of the representative character of diplomatic agents and that of functional necessity. At the 1961 Vienna Conference, a compromise had been reached and both theories had been taken as the basis for diplomatic privileges and immunities.

19. The reference to functional necessity implied the need to ascertain the functions of permanent observers in order to determine what privileges and immunities should be extended to them. The question of those func-

tions was at present under consideration by the Drafting Committee in connexion with article 52. It could, however, be said that the functions of permanent observers were almost the same as those of permanent representatives. That being so, it was difficult to grant them a different measure of privileges and immunities.

20. The solution adopted by the Special Rapporteur in article 60 was therefore theoretically sound. It had been argued, on the basis of the functional necessity theory, that permanent observer missions should not be granted full jurisdictional immunity; but the same arguments could be invoked with regard to permanent missions themselves. Since permanent observers had a representative character, and since they needed to exercise their functions freely and undisturbed, they should not be denied the same privileges and immunities as were granted to permanent representatives. Their functions were not so different from those of permanent representatives as to necessitate a differentiation in their legal position.

21. No analogy could be drawn with the position of consular officers; consuls did not have a representative character and the treatment extended to them was based on a long tradition. At the same time, it was worth noting that there was a recent tendency to place consuls on the same footing as diplomatic agents where privileges and immunities were concerned. That was the position created by the recent consular treaty between the United States and the USSR, and also by a number of consular treaties between the United Kingdom and the USSR and other socialist countries.

22. The Drafting Committee should examine the provisions of articles 22 to 44, article by article, to find out whether any changes should be made in those texts to adapt them to permanent observers.

23. With regard to article 61, he could accept the text proposed by the Special Rapporteur. He believed that the important provisions of articles 45 to 49 would probably have to be moved to Part I (General provisions) and be made applicable to Parts II to IV.

24. Mr. REUTER observed that the Commission now had four possible solutions before it. The first was to keep articles 60 and 61 as they stood; the second, proposed by Mr. Ushakov and Mr. Ustor, was to re-examine articles 22 to 49 very carefully to see whether minor corrections could be made to them; the third, proposed by Mr. Yasseen, was to re-examine articles 22 to 49 from the point of view of functional necessity and eliminate everything which might appear to assimilate observers too closely to permanent representatives; the fourth, proposed by Mr. Kearney, was that permanent observers should be placed on the same footing as a class of persons whose status was already defined, namely, consuls.

25. There was merit in all those suggestions, but he found some difficulty in determining the relative standing of all the persons who enjoyed, or would enjoy, facilities, privileges and immunities. He would like a synoptic table to be prepared showing the real differences between the various categories; for it was only when he had a general view of that kind that he would be able to take a posi-

⁶ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 191, para. 174.

tion on the facilities, privileges and immunities to be granted to permanent observers. Furthermore, he could not very well judge the scope of the problem with regard to the number of persons concerned, which was likely to be very small. Consequently, he wondered whether the Commission might not perhaps be wasting its time, and whether it might not be well to make a distinction, for the purposes of facilities, privileges and immunities, between two types of mission: those of large States and those of very small States. The text of the draft articles would then have to be reviewed in the light of that distinction. For instance, the Commission might contemplate not applying article 46 to the observer missions of very small States, for it was quite conceivable that States of that kind might wish to choose representatives of press agencies, for example, as observers.

26. The Commission's work at that stage could only be provisional: in order to determine the facilities, privileges and immunities to be granted to permanent observers, it would first have to define the functions of observer missions and the various types of mission. The Commission should be especially careful because, if it reduced the facilities, privileges and immunities of observers, the status of permanent representatives themselves might again be called in question; for it was obvious that States would consider the facilities, privileges and immunities of permanent observers and of permanent representatives as a single whole.

27. Mr. ALBÓNICO noted that the rules made applicable by articles 60 and 61 were taken from the Commission's 1969 draft articles on permanent missions, which were themselves based on the corresponding provisions of the 1961 Vienna Convention on Diplomatic Relations. It should not be forgotten that that Convention was concerned with bilateral diplomacy, in which the institution of permanent observers did not exist. He believed that much of the confusion had arisen from an attempt to apply to permanent observers—an institution of multilateral diplomacy—rules taken from bilateral diplomacy.

28. Since the rules contained in the 1961 Vienna Convention were not applicable to permanent observers, it was necessary to draw up a different set of rules which took account of the special character of their functions. While it was true that a permanent observer had, in a sense, a representative character, it was also true that he only performed representative functions in very exceptional cases. Accordingly, he should be granted only the privileges and immunities necessary for the exercise of those functions.

29. For those reasons, he could not agree that all the provisions of articles 22 to 44 should be applied to permanent observers. The institution was peculiar to multilateral diplomacy, and it had not been envisaged when the 1961 Convention on Diplomatic Relations and the 1963 Convention on Consular Relations had been drafted.

30. Mr. NAGENDRA SINGH commended the Special Rapporteur for submitting articles 60 and 61 in the form best calculated to invite discussion; those articles and their commentaries shed light on an entirely new topic.

31. It had been suggested that discussion of the two articles should be postponed until the question of the functions of permanent observers had been settled. There was no point in adopting that course, because the question had already been sufficiently debated. It had also been suggested that the privileges and immunities of permanent observer missions should be defined by reference to established institutions, such as permanent missions or consulates. He did not believe that approach was the best. Another suggestion had been that a golden mean should be found between maximum and minimum privileges and immunities; but that would entail drafting a large number of articles. The process would take a long time and would result in lengthy provisions on permanent observer missions which would give an exaggerated idea of their importance.

32. His own preference was for an article 60 setting out the privileges and immunities of permanent observer missions in a few paragraphs. For example, the facilities mentioned in article 22 could be restated for permanent observers, and it could be assumed that those listed in articles 23 and 24 were covered by the language of article 22.⁷

33. Sir Humphrey WALDOCK said he started from the position that the existing law accorded little place to permanent observer missions. The articles would therefore bring about a considerable expansion of the general law on the privileges and immunities of permanent observers. If possible, the criterion of functional necessity should be applied, and the privileges and immunities should be limited by reference to that necessity. The real difficulty was how to give concrete expression to those ideas.

34. Every effort should be made to ensure that the privileges and immunities proposed were justified by the functions of permanent observers. There was strong opposition in some quarters to any increase in the number of persons entitled to privileges similar to those of diplomatic agents.

35. He did not favour taking as an explicit basis for the work the idea that the principles to govern permanent observers should be arrived at by reference to those governing consuls. It was, of course, legitimate to seek inspiration from the provisions of each of the other conventions dealing with privileges and immunities. But such an approach would be difficult to defend on grounds of principle, since consuls were very different from observers.

36. Close examination of articles 22 to 44 was necessary and he believed it would reveal that some of those articles might be fully appropriate but others too wide for permanent observer missions. The articles dealing with facilities were probably easier to accept, because the limitations arising from the character of the functions would operate on those provisions automatically. It was the articles on privileges and immunities which contained provisions that appeared too extensive for permanent observer missions.

⁷ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, pp. 4 and 5.

37. The solution might well be to subdivide the articles on facilities, privileges and immunities into two categories. The first would include those provisions which were applicable as they stood to permanent observer missions; for them, a simple reference on the lines of articles 60 and 61 would be adequate. The second category would consist of the articles which would have to be rewritten so as to adapt them to the needs of permanent observer missions. That had been the method adopted in the Consular Convention for dealing with "honorary consuls".

38. Mr. BEDJAOUI pointed out that there was some inconsistency between paragraph (6) of the commentary to articles 60 and 61, which stressed the difference, both in nature and in scope, between the functions of permanent missions and those of permanent observer missions, and article 60 itself, which fully assimilated observer missions to permanent missions as far as facilities, privileges and immunities were concerned. It was certainly true that the situation in which observer missions had no official status and enjoyed facilities, privileges and immunities only by courtesy of the host State should be brought to an end.

39. If the Commission wished to make a distinction between observers and the members of permanent missions, the place to do so was not in article 60. There was not very much difference between the facilities, privileges and immunities granted to senior international officials and those granted to members of the diplomatic corps and to permanent representatives. Admittedly, the functions of those groups of persons differed, but the same régime was sometimes applied to persons performing different functions. He was therefore in favour of articles 60 and 61 as drafted by the Special Rapporteur. By way of compromise, he could also accept the form of words proposed by Mr. Ramangasoavina. The Commission would not reach a coherent solution by following Mr. Reuter's idea of recognizing two types of mission. As to Mr. Kearney's suggestion that permanent observers should be equated with consuls, he thought there were very considerable differences between the functions of consuls and those of permanent observers.

40. Mr. CASTRÉN said that article 60 was one of the most important provisions of the draft articles on permanent observers, since its purpose was to define the legal status of permanent observer missions and their members. The solution suggested by the Special Rapporteur, which was that such missions and their members should enjoy the same facilities, privileges and immunities as permanent missions and their members, was simple and rather radical. In his commentary the Special Rapporteur admitted that it was an innovation, since there were no precise rules and the practice varied widely. Paragraph (6) of the commentary to articles 60 and 61 showed that, at United Nations Headquarters in New York, observers had generally enjoyed the same facilities as those extended to distinguished visitors, that they had no official status and that whatever facilities they enjoyed were given merely as a gesture of courtesy by the United States authorities. With regard to the United Nations Office at Geneva, paragraph (3) of the

commentary showed that permanent observers at that office in fact enjoyed the same privileges and immunities as permanent representatives.

41. To demonstrate that the permanent missions of member States and permanent observer missions should have the same legal status despite the different nature of their principal functions, the Special Rapporteur had several times invoked the representative character of permanent observer missions. It looked at first sight as though he had been too liberal in his efforts to rectify the present situation of such missions, though that situation ought to be considerably improved. As to the means of doing so, he had some doubts about applying the régime in force for consuls, as suggested by Mr. Kearney.

42. He agreed with Mr. Bedjaoui that there was a contradiction between the conclusion in paragraph (6) of the commentary and the text of article 60 itself. The problem could be solved by assimilating observers to delegates to organs of international organizations and to conferences convened by them. There was no great difference between the legal status of such delegates and that of members of permanent missions to organizations, and the permanent character of the functions of members of permanent observer missions might be said to militate in favour of granting them extensive facilities, privileges and immunities.

43. He would be inclined to accept provisionally the text prepared by the Special Rapporteur, on the understanding that the Commission would review it on second reading in the light of the comments made by governments.

44. He had no difficulty in accepting article 61.

The meeting rose at 6 p.m.

1052nd MEETING

Wednesday, 20 May 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1)

[Item 2 of the agenda]

(continued)

ARTICLE 60 (Facilities, privileges and immunities) (*continued*) and

ARTICLE 61 (Conduct of the permanent observer mission and its members and end of functions) (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of articles 60 and 61 in the Special Rapporteur's fifth report (A/CN.4/227).
2. Mr. BARTOŠ said that permanent observers should not be accorded all the privileges and immunities enjoyed by permanent representatives, as the Special Rapporteur proposed. Some international organizations, such as the International Office of Epizootics, did not ask that full diplomatic privileges and immunities should be granted to the representatives of their member States, in view of their purely technical character. The Commission had thought that permanent missions of member States to international organizations should, by analogy, be granted the same privileges and immunities as diplomatic missions, and it now wished to grant the same privileges and immunities, again by analogy, to permanent observer missions. But if the Commission accepted the Special Rapporteur's first idea that the establishment of permanent observer missions should not be made subject to any conditions, serious difficulties would arise in practice. For example, to take a hypothetical case, the Republic of China (Taiwan), having a permanent mission to UNESCO, might refuse to return to the French Government the premises of the Embassy of China for use by the People's Republic of China, with which the French Government maintained diplomatic relations. When that permanent mission disappeared, as a result of the re-establishment of the rights of the People's Republic of China, and was replaced by a mere observer mission, nothing could compel it to return the Embassy premises if it enjoyed the same privileges and immunities as a permanent mission and if, as the Special Rapporteur proposed, the establishment of permanent observer missions was not made subject to any conditions. That example showed how dangerous it was to grant unduly extensive rights to shadow States.
3. He had thought it necessary to make those comments in order to show that it would be inadvisable to disregard the objections and submit the Special Rapporteur's proposals to States for their comments straight away. Any text emanating from the Commission had a certain authority and that procedure might quite wrongly give the impression that the Commission had decided in favour of the solution proposed, even if it had reserved the right not to take a final decision until it had received the comments of governments. The Commission should take a definite position before submitting its text to governments. Failing that, it should state clearly in the commentary that the provision had not been finally adopted by the Commission, which reserved the right to take its final decision on the second reading. In any case, the Commission should only adopt a text if it was convinced that it could be recommended from the point of view of international law.
4. Mr. TAMMES said that for the host State the most important point would appear to be the number of per-

sons attached to the permanent observer mission. The Drafting Committee should give particular attention to article 40, on the privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff.¹ The articles following article 40 presented no difficulty, but in drafting articles 22 to 39 the Special Rapporteur had been breaking new ground and it would be advisable to obtain the views of governments on how those articles should apply to permanent observer missions.

5. Mr. USHAKOV said it was self-evident that the corresponding articles concerning permanent missions, articles 22-49, could not be applied unchanged to permanent observer missions, any more than they could be included in the part of the draft relating to those missions simply by means of a reference. He therefore proposed that the Commission should request the Special Rapporteur to prepare the desired texts and commentaries for consideration by the Drafting Committee.

6. Mr. KEARNEY said he had no problem with respect to article 61, which incorporated the substance of articles 45 to 49, but in connexion with article 47 he thought that some reference should be made to the natural termination of the functions of the permanent observer mission, for instance when the sending State became a member of the organization.

7. Mr. ROSENNE, referring to the discussion on the use of the phrase "*mutatis mutandis*", said that that phrase was defined in *The Concise Oxford Dictionary* as meaning "with due alteration of details". He still considered that the Commission should explain what the due alteration of details should be and not leave it to subjective interpretation.

8. Mr. TSURUOKA said he was in favour of applying the functional theory to determine the scope of privileges and immunities. The Commission had unfortunately departed from that theory when it had drafted the articles on the privileges and immunities of permanent missions: for instance article 28 on freedom of movement. It now had an excellent opportunity of recovering itself by adhering strictly to that theory in defining the scope of the privileges and immunities of permanent observers, with due regard to the legitimate interests not only of the sending State and its representatives, but also of the host State. If the Commission was unable to formulate a precise rule, perhaps it should establish a system designed to prevent abuses, for it was abuses which were most detrimental to the interests both of the State whose representative committed them and of other sending States, the host State and even the organization. Only a rule which struck the right balance between all those interests could give general satisfaction.

9. Mr. RUDA said that the theory of functional necessity on which the privileges and immunities of permanent missions were based should obviously also apply, *muta-*

¹ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, p. 13.

tis mutandis, to permanent observer missions. Unfortunately, the Commission did not seem to be in agreement about the Special Rapporteur's text for article 52, on the functions of permanent observer missions. That text gave the impression that the functions of permanent observer missions were to a large extent similar to those of permanent missions, but contrary opinions had been expressed during the discussion. If those functions were, in fact, different, it was only reasonable to assume that the privileges and immunities to which permanent observer missions should be entitled would also be different. He himself took the view that although the functions of permanent observer missions might differ from those of permanent missions, the permanent observer mission nevertheless did represent a State and its members should at least be granted certain minimum privileges and immunities.

10. Mr. EUSTATHIADES said that he had no objection to article 61, except the use of the words *mutatis mutandis*, which established a very strict analogy, the justification for which had not been established. Article 60 was one of the most important articles in the whole draft, for there were no precedents and it was therefore an example of the progressive development of international law. The rule to be proposed by the Commission must be based on the most rigorous logic and on the practical considerations that would form the comments of governments. It was not the first time that the Commission was drafting a rule of that kind; but having taken a customary right of diplomatic missions as its starting point, it had allowed itself to be drawn into granting the same right to consular missions, then to special missions and then again to permanent missions, and it was now inclined to grant that right to permanent observer missions as well. But in the last case, logic and practical needs demanded that the essential basis should be the nature of the functions, without too much consideration being given to the permanent and representative character of the mission. It was therefore necessary to determine exactly what those functions were. Article 52, dealing with that point, attributed very extensive functions to permanent observers, and thus went too far. It was clear from the Secretary-General's statement, quoted by the Special Rapporteur himself in his report² in support of the establishment of permanent observer missions, that those functions were confined to contacts and obtaining information on the work of international organizations and the opinions expressed in them.

11. Thus it could be seen that everything depended on the content given to article 52, for if it was accepted that permanent observers had the same functions as permanent representatives, it would be natural to grant them the same privileges and immunities in article 60. He himself did not take that view, however. Many of the articles on permanent missions were not applicable to permanent observer missions; for example article 44, on non-discrimination, and article 28, mentioned by Mr. Tsu-

ruoka. The matter should therefore be referred to the Drafting Committee, which should examine more specifically which of the articles concerning the privileges and immunities of permanent missions were applicable to permanent observer missions. The Commission could, however, adopt forthwith the principle that permanent observer missions and their members enjoyed the facilities, privileges and immunities granted to permanent missions under articles 22 to 44, in so far as they were necessary for the performance of their functions, and amend the present wording of article 60 accordingly, so as to make it quite clear that the article was based on necessities for undisturbed performance of functions and that the Commission was not proposing simply to assimilate permanent observer missions to permanent missions.

12. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Yasseen's suggestion concerning the idea of functional necessity³ seemed to meet with general acceptance. The main difficulty over articles 60 and 61 could be traced to article 52; once that article had been reformulated by the Drafting Committee, the Commission should have a clearer idea of the functions of a permanent observer mission. Mr. Kearney had suggested that, for the purposes of those articles, the position of a permanent observer mission should be equated with that of a consular mission,⁴ but he himself was inclined to agree with the Special Rapporteur that it was more appropriate to regard permanent observer missions as a special kind of permanent mission. He suggested that the Drafting Committee, when considering articles 60 and 61, should pay particular attention to articles 28, 29, 32, 37, 38, 44 and 47. The Drafting Committee should, of course, proceed on the understanding that all the draft articles would eventually have to be brought into alignment. The Commission should also make it clear that its final position on articles 60 and 61 would be taken only on second reading and that those articles would not be submitted to governments before then.

13. Mr. USHAKOV said he did not think the general opinion in the Commission was that the draft articles were based on the theory of functional necessity. Both the present members of the Commission and its former members had always held that the texts it prepared were based on both the representational theory and the functional theory, and that only the representative character of missions, of whatever kind, provided a ground for granting them such privileges as exemption from dues and taxes and exemption from customs duties, which manifestly had no connexion with their functions. Thus the Vienna Conventions and the Convention on Special Missions made it clear that it was the representative character of a mission, over and above its functions, which supplied the basis for the privileges and immunities accorded to it. The Commission itself had definitely recognized that fact in article 1 (d) of the draft on representatives of States to international organiza-

² A/CN.4/227, Section II, General Comments, para. (3).

³ See previous meeting, para. 11.

⁴ *Ibid.*, para. 10.

tions.⁵ He could not see why that notion should be continually called in question.

14. As to the procedure to be followed for articles 60 and 61, it was essential to draft as many articles as necessary on the basis of the corresponding articles on permanent missions, and to provide commentaries; otherwise, the draft on permanent observer missions would be non-existent, not to mention the fact that States could not simply be asked to make the necessary changes themselves when applying to permanent observers articles 22 to 49, to which articles 60 and 61 referred. The Special Rapporteur should therefore be asked to prepare such articles and the necessary commentaries.

15. The CHAIRMAN said it should be left to the Drafting Committee to decide whether the Special Rapporteur should be asked to redraft any or all of the first twenty-eight articles.

16. Mr. EL-ERIAN (Special Rapporteur), summing up the discussion, said that some members appeared to think that governments should be invited to furnish guidelines concerning the functions of permanent observer missions. Mr. Yasseen had emphasized the theory of functional necessity, while Mr. Kearney had suggested that the problem might be solved by assimilating permanent observer missions to consular missions. Incidentally, he wished to thank Mr. Kearney for his information concerning the use of national flags and emblems in New York, and for his interpretation of the *Pappas v. Francini* case.

17. At the present stage, the draft articles were only provisional, but they would have to be submitted to governments to elicit their views. In doing so, the Commission should make it clear that it was entering on new ground, without any guidance from case law or practice, and that it was for governments to say to what extent they were prepared to accept innovations.

18. Mr. Ustor had reminded the Commission that permanent observer missions, unlike diplomatic and consular missions, were actually very few in number and that it was necessary to establish some theoretical basis for them with that fact in mind.

19. He noted that the Commission had rejected his idea that permanent observer missions should be assimilated to permanent missions, but he relied on the Drafting Committee to find some satisfactory wording for article 52.

20. Objection had been made to the expression "*mutatis mutandis*", but he would submit that legislators could not be expected to provide for all contingencies and that some such saving clause was necessary.

21. He drew attention to the fact that article 48, on facilities for departure, did not provide for the case of armed conflict, although that case was referred to in the Convention on Diplomatic Relations.⁶

22. As to article 44 on non-discrimination, he could see no reason why that article should not apply to permanent observer missions as well as to permanent missions.

23. Despite Mr. Kearney's argument, he could not accept the analogy between permanent observer missions and consular missions. Consular missions dealt primarily with business matters and did not really have any representative or political character. A consul could not be compared with an ambassador, who occupied a highly sensitive political position and needed a much fuller measure of protection.

24. With regard to the privileges and immunities of permanent observer missions, the majority of the members seemed to favour a combination of the representative and the functional necessity theories; they took the view that permanent observer missions should, as a general rule, enjoy the same privileges and immunities as permanent missions. The problem could perhaps be solved by including in article 60 some such phrase as "to the extent necessary for the proper performance of their functions".

25. The CHAIRMAN suggested that articles 60 and 61 should be referred to the Drafting Committee, with the request that it take into consideration the different points of view which had been expressed.

*It was so agreed.*⁷

26. Mr. EUSTATHIADES suggested that, if the Drafting Committee had great difficulty in reformulating article 60, the article might be drafted to read:

"The Organization and the State in which its headquarters are situated shall accord to permanent observers the facilities, privileges and immunities necessary for the performance of their functions, taking articles 22 to 44 as a basis."

That wording would make it possible to take due account, in each specific case, of the importance of the permanent observer mission and the basic principles laid down in articles 22 to 44.

27. The CHAIRMAN requested Mr. Eustathiades to submit his proposal in writing; a copy would be sent to the Drafting Committee, which would take it into account.

PART IV. DELEGATIONS TO ORGANS OF INTERNATIONAL ORGANIZATIONS AND TO CONFERENCES CONVENED BY INTERNATIONAL ORGANIZATIONS

28. The CHAIRMAN invited the Commission to take up Part IV in the Special Rapporteur's fifth report (A/CN.4/227/Add.1)

ARTICLES 0 and 62

29.

Article 0

Use of terms

For the purposes of the present articles:

(a) A delegation is the person or body of persons charged with the duty of representing a State at a meeting of an organ of an international organization or at a conference.

⁵ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 196.

⁶ United Nations, *Treaty Series*, vol. 500, p. 122, article 44.

⁷ For resumption of the discussion, see 1064th meeting.

(b) A conference is a meeting of representatives of States for negotiating or concluding a treaty on matters concerning the relations between the States.

Article 62

Composition of the delegation

1. A delegation to an organ of an international organization or to a conference convened by an international organization consists of one or more representatives of the sending State from among whom the sending State may appoint a head.

2. The expression "representatives" shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.

3. A delegation to an organ of an international organization or to a conference convened by an international organization may also include administrative and technical staff and service staff.

30. Mr. EL-ERIAN (Special Rapporteur), introducing articles 0 and 62, said that Part IV, in his fifth report, was preceded by some general comments which traced the development of the law on the subject and gave an account of the efforts of the General Assembly to elaborate on the relevant provisions of the Charter. That process had resulted in the adoption of the general Convention on the Privileges and Immunities of the United Nations of 13 February 1946⁸ and the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947.⁹

31. In paragraph (5) of his general comments, he had given examples of the provisions on privileges and immunities in the constitutional instruments of certain regional organizations and had listed in a footnote the corresponding regional conventions on privileges and immunities.

32. Article 0 (Use of terms) was intended to supplement article 1 by introducing two additional sub-paragraphs: sub-paragraph (a) defined the term "delegation" and sub-paragraph (b) the term "conference". In sub-paragraph (a), the words "a meeting of an organ" should perhaps be replaced by "a session of an organ".

33. Article 62 (Composition of the delegation) was modelled on existing rules of procedure and on the provisions of the general Convention on the Privileges and Immunities of the United Nations. Its text had been co-ordinated with that of the articles on the composition of permanent missions in Part II (article 15) and on the composition of permanent observer missions in Part III (article 55).

34. He had explained in paragraph (2) of the commentary to article 62 that the term "secretaries of delegations" as used in paragraph 2 was deemed to refer to diplomatic secretaries only and not to include clerical staff. Paragraph (3) of the commentary referred to the provision in the ICAO Headquarters Agreement which specified that the expression "secretaries of delegations" included "the equivalent of third secretaries of diplomatic mission but not the clerical staff".

35. In paragraph 3 of article 62, it was provided that a delegation might include administrative and technical staff.

36. Mr. CASTRÉN requested that the articles be discussed separately.

37. Mr. ROSENNE urged a more flexible approach; he would find it difficult to discuss the articles separately, in isolation.

38. The CHAIRMAN said that some flexibility would have to be allowed in order to advance the Commission's work. The present discussion was confined to articles 0 and 62, but members could comment on general aspects of the subject.

39. Mr. REUTER said he wished to make a few brief remarks on article 0 (Use of terms). First, the change which the Special Rapporteur had just proposed in sub-paragraph (a), substituting the word "session" for "meeting", seemed to him to be ill-advised; it would be dangerous to make that change because, in the practice of international organizations, meetings were sometimes held apart from sessions. He would favour the broadest possible formulation, namely "... representing a State in an organ of an international organization...". Secondly, while he approved of the distinction which the Special Rapporteur had made between organs of international organizations and conferences, in practice, unfortunately, international organizations did not adhere to that distinction; they often gave the title of "conference" to what was only an organ, as in the case of the United Nations Conference on Trade and Development, and that undoubtedly had administrative consequences. The commentary to article 0 should therefore explain that the use of terms in the draft articles was stricter than it was in practice.

40. In sub-paragraph (b) he doubted whether the term "conference" was broad enough if it was to be linked only with negotiating or concluding treaties, since there were conferences which resulted in something less formal than a treaty, such as recommendations or resolutions. The use of a rather more general expression should therefore be considered. Moreover, he was not sure that it was necessary, in defining a "conference", to specify that the treaty dealt with "matters concerning the relations between the States", unless a very broad interpretation was placed on that phrase; but then the point would have to be explained in the commentary.

41. He also wished to draw the Special Rapporteur's attention to the fact that it was not only representatives of States who took part in the proceedings of organs of international organizations. The case of the International Law Commission and other organs showed that independent persons could take part in such proceedings, and defining their legal status raised awkward questions. The Commission should therefore consider assimilating such persons to representatives of States, or rather to international officials.

42. Mr. USTOR commended the Special Rapporteur on the useful material he had provided. He would like to know whether the term "delegation", in sub-paragraph (a)

⁸ United Nations, *Treaty Series*, vol. 1, p. 16.

⁹ *Op. cit.*, vol. 33, p. 262.

of article 0, was intended to cover both temporary representatives of States and temporary observers. In recent conference practice, the only observers present had been from international organizations, but at the sessions of various United Nations organs, particularly the Economic and Social Council, States which were not members of those organs had adopted the practice of sending observers. No doubt a separate part dealing solely with observer delegations could be included in the draft, but he thought they could be taken together with delegations of representatives. It would, however, be necessary to explain in the commentary that the expression "delegation" covered both temporary representatives and temporary observers.

43. As to the definition of the term "conference", subparagraph (b) should be brought into line with the title of Part IV, which specified "conferences convened by international organizations". Personally, he would have been in favour of extending the scope of the draft to cover all types of conferences, but if the Special Rapporteur wished to limit it to a certain kind of conference, as the title of Part IV suggested, that should be reflected in the language of subparagraph (b).

44. Mr. EL-ERIAN (Special Rapporteur) said he would include at the end of his fifth report a note on temporary observers, who were mentioned in a number of headquarters agreements. It would conclude with the suggestion that temporary observers should be covered by the definition of the term "delegation".

45. With regard to conferences not convened by international organizations, he would also append a note at the end of the report, in which he would suggest an article assimilating those conferences to conferences convened by international organizations.

46. During the discussion of the draft convention on special missions in the Sixth Committee, the United Kingdom had proposed that an article on conferences should be included.¹⁰ That proposal had been withdrawn on the understanding that the International Law Commission, when considering the topic of relations between States and international organizations, would deal with the status, privileges and immunities of delegations to international conferences. It was essential that the Commission should do so, because otherwise there would be a gap in the law. The matter was not one that was likely to be dealt with as a separate topic.

47. A conference convened by an organization was regarded as an extension of that organization. The General Convention on the Privileges and Immunities of the United Nations always mentioned representatives to conferences together with representatives to meetings of organs.

The meeting rose at 12.55 p.m.

¹⁰ See *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, Agenda item 87, document A/7799, para. 175.

1053rd MEETING

Thursday, 21 May 1970, at 10.55 a.m.

Chairman: Mr. Taslim O. ELIAS

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

Filling of casual vacancies in the Commission (article 11 of the Statute)

[Item 1 of the agenda]

1. The CHAIRMAN announced that, at a private meeting, the Commission had elected Mr. José Câmara, of Brazil, Mr. Doudou Thiam, of Senegal, and Mr. Gonzalo Alcívar, of Ecuador, to fill, respectively, the casual vacancies caused by the death of Mr. Gilberto Amado and the resignations of Mr. Louis Ignacio-Pinto and Mr. Eduardo Jiménez de Aréchaga on their election as Judges of the International Court of Justice.

Sixth session of the International Law Seminar

2. The CHAIRMAN invited Mr. Raton, the senior officer in charge of the sixth session of the International Law Seminar, to address the Commission.

3. Mr. RATON (Secretariat) said that he wished first to thank the members of the Commission who had agreed to address participants in the sixth session of the International Law Seminar. There would be twenty-four participants selected from among sixty candidates. Eighteen participants would be coming from developing countries, as a result of a special effort made in accordance with the wishes of the International Law Commission and the Sixth Committee of the General Assembly. That effort had been successful thanks to the generosity of several States which had financed the award of fellowships. Denmark, Finland, the Netherlands, Norway and Sweden had awarded fellowships of \$1,500 each and the Federal Republic of Germany and Israel fellowships of \$1,000 each. In addition UNITAR fellowships had been awarded to four participants. In tribute to the memory of Gilberto Amado, the organizers of the Seminar had decided to give his name to its sixth session.

4. Mr. YASSEEN said he would like to take the opportunity of thanking Mr. Raton for his continuing efforts to ensure the Seminar's success.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 0 (Use of terms) and

ARTICLE 62 (Composition of the delegation) *(continued)*

5. The CHAIRMAN invited the Commission to resume consideration of articles 0 and 62 in the Special Rapporteur's fifth report (A/CN.4/227/Add.1).

6. Mr. EL-ERIAN (Special Rapporteur) said he withdrew the suggestion he had made at the previous meeting that the word "meeting" should be replaced by the word "session" in sub-paragraph (a) of article 0 (Use of terms).¹ The term "session" was not suitable, because it would not cover all situations. The Security Council, for example, did not hold separate sessions: it functioned continuously.

7. Mr. ROSENNE said that the Drafting Committee would have to scrutinize very closely the words "body of persons" used in sub-paragraph (a) of article 0. Those words could be interpreted as meaning a body corporate in municipal law. They could give rise to difficulties, particularly if the draft articles were later converted into internal law. Moreover, the word "bodies" had already been used by the Commission in sub-paragraph (m) of article 1 (Use of terms)² in quite a different sense.

8. In sub-paragraph (b) of article 0, it would be necessary, following the discussion at the 945th and 946th meetings,³ to adopt more flexible language, because conferences often met for purposes other than "negotiating or concluding a treaty".

9. There was, however, a more fundamental question he wished to raise: was there any real need to define the use of the terms "delegation" and "conference"? The descriptions given were arbitrary and it was possible to point to many examples of delegations and conferences which were not covered by the language used. In fact, the two terms were not used in the draft articles in any very special sense; the meanings attached to them were those given in any dictionary. Since definitions were always dangerous, because they could lead to unexpected results, it would be preferable not to define the terms "delegation" and "conference" at all.

10. He had great difficulties over the group of articles 62 to 64. One difficulty arose from the fact that article 3 as adopted by the Commission in 1968 might well not be applicable in respect of those articles. The safeguard in article 3 related to the "relevant rules of the Organization" and would therefore not cover cases where no relevant rules existed, which were likely to occur quite often where conferences were concerned. For example, at the United Nations Conference on the Law of Treaties, as at other similar conferences, there had been no "rele-

vant rules" until the Conference had adopted its rules of procedure. It had done so at the first plenary meeting; but a conference might well not adopt its rules of procedure so early, and delegations had to be present from the beginning. Moreover, the rules of procedure of a conference of plenipotentiaries would hardly be the "relevant rules of the Organization".

11. The Special Rapporteur had referred in his fifth report (A/CN.4/227, section I, para. 9) to the proposal, made by the United Kingdom in the Sixth Committee of the General Assembly, to include an article on conferences in the draft Convention on Special Missions.⁴ That proposal, which had been limited to privileges and immunities, had been withdrawn on condition that the Committee included in its report a summary of the views expressed during the discussion of the question of conferences. The summary in question contained the following significant passage:

"The Committee was of the opinion that the question of the legal status, privileges and immunities of members of delegations to international conferences . . . constituted a gap in the law relating to international representation which remained to be filled. Once again, it was necessary to start from the proposition that the status, privileges and immunities should be those necessary to ensure the efficient and independent exercise of their respective functions."⁵

The Sixth Committee had also noted that the International Law Commission, in its work on relations between States and international organizations, would be dealing with "the status, privileges and immunities of delegations to international conferences" and had requested it to take into account "the interest and the views expressed" in the Sixth Committee.⁶

12. The matters dealt with in articles 62 to 64, namely, the composition of the delegation, the appointment of a joint delegation to two or more organs or conferences and the appointment of the members of the delegation, were not covered by the rules of organizations or by the rules of procedure of conferences. They went beyond the question of "the status, privileges and immunities of delegations to international conferences" which the Commission was called upon to discuss.

13. He wondered whether it was really possible, or desirable, to generalize on such subjects. Obviously, the Commission could not dictate to States on matters of that kind. Moreover, the requirements of States differed from one State to another and from one agenda item to another. For example, the requirements of a government regarding its representation in the General Assembly would vary very much according to the subjects discussed. The matter was not one of concern either to the organization or to the host State, nor was it relevant to the question of privileges and immunities.

14. In his view, Part IV of the draft, which in any case

¹ 1052nd meeting, para. 32.

² See *Yearbook of the International Law Commission, 1968*, vol. II, p. 196.

³ *Op. cit.*, 1968, vol. I, pp. 13-25.

⁴ See *Official Records of the General Assembly, Twenty-fourth Session, Annexes, Agenda item 87, document A/7799*, para. 175.

⁵ *Ibid.*, para. 178.

⁶ *Ibid.*

contained a difficult set of provisions, should be confined to the question of the status, privileges and immunities of delegations, with which the Commission was called upon to deal on the basis of the consensus reached by the Sixth Committee at the twenty-fourth session of the General Assembly.

15. Mr. USHAKOV said he would like to raise two preliminary points. First, the Commission would recall that, as stated in paragraph 17 of the report on the work of its twenty-first session,¹ it had provisionally decided that the draft should include articles on delegations to conferences convened by international organizations, leaving the final decision to be taken at a later stage. He himself was in favour of including such articles, and he thought the Commission should now take a final decision on the matter.

16. The second point was whether it was necessary, useful and possible to draft provisions applicable both to delegations to organs of international organizations and to delegations to conferences convened by international organizations. The situations of the two kinds of delegation were entirely different. The Special Rapporteur had been right to draft two separate sets of articles, one on permanent missions, which concerned member States, and the other on permanent observer missions, which concerned non-member States. He should have done likewise for delegations to organs of international organizations and delegations to conferences, since the former concerned States which were members of the organs, whereas the latter concerned all States. Again, the reference to the relevant rules of international organizations in articles 3, 4 and 5 would apply to permanent missions of member States, to permanent observer missions for non-member States and to delegations to organs of international organizations. But the situation was completely different in the case of delegations to conferences, for which the rules of international organizations were of no consequence whatever, since conferences were fully sovereign organs which adopted their own rules of procedure, and those rules were not subordinate to the rules of any international organization.

17. Being intended to regulate two entirely different situations, each of the articles drafted by the Special Rapporteur raised extremely serious difficulties. For instance, the expression "sending State" in article 64 did not mean the same thing when it referred to delegations to organs of international organizations as it did when it referred to delegations to conferences. In the former case, the sending State was a member State of the organ in question, whereas in the latter case it was any State invited to participate in the conference. The same applied to the word "freely" in article 53. In the case of delegations to organs, if the relevant rule of the organization provided that a State must be represented by a person holding a particular position, there was no freedom of choice, whereas in the case of delegations to conferences the situation was manifestly different, for each State participating was naturally free to

appoint the members of its delegation. Articles 62 and 63, and even article 0, raised equally insuperable difficulties. He therefore considered it impossible to prepare a single draft applying both to delegations to organs of international organizations and to delegations to conferences convened by international organizations.

18. Mr. ALBÓNICO said he thought Part IV was narrower in scope and clearer in intent than the statement by the previous speaker would seem to suggest. Its sole purpose was to regulate the question of the representation of States in conferences convened by international organizations, and it merely put in written form rules which constituted the more or less established practice of the United Nations. In any case the rules embodied in Part IV would only apply in the absence of a relevant rule or practice in the organization concerned; they met a need which was becoming daily more apparent in the various organizations.

19. The description of the use of the term "delegation" in sub-paragraph (a) of article 0 seemed to him to be adequate. With regard to sub-paragraph (b), however, he agreed with Mr. Rosenne that the language should be made broader, because a conference might well meet for a purpose other than that of "negotiating or concluding a treaty". Sub-paragraph (b) should therefore be reworded to state that a conference was a meeting for the discussion of any problem of interest to the participating States.

20. Paragraph (2) of the commentary to article 0 discussed the use of the terms "conference" and "congress", but that was not a question of any great contemporary importance.

21. Article 62, paragraph 1, attempted to regulate the composition of a delegation and thus entered into a matter pertaining to the domestic jurisdiction of the sending State. Each State would act in accordance with its own needs and practices. The matter was quite different from that dealt with in article 56, for in the case of a permanent observer mission it was appropriate to lay down a rule regarding size and to specify that it should not exceed what was "reasonable and normal, having regard to the functions of the Organization, the needs of permanent observer missions and the circumstances and conditions in the host State".

22. He was in general agreement with the Special Rapporteur on the present group of articles, but he might have occasion to speak again on individual provisions.

23. Mr. CASTRÉN observed that in article 0 the Special Rapporteur had given two new definitions which were both necessary and useful. The Special Rapporteur had not commented on sub-paragraph (a) in his report, but he had stated during the discussion that, in his view, the term "delegation" should include participants in all conferences, not merely those convened by international organizations. Since several members did not agree with that interpretation, the Commission would have to settle the question and state its decision in the commentary to the draft articles. With regard to the drafting, sub-paragraph (a) should specify that the "persons charged with the duty of representing a State" had the right, recog-

¹ *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10.*

nized by the organ of the organization or the conference, to represent the sending State. The word "authorized" might perhaps be used, as it covered both elements: the mandate of the sending State and the consent of the organization or conference. He agreed with Mr. Reuter that the aims and functions of conferences were described too restrictively in sub-paragraph (b), so that it would be necessary to recast the definition of the term "conference" in the way Mr. Reuter had suggested.

24. With regard to article 62, he wondered whether it might not be necessary, or at least useful, to specify in paragraph 1 that every delegation must have a head, as in the case of permanent missions and special missions. Referring to paragraph 2, the Special Rapporteur had explained in paragraph (2) of his commentary that he had given the term "representatives" the same definition as that used in article IV, section 16 of the general Convention,⁸ which seemed right. The commentary also stated that the term "secretaries of delegations" was deemed to refer to diplomatic secretaries, and it might be as well to say so explicitly in the body of article 62, paragraph 2; that also applied to advisers and technical experts, who must have diplomatic status if they were to be regarded as representatives.

25. Mr. Rosenne had expressed some doubt whether the draft articles should include provisions on the legal status of delegations to organs of international organizations and to conferences. His own view was that it was rather hard to say at the present stage whether that part of the draft was necessary, because the Commission had not yet seen the other articles the Special Rapporteur was to submit to it. He could only say that he found some of the provisions already submitted useful. As to Mr. Ushakov's comments, he recognized that there were differences between the situation of delegations to organs of international organizations and that of delegations to conferences convened by international organizations, and that they should be taken into consideration.

26. Mr. NAGENDRA SINGH said it had been suggested that the terms "delegation" and "conference" were so well known that it was unnecessary to define them. He did not think, however, that the meaning of those terms was self-evident and he agreed with Mr. Castrén that they should be defined in the draft articles. It had also been argued that complications would be avoided if a separate chapter were devoted to the privileges and immunities of delegations to conferences, or if that subject was left outside the scope of the draft, but he did not believe that the Commission, responsible as it was for the codification of international law, could leave the privileges and immunities of delegations to conferences undefined. In his opinion, article 0 was necessary, and the Special Rapporteur should be congratulated on having presented the basic material in his commentary. Conferences were a common, well-established feature of international life and they could not be omitted.

27. With regard to the drafting of sub-paragraph (a) of article 0, he agreed with Mr. Rosenne that the term "body of persons" was not entirely satisfactory; he suggested that the phrase should be amended to read "person or persons". The word "session" would not be correct, as it would not cover the meetings of the Security Council, for example. In the circumstances, the existing text, "at a meeting of an organ", was appropriate.

28. As to sub-paragraph (b), he agreed with Mr. Reuter that it was necessary to state explicitly that a conference was convened by an international organization. That would limit the sphere, but it was necessary, because the Commission was primarily concerned with organizations. He had no objection, however, to widening the concept of "conference" to include meetings held to consider matters arising out of problems of international law and the like.

29. He could understand Mr. Ushakov's objection to drafting a single text to cover two entirely different situations, but he still found article 0 generally satisfactory. He agreed with Mr. Castrén, however, that the Drafting Committee should be careful to avoid any overlapping; he suggested, for example, that the term "sending State" should be defined more clearly as the "sending member State" or "sending non-member State", as appropriate. If that would help Mr. Ushakov he would have no objection, although it was not strictly necessary.

30. He hoped that the Special Rapporteur would also include a definition of temporary observers at a conference.

31. Article 62 was acceptable to him, though he would suggest that paragraph 3 could be abbreviated. A delegation had already been defined as covering both an organ and a conference, so the words "to an organ . . . by an international organization" could be omitted. Perhaps the substance of the paragraph, which was that a delegation might include administrative and technical staff, could be incorporated in paragraph 1, so that a separate paragraph 3 would not be necessary.

32. Mr. TAMMES said that the Special Rapporteur's draft articles 0, 62, 63 and 64 represented a substantial contribution to the solution of the problem of the ambiguous status of international conferences—a problem which had been discussed by jurists since the days of the League of Nations.

33. He wished to associate himself with Mr. Reuter's suggestion that the scope of article 0, sub-paragraph (b), should be somewhat extended so as not to limit the purposes of conferences to the negotiation or conclusion of treaties.

34. In his view, a conference was master of its own procedure. The following passage occurred in the report of the Sixth Committee of 28 November 1969:⁹

"Several representatives agreed with the Commission's conclusion that its draft should also include

⁸ United Nations, *Treaty Series*, vol. 1, p. 24.

⁹ See *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, Agenda items 86 and 94 (b), document A/7746, para. 21.

articles dealing with delegations to sessions of organs of international organizations. With regard, however, to delegations to conferences convened by such organizations, some representatives reserved their position. It was said, in this connexion, that an international conference was a sovereign body, irrespective of who convened it."

Nobody could legislate for a sovereign body which did not yet exist; every conference started its independent life at the moment when it was convened and it was not obliged to adopt any model which might have been made for it by the international organization convening it or by the International Law Commission. That the problem was not a purely theoretical one could be seen from article 9, paragraph 2, of the Vienna Convention on the Law of Treaties,¹⁰ which stated that: "The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule". The final clause in that sentence amounted to a reservation of the sovereignty of the conference.

35. What was needed in Part IV, therefore, was some saving clause similar to article 3;¹¹ it might read: "The application of the present articles is without prejudice to any rules adopted by the conference".

36. Mr. AGO said that the Special Rapporteur was specially to be commended because, in drafting the articles on delegations to organs of international organizations and to conferences convened by international organizations, he had had to venture into unknown territory, since there were practically no precedents. The articles he was submitting to the Commission were all the more useful because, although the various kinds of mission and delegation had some features in common, their situations differed widely in many respects, and needed to be regularized. Perhaps the Commission should provide for each possible situation in a different chapter, rather than try to deal with all eventualities together by means of drafting devices which might make the wording of the articles difficult to understand.

37. There was one class of representatives in certain organs of international organizations which the Special Rapporteur had not taken into account in his draft articles. They were not heads of permanent missions to an organization, nor were they delegates to a particular meeting or session of an organ of an organization: they were the permanent representatives of member States *in* or *to* an organ—generally an organ with a small membership, such as the councils of WHO, UNESCO, FAO, ICAO, ITU and UPU. Those representatives were accredited on a permanent basis. The privileges and immunities they enjoyed were extended to them not for one meeting or for one particular session, but permanently. Hence, if the draft referred only to members of

delegations, it would not cover their case, although it was common to the great majority of international organizations.

38. In his view, heads of permanent missions, permanent representatives in certain organs of international organizations, delegates to a particular meeting of an organ and delegates to conferences should be dealt with separately in the draft articles.

39. Mr. CASTAÑEDA congratulated the Special Rapporteur on having submitted to the Commission a set of draft articles containing a substantial amount of innovation. Those articles raised some questions and called for some comment. For example, it might be asked, as Mr. Reuter had asked at the previous meeting,¹² whether the definition in article 0, sub-paragraph (a), should be limited to persons charged with the duty of representing a State, since it would seem that other persons too should be entitled to enjoy privileges and immunities, among them members of the governing bodies of international organizations and highly qualified experts who were members of commissions such as the International Law Commission. The problem posed by the status of such persons brought to mind that other problem which had arisen in labour law in defining the labour relationship, the criterion used there being either dependence or technical subordination. Perhaps, on similar lines, the representative of a State could be regarded as the person who received instructions from his government.

40. As to the question whether to refer to a "meeting" or a "session" of an organ, it might be better just to say "in an organ", in view of the complexity of the subject, which Mr. Ago had well brought out.

41. It had been proposed that the words "convened by an international organization" should be added at the end of sub-paragraph (a), so that the régime for conferences convened by an international organization would be the same as that for an organ of such an organization. Despite Mr. Ushakov's opinion that the two questions should be treated separately, the régime for an organ of an international organization and the régime for a conference convened by it were very much alike, at least so far as codification conferences were concerned. The rules of procedure for such conferences, as established in 1957 for the first Conference on the Law of the Sea¹³ by experts convened by the Secretary-General, were to all intents and purposes modelled on the rules of procedure of the General Assembly, and similar rules had been used at the other conferences. Such conferences were the subject of an agreement between the United Nations and the country in which they met, their secretariat was provided by the Secretariat of the United Nations and it was the United Nations which decided who should participate in them. The resemblance between them and an organ of an organization was therefore very close and that should be reflected in the régime

¹⁰ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/27* (United Nations publication, Sales No.: E.70.V.5).

¹¹ See *Yearbook of the International Law Commission, 1968, vol. II, p. 197.*

¹² See 1052nd meeting, para. 41.

¹³ *United Nations Conference on the Law of the Sea, Official Records, vol. II, p. xxxi* (United Nations publication, Sales No.: 58.V.4, vol. II).

for privileges and immunities. In the case of other conferences, such as conferences of Heads of State or technical conferences, it was impossible to provide for a uniform régime.

42. He supported Mr. Castrén's proposal that the words "charged with the duty" should be replaced by "authorized" in sub-paragraph (a). In sub-paragraph (b) the words "relations between the States" should be replaced by words with a broader meaning, since the subject-matter of treaties was not confined to those relations. Lastly, the Special Rapporteur should take into consideration, at least in the commentary, the special, though rare, situation in which a State was not wholly free to appoint its representative, as in the case of the World Meteorological Organization, for example, where representatives were required to be specialists responsible for the meteorological services of their countries, and in that of the International Union of Official Travel Organizations, which had a similar requirement.

43. Mr. RUDA said that in his opinion the Commission should conclude consideration of the draft articles as a whole before taking any final decision on the question of delegations to conferences convened by international organizations. The discussion had only increased his misgivings about the desirability of dealing with that question in the draft articles, and he would have to reserve his position until a later stage.

44. He agreed with the criticisms made of the definition of a "conference" in article 0, sub-paragraph (b) and suggested that it might be improved by taking as a basis Sir Ernest Satow's definition, quoted in paragraph (2) of the commentary, which was more comprehensive.

45. He questioned the definition of a "delegation" given in sub-paragraph (a); there appeared to be some contradiction between that sub-paragraph and the provisions of article 62, which referred not only to representatives, but also to administrative, technical and service staff.

46. Another point which caused him some concern was that there was no mention of a problem similar to that contemplated in article 9, paragraph 2, of the Convention on Special Missions,¹⁴ that was to say, the problem of the privileges and immunities of members of a permanent diplomatic mission or consular post who served on a delegation to an organ of an international organization or to a conference convened by such an organization. He thought that that important, practical, everyday problem, which had been appropriately dealt with in the article on the composition of the special mission, should also be dealt with in article 62 of the present draft, on the composition of the delegation.

The meeting rose at 12.55 p.m.

¹⁴ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 100.

1054th MEETING

Friday, 22 May 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Wal-dock, Mr. Yasseen.

Letter from the President of the Security Council

1. The CHAIRMAN said he had received the following letter, dated 14 May 1970, from the President of the Security Council:

"I have the honour to transmit to you herewith a copy of document S/9789 which reproduces the text of a letter addressed to me by the Netherlands representative to the United Nations on 5 May concerning the problem of the protection and inviolability of diplomatic agents.

"In the fourth paragraph of that letter, the Netherlands Government requests me to inform not only the members of the Security Council, but also appropriate organs of the United Nations, of its concern at recent infringements of the inviolability of diplomatic agents.

"To meet that request, I have decided to transmit the text of the letter to the President of the International Court of Justice and to the Chairman of the International Law Commission for such purposes as may be desirable.

"Accept, Sir, etc.

Jacques KOSCIUSKO-MORIZET
President of the Security Council"

2. The letter of 5 May 1970 reproduced in document S/9789 read as follows:

"Upon instructions from my Government, I have the honour to bring the following to your attention in relation to the protection and inviolability of diplomatic agents.

"The Government of the Netherlands wishes to recall that from ancient times peoples of all nations have recognized the status of diplomatic agents. Their immunity and inviolability have clearly been established by time-honoured rules of international law.

"The increasing number of attacks on diplomats which have inflicted great danger and hardship and have, in some cases, resulted in loss of life, is a cause of alarm to the Netherlands Government. My Government is of the opinion that such incidents may endanger the conduct of friendly relations between States, and that attacks on the person, the freedom or dignity of diplomats could lead to situations which might give rise to a dispute and as such even could

endanger the maintenance of international peace and security.

"In view of these considerations, the Netherlands Government deems it proper to draw attention to the question raised above and expresses the hope that Your Excellency will inform members of the Security Council, as well as appropriate organs of the United Nations, of the existing preoccupations.

"I kindly request Your Excellency that my letter be circulated as an official document of the Security Council.

"Please accept, etc.

R. FACK
Permanent Representative
of the Kingdom of the Netherlands
to the United Nations"

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 0 (Use of terms) and

ARTICLE 62 (Composition of the delegation) (*continued*)

3. The CHAIRMAN invited the Commission to resume consideration of articles 0 and 62 in the Special Rapporteur's fifth report (A/CN.4/227/Add.1).

4. Sir Humphrey WALDOCK said he was concerned about what exactly the Commission was trying to accomplish in articles 0 and 62. At a previous meeting, Mr. Ago had suggested that the Commission appeared to be concentrating on organizations of a universal character; most of those organizations, however, like the United Nations, had already developed a considerable body of practice and were less in need of the guidance of a general code than ordinary international organizations and conferences. In the case of conferences, there was generally a set of rules regarding privileges and immunities to which reference could be made; moreover, when conferences were convened by universal organizations, the question of the sovereignty of the conference was of limited significance, since it was unlikely that the question of privileges and immunities would not have been the subject of some prior consultations between the host State and the organization. What the commission should be concerned with, therefore, was primarily those cases in which no agreement on privileges and immunities had been arrived at and it was necessary to appeal to some generally accepted set of principles for the settlement of disputes. The Commission should not attempt to regulate every kind of special case, or deal with every category of participants in conferences, since that would lead to too many complications. It should, instead, try to produce as comprehensive a code as possible along the lines suggested by the Special Rapporteur in his excellent report. The question of the sovereignty of conferences might present difficulties in certain cases, but in general that question would be covered by a

reservation on the lines of that contained in article 9, paragraph 2, of the Vienna Convention on the Law of Treaties,¹ concerning the adoption of the text.

5. As to the drafting, he questioned the use of the expressions "a delegation is" and "a conference is" in article 0; in his opinion, the verb "is" should be replaced by the verb "means", which was used consistently throughout article 2 of the Vienna Convention on the Law of Treaties. The same change should be made in article 1 of the draft.

6. Mr. RAMANGASOAVINA said that the Special Rapporteur was greatly to be commended for having prepared articles which were very difficult to draft owing to the complexity of their subject-matter. The difficulties were obvious. Sir Humphrey WALDOCK had mentioned the risks involved in extending the régime of diplomatic privileges and immunities to the delegations in question; moreover, although the Commission was clear about the status and the protection to be accorded to delegations to the principal organs of international organizations and to delegations to specialized agencies, it had yet to define the status of a category of delegations which were very numerous and might be described as "floating delegations", since they were sent by States to certain meetings only. In that connexion, it had been pointed out that the members of those delegations were not always representatives of governments and could be experts in the service of the United Nations, like the members of the International Law Commission, for example. But many of them occupied posts in their countries' civil services, and it could therefore be said that they were on mission, in the internal law sense, when they absented themselves to attend meetings of the organs of which they were members, and that as officials of a country on mission, they should enjoy certain safeguards to enable them to discharge their duties. Article 0 and the succeeding articles therefore appropriately supplemented article 1 of the draft² by covering that category of delegation.

7. He had no objection to the substance of article 0, but its drafting could be improved. If the word "mission" was interpreted as he had just indicated, and not as meaning an institution, sub-paragraph (a) would be more appropriately worded if it read: "A 'delegation' means a mission of a temporary character consisting of one or more persons charged with the duty of representing a State in an organ of an international organization or at a conference". In article 62, any overlapping with article 0, sub-paragraph (a), could be avoided by simply saying in paragraph 1: "The sending State may appoint a head from among the representatives serving on the delegation to an organ of an international organization or to a conference convened by an international organization".

8. Mr. USHAKOV said that the Commission would

¹ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/27* (United Nations publication, Sales No.: E.70.V.5).

² See *Yearbook of the International Law Commission, 1968, vol. II, p. 196.*

be unable to make much progress in its work until it had clearly defined the meaning of the terms used in the draft articles; for the substance and form of the succeeding articles depended on what was decided with regard to article 0, in particular on what was to be understood by the word "delegation". As used in article 0, sub-paragraph (a), the word applied to both delegations to an organ and delegations to a conference. But the two situations involved were very different and there might be serious difficulties if they were dealt with in one provision. It was virtually impossible to find a single formula which stated clearly and explicitly that the persons forming the delegation were charged by a State member of an organ or a State participating in a conference with the duty of representing that member State or participating State in the organ or at the conference, according to whether the delegation concerned was sent to an organ or to a conference. It would therefore be far better either to divide the draft into two parts, one dealing with delegations to organs and the other with delegations to conferences, or to draft two separate articles.

9. With regard to the substance, it was fairly easy to define the word "delegation" in the case of delegations to international conferences. For example, taking article 1 of the Convention on Special Missions³ as a basis, it could be said that a "delegation" meant a delegation representing a State, which was sent by the State to the conference in question. The word "State" could then be defined by saying that it meant a State participating, or invited to participate, in the Conference; after that the word "conference" would be defined. Then would follow the article on the composition of the delegation, and there would be no objection to saying that it consisted of delegates, from among whom the State could appoint a head, and of advisers and administrative and office staff.

10. Difficulties arose when the composition of a delegation to an organ of an international organization had to be defined. If the Special Rapporteur's proposal were followed, it could be said that a "delegation" meant, in the case in point, one or more delegates charged by a State member of an organization with the duty of representing it in an organ of the organization of which it was a member. But delegates were not always "charged" with the duty of representing the State; they might be authorized or appointed to do so. Moreover, it was not always the State which made the decision, because delegates could be either appointed by the secretary-general of the organization on the authorization of its general assembly, or elected. Again, delegates did not always represent the State: there were organs whose members were experts acting in a personal capacity. The great difficulty of defining a delegation to an organ was thus readily apparent.

11. But then, what was meant by the term "organ"? It was not enough to say that it meant the principal, regular, ordinary or subsidiary organ of the organization in

question, because the status of the delegates to the organ also depended on its composition—whether it consisted of representatives of States, representatives of other bodies, or individuals acting in a personal capacity. First of all, therefore, the Commission must decide what organs it was referring to; and before going on to the succeeding articles, it must also decide whether the same privileges and immunities should be granted to members acting in a personal capacity as to representatives of States, or whether they should be dealt with separately. His own view was that it would be better to define the different delegations and organs separately, even if it took several articles. As far as delegations to conferences were concerned, it could be stated that the legal situation and the privileges and immunities differed according to whether the conference was or was not convened by an international organization.

12. Mr. ALBÓNICO said it was his impression that the Commission was giving too much attention to questions of secondary importance and losing sight of the main issue. Essentially, the draft articles dealt with the relations between States and international organizations; the question to be considered was what persons or group of persons acted as links or intermediaries between them. In his view, those relations could be said to be maintained through seven categories of persons: permanent missions; heads of missions; permanent representatives to organs of an international organization; delegations to meetings of such organs; permanent observers from non-member States; delegations to certain organs and conferences; experts, whether governmental or not, sent to meetings of the main or subsidiary bodies of organizations. He suggested that the Commission should first deal with the over-all problem of relations between States and international organizations by laying down general rules, and then lay down specific rules to govern special cases. In any event, it should first agree on some general method of approach, since otherwise it would become involved in matters of purely academic interest that were best relegated to the commentary.

13. Mr. AGO said that, while he agreed that the Commission should press on with its work, care should nevertheless be taken to ensure that the draft articles did not become a source of difficulties in the future. Many problems arose and they could not be solved by reference to the relevant rules of the organization; otherwise the articles in Part IV of the draft would be quite unnecessary. Like Mr. Ushakov, he did not believe the Commission would be able to work out a single formula for all cases that would be sufficiently clear.

14. The word "delegation", in article 0, was appropriate in that context so long as it was used to designate representatives of States, not just to any organ, but to the plenary organ of an organization; they were not permanent delegations, but *ad hoc* delegations appointed each time a meeting took place. It was true that delegations to the International Labour Conference comprised two government representatives, one trade union representative and one employers' association representative, but all four were State delegates. In the case of smaller organs, on the other hand, the term used was never

³ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, pp. 99-100.

“delegations”, but “representatives”, and they were usually permanent. A State might appoint as its representative in such an organ the person who was head of its permanent mission to the organization, but then the two functions were combined quite incidentally and still remained distinct. The representatives of a State in an organ must also be distinguished, in some cases, from members of the organ who were appointed in a personal capacity—as he himself had been appointed to the UNESCO Executive Board—and were not government representatives. That was the position, for example, in the Governing Body of the ILO. Consequently, if a single formula was to be used, it would be necessary to take careful account of all the distinctions and their incidence on the text to be adopted.

15. Mr. BARTOŠ said that in the present state of international law, the status granted to some delegations to certain kinds of conference raised serious problems. He referred in particular to humanitarian and scientific conferences convened both by an international organization and by other organizations which were not intergovernmental organizations, for example, the conferences convened by the Office of the United Nations High Commissioner for Refugees, or the International Narcotics Control Board, jointly with non-governmental organizations. The status of meetings of experts thus convened in the territory of a sovereign State, for example in Italy at the Villa Serbelloni, which the Rockefeller Foundation made available for such conferences, was not defined. Some held that those meetings were United Nations conferences, others disagreed; but it seemed that such meetings did not enjoy immunity, for the Chairman sometimes warned participants against verbal offences against the host State.

16. There was yet another kind of conference, called the “diplomatic” conferences of the Red Cross, attended by representatives of the national Red Cross societies and representatives of States which had ratified the Geneva Conventions. As far as privileges and immunities were concerned, the status of the former representatives was undefined; the latter should enjoy diplomatic privileges and immunities as representatives of States, but what was the position of representatives of States which were not recognized by the host State or whose government had no diplomatic relations with the government of the host State?

17. Lastly, there was the question of the immunity of expert members of working groups set up to study a specific question, who were either directly appointed by an international organization, or chosen by States or designated by a non-governmental organization having consultative status in category I or II. Those working groups sometimes also included representatives of the intergovernmental organization itself. The question arose whether such an expert could be prosecuted in his country's courts for having expressed an opinion contrary to its vital economic interests, for example.

18. All those questions arose increasingly often in contemporary international law. They were perhaps not yet ripe for settlement by rules having the character of codification, but they should at least be mentioned in the

commentary to show that the Commission was aware of them and was asking States for their opinions.

19. Mr. KEARNEY said that four main questions had arisen during the discussion. The first was whether the Commission should deal at all with the problem of attendance at meetings of organs of an organization and at conferences convened by an organization. In his view, that was a matter which the Commission should deal with, because, if it were not examined in connexion with the present topic, it was not likely to be taken up for many years.

20. The second question was whether the Commission should concern itself with organizations other than those of a universal character. He himself would have preferred it to do so, but the Commission had decided to confine itself to organizations of a universal character.

21. The third question was whether a distinction should be drawn between attendance at meetings of the organs of an organization and attendance at conferences. It seemed to him that the answer should be in the affirmative. The discussion had clearly shown that there was a fundamental difference between the two types of meeting; in particular, a conference was always attended by representatives of States, and that was not always true of meetings of international organs. A number of examples had been given, including that of the Commission itself. He considered that the Commission should deal with such bodies in connexion with the present topic.

22. The fourth question was whether rules should be laid down in the draft articles on the composition of delegations and on the qualifications of persons attending conferences and meetings of organs. As far as meetings of organs were concerned, there were great differences between the organs of the various international organizations, and the matter should therefore be left to the rules and practices of the organization concerned. The position with regard to conferences was different, however, since each conference was convened for a particular purpose. It would therefore be advisable to include residuary rules on the subject of delegations to conferences convened by international organizations.

23. Lastly, there was the less important question whether a distinction should be drawn between persons who attended meetings of organs as representatives of States and those who attended in another capacity. Because of the great variation in the practice of organs of organizations, he did not believe it was advisable to draw that distinction. The essential consideration was the function performed by participants at meetings, not whether they technically represented States. The matter should therefore be approached from the functional point of view and the Commission should concern itself with the privileges and immunities of the persons concerned rather than with their status.

24. Consequently, a distinction should be made between participation in conferences and participation in the meetings of organs. The first case could be covered by a sub-paragraph which might read: “A delegation means a person or group of persons who represent a State at a

conference convened by an international organization of a universal character". The second case could be covered by a paragraph defining the term "members" as meaning persons who participated in meetings of organs or subsidiary bodies of an international organization of a universal character under the statute of the organization concerned, other than employees of the organization.

25. Mr. RAMANGASOAVINA observed, in connexion with Mr. Ago's remarks, that so far as his country was concerned, the employers' and workers' delegates to the International Labour Conference were appointed by the Government, after nomination or election by their unions or associations, so that in fact they did represent the State; moreover, paragraph (3) of the commentary to article 62 showed that employers' and workers' delegates to the International Labour Conference were assimilated to representatives of member States in respect of privileges and immunities. Hence they did not seem to raise any special problem, and it would be sufficient to emphasize the special character of representatives to the ILO in the commentary.

26. The Commission had recognized the need to include provisions concerning representatives of States to international conferences and to organs of international organizations, but he thought that two limitations should be placed on the rules laid down. One concerned the organs to which they would apply: the application of the articles should be restricted to organs of a universal character, though admittedly it would sometimes be difficult to put that limitation into effect, as the number of organs was very large. The other limitation concerned privileges and immunities. The concept of an international organization should certainly be rather broad, as that would increase the draft's prospects of success; on the other hand, the Commission should be extremely cautious about granting privileges and immunities. They were accorded to ensure the protection of the persons enjoying them, but those persons must not abuse them; hence privileges and immunities should be granted only to the extent necessary for the performance of functions.

27. Mr. YASSEEN said he recognized that the term "delegation" might be rather hard to define. He believed, however, that all the members of the Commission were agreed upon the substance: it mattered little whether a person was taking part in the work of an organ of an international organization in an individual capacity or as the representative of a State; in both cases he should enjoy the same privileges and immunities, because he was performing an international function and it was the theory of functional necessity that provided the ground on which privileges and immunities were accorded to him. It was really a problem of drafting. He was therefore in favour of broadening the definition to include members of organs of international organizations who did not represent a State. The definition could thus cover the workers' and employers' representatives in the Governing Body of the ILO, who could not be regarded as representing States.

28. Mr. EUSTATHIADES said that article 0 was of great importance, since the definitions would affect the

field of application of the subsequent articles. The field of application was shown by the title of Part IV of the draft and the two definitions in article 0 were fully in conformity with that title. There were, however, some special cases which, in those circumstances, would not be covered by the draft articles, but which were of considerable importance. Some of them had been mentioned by Mr. Ushakov, Mr. Ago and Mr. Bartoš. He himself wished to refer to three cases, the first two of which involved persons who were not delegates or representatives of States. Those cases were: persons who attended organs of international organizations in an individual capacity; members of commissions of inquiry and conciliation; and delegations to certain conferences which were not covered by the existing text.

29. With regard to the first class of persons, if it was necessary to accord privileges and immunities to representatives of States, it seemed to him even more necessary to accord them to persons who, though acting in an individual capacity, performed functions of international importance within international organizations, unless it was expressly stated in the commentary that it had been decided, without prejudice to their situation, not to deal with it. The second class of persons might not represent a State, and might be chosen for their particular qualifications or for other reasons; they might be covered by the method suggested by Mr. Kearney. Lastly, with regard to the third class of persons to whom he had referred, he was not sure whether delegations to international conferences not convened by international organizations, but having a universal character, would fall within the scope of the draft articles. If they did not, it would be logical to add at the end of article 0, subparagraph (a) the words "convened by such an organization".

30. With regard to sub-paragraph (b), defining the term "conference", there were international conferences attended by representatives of States whose purpose was not "negotiating or concluding a treaty". They could be convened by international organizations, or by States outside those organizations, to settle some international question. He asked the Special Rapporteur to consider that problem.

31. There were two possible methods of dealing with the special cases he had referred to which did not fall within the scope of the draft articles. Either the article could be drafted to regulate those cases, or a paragraph similar to paragraph (2) of the commentary to article 2⁴ could be included in the commentary, in which the Commission would state clearly that it had wished to take all those cases into account.

32. Mr. ROSENNE said that, if article 62 were ultimately retained, it should, together with the following two articles, be limited to persons who represented States actually or notionally. The wording should be carefully chosen so as to cover cases such as those of employers' and workers' representatives at the ILO, who by virtue of the rules of the organization itself, enjoyed a status

⁴ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 197.

equal to that of the representatives of governments. A situation of that type would be fully covered by the provisions of article 3,⁵ under which the relevant rules of the organization would prevail.

33. With regard to experts who did not represent States, the Commission should be extremely careful. Those experts should normally be covered by the agreements on the status, privileges and immunities of the organization itself. They did not come within the scope of the topic of relations between States and international organizations. In the present instance, the Commission was called upon to deal with the representatives of States to international organizations.

34. He remained unconvinced that there was any real need to include provisions dealing with the meaning of terms which were not being used in a special sense in the draft. It was only if a special meaning were attached to a term that there was any justification for including such a provision. Moreover, the description of the use of the term "delegation" in sub-paragraph (a) of article 0 was incomplete: it had to be read in conjunction with the provisions of article 62, paragraph 2, and that created an additional complication.

35. The CHAIRMAN said that different views had been expressed on the question whether a provision on delegations to conferences should be included in the draft. The balance of opinion, however, appeared to be in favour of including some such provision.

36. It had been suggested that there should be two separate series of articles: one dealing with delegations to meetings of organs of an organization and another dealing with delegations to conferences.

37. On the question whether the Commission should confine itself to organizations of a universal character, it had been generally agreed that it should place the main emphasis on the problems of representation to conferences convened by organizations of a universal character, but pay some regard to exceptional cases such as those of UNESCO and the ILO.

38. The Drafting Committee would take note of the various suggestions which had been made. In particular, the word "conference" should be given a wider meaning than a meeting "for negotiating or concluding a treaty".

39. Article 62 might be condensed into two paragraphs by combining paragraph 3 with paragraph 1, on the lines of article 9, paragraph 1, of the Convention on Special Missions.⁶

40. Mr. EL-ERIAN (Special Rapporteur) said he welcomed the useful drafting suggestions which had been made during the discussion. In particular, sub-paragraph (b) of article 0 could be broadened to state that a conference meant a meeting of representatives of States for the consideration of questions of international interest, the negotiation or conclusion of a treaty, or the

adoption of appropriate resolutions and recommendations.

41. He accepted Sir Humphrey Waldock's suggestion that the word "means" should be substituted for "is" in article 0, though he would point out that the word "is" was used in article 1 of the Vienna Convention on Diplomatic Relations⁷ and also in article 1 of the Convention on Special Missions.

42. There had been some objection to the use of the expression "body of persons" in sub-paragraph (a), and he was prepared to alter the opening words of that sub-paragraph to read "A delegation is the person or persons. . ." or "A delegation is the person or group of persons. . .".

43. On the question whether the draft should include a set of articles on delegations to organs and conferences, he would remind the Commission that it had already taken a provisional decision at the previous session.⁸ He urged members to consider all the draft articles on delegations before taking a final decision on the matter.

44. The point had been made that a conference did not have any rules until it had adopted its own rules of procedure. To his mind, that was a very good reason for formulating residuary rules that could be applied until the rules of procedure were adopted.

45. With regard to categories of persons other than State representatives, experts were covered by the appropriate article of the general Convention on the Privileges and Immunities of the United Nations.⁹ As for participants in meetings of organs who were chosen as individuals and not as representatives of States, it should be possible, for purposes of privileges and immunities, to cover them by means of a broad definition of the term "delegation". Another possibility was to cover the privileges and immunities of such persons by means of an appendix to the articles on delegations.

46. In conclusion, he emphasized that the draft articles were intended to deal with general cases rather than special cases such as those of employers' and workers' delegates to the ILO. Exceptional situations of that kind were covered by the provisions of articles 3 and 4.

47. The CHAIRMAN said that, if there were no objections, he would assume that the Commission agreed to refer articles 0 and 62 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁰

The meeting rose at 1.30 p.m.

⁷ United Nations, *Treaty Series*, vol. 500, pp. 96 and 98.

⁸ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, p. 3, para. 17.

⁹ United Nations, *Treaty Series*, vol. 1, p. 24, article IV, section 16.

¹⁰ For resumption of the discussion, see 1067th meeting, para. 10.

⁵ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 197.

⁶ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 100.

1055th MEETING

Monday, 25 May 1970, at 3.10 p.m.

Chairman: Mr. Taslim O. ELIAS

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1)

[Item 2 of the agenda]

(continued)

ARTICLE 63

1. The CHAIRMAN invited the Commission to consider article 63 in the Special Rapporteur's fifth report (A/CN.4/227/Add.1).

2.

Article 63

Appointment of a joint delegation by two or more States

1. A delegation to an organ of an international organization or to a conference convened by an international organization should in principle represent one State only.

2. A member of a delegation sent by a State to an organ of an international organization or to a conference convened by an international organization may represent another State at that organ or conference, provided that the member concerned is not simultaneously acting as the representative of more than one State.

3. Mr. EL-ERIAN (Special Rapporteur) said that in his third report he had included a note on the appointment of a joint permanent mission by two or more States and had explained that, in the infrequent cases where such a situation arose, the question related in fact to representation in one of the organs of the organization or at a conference convened by it, and not to the institution of permanent missions.¹

4. Paragraphs (2), (3) and (4) of the commentary to article 63 cited a number of cases of dual or multiple representation, without mentioning the names of the countries concerned. All the cases had been taken from the Secretariat study² and from information supplied by the legal advisers of the specialized agencies. The commentary also gave an account of United Nations practice in the matter and of the position taken by the Legal Counsel.

5. Since cases of dual representation occurred in practice, a provision on the lines of article 63 was necessary.

¹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 135.

² *Op. cit.*, 1967, vol. II, p. 154.

Paragraph 1 stated the position in principle, namely, that a delegation should represent only one State. Paragraph 2 covered the exceptional cases in which dual representation was possible.

6. Mr. NAGENDRA SINGH said he fully accepted the principle laid down in paragraph 1. He also agreed with the substance of paragraph 2, but suggested that the words "the member concerned" should be replaced by the words "the same member". That change would strengthen the provision.

7. Mr. ROSENNE said he was perplexed by article 63, which involved matters that were far from simple. The article dealt with the general problem of agency or representation in international law. In diplomatic law, that matter was dealt with in article 6 of the Vienna Convention on Diplomatic Relations³—an article which had not been part of the Commission's draft, but had been introduced by the Conference itself. There were similar clauses in article 8 of the Vienna Convention on Consular Relations⁴ and in articles 5 and 6 of the Convention on Special Missions,⁵ but in both those cases the provision had been proposed by the Commission itself.

8. A feature common to those existing provisions was the element of the consent of the receiving State. A question which now arose was how to introduce a corresponding element of consent into the provision under discussion.

9. In the case of the law of treaties, the problem of representation had been discussed at the Commission's 781st meeting,⁶ in connexion with the conclusion of treaties by one State on behalf of another or by an international organization on behalf of a member State—a question raised in Sir Humphrey Waldock's fourth report. The Commission had then been unwilling to consider the notion of agency in the conclusion of treaties, and he thought that that discussion was relevant in the present context.

10. In the circumstances, the question arose whether there were now sufficient new elements to justify an attempt to regulate the matter further in the present articles. Was the attempt justified by the valuable compilation of little-known material contained in paragraph (2) of the commentary?

11. A further question was whether article 63 was compatible with the basic concept of representation, as expressed in article 7 (Full powers) and to some extent in article 9 (Adoption of the text) of the Vienna Convention on the Law of Treaties.⁷ In his view, there was nothing in those carefully worded texts to justify the conclusions set out in the article 63 proposed by the Special Rapporteur.

³ United Nations, *Treaty Series*, vol. 500, p. 100.

⁴ *Op. cit.*, vol. 596, p. 270.

⁵ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 100.

⁶ See *Yearbook of the International Law Commission, 1965*, vol. I, p. 39, para. 42 *et seq.*

⁷ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, document A/CONF.39/27 (United Nations publication, Sales No.: E.70.V.5).

12. Paragraph 1 of the article contained the expression "should in principle", which the Commission had already found to be a potential source of difficulty. In his view, if the article was retained, the rule should be stated in negative terms, with some reservation to allow for the decisions or practice of the organ or conference concerned.

13. He found paragraph 2 almost unintelligible in view of the extremely wide meaning given to the term "representative" under the provisions of article 0, sub-paragraph (a), combined with article 62, paragraph 2, which must often also be read in conjunction with the definition of "full powers" in the Convention on the Law of Treaties. Moreover, paragraph 2 did not tally with the statement of the practice contained in paragraph (3) of the commentary. He assumed that the article was intended to refer to the representative empowered to cast votes at plenary meetings.

14. For those reasons, he was inclined to favour dropping article 63, although he agreed with the ideas underlying the article and with the view that the practice of dual or multiple representation should not be encouraged. Nevertheless, he doubted whether there was sufficient evidence of abuse to justify banning such representation. Experience appeared to militate in favour of a fairly open attitude in the matter and the best course would be to leave it to be governed by the rules and practices of the organizations concerned, in accordance with article 3.^a

15. Mr. USHAKOV said that he wished first to make a few remarks on article 62. He was doubtful about the meaning of the expression "sending State", which the Special Rapporteur used in paragraph 1 of that article without having previously defined it. That expression could refer to two different situations, depending on whether the State concerned was a member of an organ of an international organization or a State participating in a conference, and he did not think the same expression could be applied to two entirely different legal situations. He doubted whether the expression "may appoint a head" was appropriate, since it might be asked whether delegations to organs of international organizations or delegations to conferences could exist without having a head. Also, according to paragraph 1, a delegation consisted of "one or more representatives of the sending State", whereas in paragraph 2 the term "representatives" denoted very different categories of person. He himself thought it impossible for a delegation to consist of only one adviser or technical expert, so that the Special Rapporteur should not have described all the members of the delegation as "representatives".

16. He wished to ask the Special Rapporteur once again what, in his view, the expression "delegation to an organ" meant. It was true that the Special Rapporteur had already said he interpreted that expression as being applicable to members of organs of international organizations who did not represent a State, but in that case it might be asked what was meant in article 62, para-

graph 1, by the words "a delegation to an organ of an international organization . . . consists of one or more representatives", which raised doubts about the situation of members of an organ who did not represent a State. It was necessary to know what organs were involved.

17. Turning to article 63, he said that under paragraph 1 it was a delegation that represented a State, whereas under paragraph 2 it was a member of a delegation that did so, and that made the article rather confusing. Moreover, paragraph 1 provided that a delegation should in principle represent one State only, which suggested that in certain cases it could represent more than one State and that it possessed a subjective right to do so. But he did not think it possible for a delegation to have the subjective right to decide that it represented two or more States. Paragraph 2 conferred that subjective right on a member of a delegation, which was equally impossible; lastly, the fact that the conjunction "or" was used twice tended to detract from the clarity of the paragraph.

18. With regard to the substance of article 63, he could not see how a delegation could represent two States: that would be an unprecedented situation in a universal organization of a political character such as the United Nations. He accepted, however, that two States participating in a conference could send a joint delegation to it. But, even assuming that he agreed with the substance of the article, he did not know what was meant by the expression "a member of a delegation", which was entirely new, since the Special Rapporteur had not defined it.

19. In conclusion, he summarized the conditions he considered essential for the successful formulation of the draft articles. First, the Commission must settle the preliminary question whether one set of articles could be applied to two entirely different situations. Then it must decide what organs were envisaged—was it only organs composed of representatives of States, or also organs which included persons who did not represent States? Lastly, it must decide whether two entirely different things could be denoted by the term "delegation".

20. Mr. REUTER said he would like to make three comments on the drafting of article 63. First, he agreed with Mr. Ushakov that the question of delegations to organs of international organizations was not the same as the question of delegations to conferences. That difference was particularly noticeable in the French text, which referred to delegations "*auprès d'un organe*", which suggested something external, and to delegations "*à une conférence*", which suggested participation. Secondly, though it might be conceivable in theory for a natural person to represent two legal persons or for one legal person to represent another legal person, the question arose whether it was a case of one State representing another State or of a natural person representing now one State and now another. Then there was the use of the adverb "simultaneously"; he assumed that it meant that a representative could not act without specifying on behalf of what State he was acting. If that was the meaning of the proviso inserted by the Special Rapporteur, it should be put in some other way, perhaps by saying that

^a See *Yearbook of the International Law Commission, 1968*, vol. II, p. 197.

the person concerned must act separately for each of the States he represented. In his view, simultaneity did not generally preclude participation in a single procedure.

21. With regard to the substance of article 63, he was in favour of a procedure that would permit economies in representation. He was thinking in particular of the difficulties of very small States. The Commission had an opportunity of showing, by approval of such a procedure, that it wished to be useful to those States. Consequently, provided that a distinction was made between conferences and organs, and between delegations and natural persons, he was in favour of article 63, though he thought a single paragraph would probably suffice. If the Commission adopted the idea in principle, however, it would have to make the rule subject to a proviso over and above the general saving clause in article 3, since there were international organizations which had not adopted "relevant rules" and article 63 would apply to them. There were cases in which such a concentration of power in the hands of a single person had disadvantages and should be avoided: for instance, international organizations concerned with economic affairs, in which consuming States and producing States, or importing States and exporting States, were represented, and the United Nations, which carried on activities of a political nature. The proviso might be similar to that adopted in the context of the law of treaties with regard to the objects and purposes of treaties; it might relate to the structures and essential characteristics of an organization.

22. Mr. YASSEEN said that the idea underlying article 63 reflected a need that had arisen in the international community. If effective and broader participation in international life was to be ensured, it was necessary for certain States to be able to be represented by persons who were members of delegations representing other States. There was no rule in international law against it. Such a possibility was in no way incompatible with State sovereignty; on the contrary, it was an expression of that sovereignty. The procedure also had advantages, not only for new States but for all States, as it made for simplification of the discussions at some meetings. It could be useful, too, to States bound by ties of special solidarity. But in view of the doubts which had been expressed about the advisability of combining the question of representation to organs of international organizations with that of representation at conferences, certain safeguards would have to be attached to the faculty. For example, it should be stated in article 63 that a member of a delegation of a State who was asked by another State to represent it must obtain the consent of the first State. He interpreted the adverb "simultaneously" in the same way as Mr. Reuter. What was needed, in order to avoid any misunderstanding, was that a person representing two States should be clearly seen to be acting for one State or the other. The task of stating the rule clearly in the article should be entrusted to the Drafting Committee.

23. As to the drafting of article 63, he thought paragraph 1 could be omitted, since it would be sufficient to say that a State possessed the faculty of being represented by a person representing another State. Never-

theless, he recognized the difficulties to which Mr. Reuter had referred. It was true that there were many international organizations in which representation varied with the kind of State represented. In UNCTAD, for instance, the member countries were divided into groups, *inter alia* the industrialized countries and the developing countries, and a developing country was not likely to ask a person representing an industrialized country to represent it. Nevertheless the possibility of dual representation existed within each group.

24. Mr. RUDA commended the Special Rapporteur for submitting, in his commentary, much interesting information which clearly reflected existing international practice. In particular, the Secretariat statement reproduced in paragraph (3) explained United Nations practice in the matter and made it clear that dual or multiple representation was "not permissible unless clearly envisaged in the rules of procedure of the particular body". Accordingly, paragraph 1 of article 63 should be amended to state the principle that one delegation could not represent more than one State. That negative formulation would be more in keeping with the Secretariat statement. In addition, it was necessary to avoid the form of words "should in principle", which was suitable for the expression of a theoretical principle, but not for the formulation of a legal rule.

25. Paragraph 2 of article 63 was not in line with the statement of the practice contained in the commentary, and in particular with the last sentence of paragraph (3) of the commentary. Paragraph 2 should be reworded to state that "an official of one government" might be accredited "as the representative of another", so as to use the language of paragraph (3) of the commentary. In that case, of course, the official concerned would no longer be a member of the delegation of his State, but would act as the representative of the other State.

26. Cases in which a single person represented more than one State constituted anomalies which would be amply covered by the provisions of article 3.

27. Mr. KEARNEY said that, before examining the principle stated in article 63, he wished to raise, in connexion with the whole group of articles now being discussed, the question of the use of the words "convened by an international organization". That expression might not be broad enough to cover all possibilities. Some international organizations, like the International Institute for the Unification of Private Law (UNIDROIT), relied on States to convene their conferences. Since organizations of that kind were included in the definition of an "international organization" in article 1,⁹ they should be covered by the provisions of the present group of articles.

28. With regard to article 63, he understood the Special Rapporteur's concern for the smaller and less wealthy States which were unable to send their own representatives to all the conferences in which they were interested. Nevertheless, he thought it undesirable to adopt an unduly permissive attitude. It might become

⁹ *Ibid.*, p. 196.

a habit for the delegation of one State to appear at a conference with powers to vote on behalf of several States. Such a situation would not contribute to the development of international relations. In his view, it would be preferable to maintain the existing practice and, to that end, he favoured redrafting paragraph 1 of article 63 on the lines suggested by Mr. Ruda. He did not consider, however, that Mr. Ruda's proposed redraft of paragraph 2 was necessary: the point was covered by article 64 and by the note on nationality. Since a State was not limited as to the nationality of its representatives, it was clearly immaterial whether the person designated was an official or not.

29. Mr. CASTRÉN said that he agreed in principle with the idea expressed by the Special Rapporteur in article 63, paragraph 2, for the reasons given by the Special Rapporteur himself and by other members of the Commission. The drafting might be improved, however. The title of the article did not correspond to paragraph 1, and that paragraph should be deleted, as Mr. Yasseen has proposed. It was obvious that any person representing a State must be authorized to do so by that State, so there was no need to say so expressly. The same applied to the consent of a State when a member of its delegation was asked to represent another State.

30. Mr. BARTOŠ congratulated the Special Rapporteur on having submitted the articles now before the Commission. He did, however, see some practical objections to them. First, the definition of the term "representatives" in article 62, paragraph 2, was too general. The Special Rapporteur had taken the Convention on the Privileges and Immunities of the United Nations as his model in drafting it,¹⁰ but that Convention concerned the privileges and immunities granted to certain persons to enable them to perform their functions in the United Nations, which was not the matter under consideration. He therefore agreed with Mr. Ushakov that it would be advisable to specify which persons were representatives and enjoyed privileges and immunities as such, and which other persons might enjoy the privileges and immunities accorded to representatives.

31. With regard to article 63, the possibility of several States being represented by a single delegate had been contemplated at the Vienna Conference on Diplomatic Intercourse and Immunities, and the idea, against which he himself had originally protested, had become part of international law and could no longer be challenged. It remained to be seen whether it could be applied. The precedent of the real union between Norway and Sweden, which had finally been dissolved because a single consular representation had proved impossible owing to the competition between the two countries in foreign trade, gave grounds for saying that representation of several States by a single delegate was not feasible when there was a conflict of interests. It was in that sense that he interpreted the Special Rapporteur's idea, behind the statement in article 63, that a representative still could

not act simultaneously as the representative of more than one State. Where a conflict of interests existed, representation of two States by a single representative could not be valid in international law, by reason of the principle that the interests of one State must not be sacrificed to those of another.

32. Mr. RAMANGASOAVINA congratulated the Special Rapporteur on having submitted article 63 to the Commission, as it filled a real need. It was true that it dealt with a special, and so to speak marginal, situation, since each State normally had representation of its own, but a State might be temporarily obliged to arrange for representation by another State. The provisions proposed by the Special Rapporteur in article 63 were based on the idea that a delegation, as such, could represent only one State, that a single delegate could not be a member of two delegations representing two different States, but that in exceptional cases a delegate could represent another State if he was duly authorized to do so. Although a delegation as such could not, in principle, represent two States, there were several commodity agreements which provided that a State might represent another State, so it would be placing a restriction on the practice established by those agreements to provide that a single delegate could represent only one State. And the practice did serve a useful purpose, by ensuring the effective operation of the organs of which the States in question were members, when one of them was unable to send its own representative. It would be preferable, therefore, in the interests of such organs and provided that the delegate was authorized by another State to represent it, not to prohibit the practice and to make express provision for that exceptional situation, if only in the commentary, inserting some such phrase as "subject to any provisions to the contrary included in certain special agreements".

33. Some members had asked what was meant by an "organ"; the answer lay in the definition of that word to be given in article 0.

34. Sir Humphrey WALDOCK said that in principle he agreed with the Special Rapporteur's basic idea that, since many States today experienced difficulty in providing for adequate representation at conferences and in the organs of international organizations, it might be a real convenience if they were able to appoint a member of the delegation of some other State to represent them. To some extent he shared the fears expressed by Mr. Kearney that that practice might give rise to abuses, but it seemed difficult to dispute the right of States to provide for their representation in whatever way they wished, unless there were specific rules of a conference which provided otherwise.

35. There had been some cases in which individuals had been accredited as the representative of more than one State. The point had been referred to during the discussion of the law of treaties, as Mr. Rosenne had mentioned; the question had then arisen in relation to the effects of a representative's lack of authority. In article 63, however, the question was whether a State was entitled to appoint a member of the delegation of another State to act for it. It was difficult to deny the possibility

¹⁰ United Nations, *Treaty Series*, vol. 1, p. 24, article IV, section 16.

in law of making such an appointment, though whether it was desirable to draw attention to that possibility in the draft articles was another matter. On the assumption that a certain measure of good faith was to be expected on the part of States, he could accept the general principle contained in paragraph 2, subject to some reservations. But the principle would have to be expressed with considerable care. What was really involved was the faculty of appointment possessed by a State in connexion with the conferences. He thought that that faculty could not be denied, but in the case of organs of international organizations, he agreed with Mr. Reuter about the need to minimize any possible difficulties. Mr. Reuter's own suggestion was a useful one; he was not sure that it completely solved the problem, but that would be a question for the Drafting Committee to decide. He agreed with Mr. Yasseen that it was necessary to introduce the element of the consent of the State whose representative was appointed to act for another State.

36. In short, his view was that paragraph 1 was unnecessary; all that was needed was a brief statement of the principle contained in paragraph 2, formulated in such a way as to make it a question of the faculty of a State to appoint a member of another State's delegation to represent it, and to minimize abuses.

37. Mr. ALBÓNICO said he agreed with Sir Humphrey Waldock and Mr. Ruda that paragraph 1 of article 63 was entirely unnecessary. As to paragraph 2, he thought that the question of dual or multiple representation did not arise in connexion with certain international organizations, such as IAEA, ICAO and GATT, where representatives had to possess certain qualifications. If, however, paragraph 2 was intended to apply to organizations of a universal character outside the United Nations system, then the Commission should proceed with caution, since there was a very real danger that the provision might open the door to multiple representation. Under such a system it might be possible for one delegation to have in its pocket, so to speak, the votes of a number of small States on important political issues. Nevertheless, he was prepared to accept paragraph 2, subject to a minor amendment stating that dual or multiple representation would be acceptable provided that it was permitted by a specific rule of the conference or organization concerned.

38. Mr. NAGENDRA SINGH said that he supported article 63 on the basis of his own personal experience. In 1959, when the United Arab Republic had not had diplomatic relations with the United Kingdom, he had been instructed by his Government to represent the United Arab Republic, as well as India, at IMCO. The President of the IMCO Assembly had not objected on the first day, inasmuch as IMCO's rules made no reference to the subject, but on the following day he had asked him to find another representative for the United Arab Republic from among the members of the Indian delegation, on the ground that the representation of two States by the same individual detracted from the decorum of an organization which was an organ of the United Nations. Apart from that, there was difficulty in voting and taking the floor if one man represented two States.

That was a basic objection which had to be respected. In United Nations practice, as pointed out in the commentary, there would appear to be nothing considered legally objectionable in the representation of one State by a member of the delegation of another, provided that the same individual did not simultaneously represent both States.

39. There was no special need to follow Mr. Ruda's suggestion that paragraph 1 should be formulated in a negative way, since paragraph 1 stated the general rule and paragraph 2 the exceptions. Moreover, paragraph 1 was based on a previous formulation. He agreed with Mr. Ruda, however, that it was necessary to stress the fact that article 63 was based on United Nations practice, as explained in paragraph (3) of the commentary.

40. Mr. ROSENNE said that in the course of the meeting his attention had been drawn to an opinion of the Office of Legal Affairs of the United Nations Secretariat on the question of dual or multiple representation, which was contained in a memorandum to the Secretary-General of UNCTAD dated 16 May 1967. After citing a number of examples of such representation, the memorandum continued:

"The practice of one delegate representing two or more countries, if allowed to develop generally, would be inconsistent with one of the basic concepts underlying deliberations in United Nations organs, namely that the various members of those organs should be represented by different delegates who reach conclusions on the issues discussed only after considering the arguments advanced in debate as they affect the interests of their own respective countries. One person representing two States would be unlikely to weigh differently the arguments advanced in his capacity as representative of State A and representative of State B. Furthermore, confusion might arise as to whether a particular statement or argument was made by a single representative on behalf of State A or State B."¹¹

41. After analysing the issues involved, the Office of Legal Affairs had gone on to summarize the practice as follows:

"(a) In no event may one individual be permitted to represent two States *members* of a United Nations organ, as multiple voting is contrary to the concepts underlying United Nations proceedings and to the rules of procedure of United Nations organs;

(b) Exceptionally, one individual may be accredited to a technical United Nations organ by (i) one State and one observer organization, or (ii) one member State and one observer State, or (iii) by two observer States. These exceptions will not, however, be extended to representation of more than two entities by a single person. Furthermore, they should be embodied in a rule of procedure or express decision of any United Nations organ permitting such exceptions;

(c) In cases of the nature outlined in (b) above, in order to distinguish the capacity in which a representative of two entities is speaking, he should

¹¹ *United Nations Juridical Yearbook*, 1967 (ST/LEG/SER-C/5), p. 318 (United Nations publication, Sales No.: E.69.V.2).

either speak from separate places or the name plate in front of him should be changed in order to identify the particular entity he is representing at a given moment."¹²

42. The very concept of representation seemed to him to be extremely ambiguous. In the memorandum he had just quoted, it appeared to comprise at least two separate functions: that of speaking and that of voting. He reserved his position on whether that legal opinion required any change in his attitude as expressed earlier in the meeting.

43. Mr. USTOR said that article 63 dealt with a very important and difficult question, about which the Commission could not remain silent. It involved two different situations: that of a delegation to an organ of an international organization and that of a delegation to a conference convened by such an organization. As Mr. Ushakov had pointed out, it was difficult to deal with both situations under the same rule. In the case of conferences, he suggested that the Commission should adopt a general rule, which would be subject to any other rules adopted by the conference itself, whereas in the case of organs of international organizations, there should, in the absence of express rules providing otherwise, be a general rule that each State must have a separate representative of its own.

44. Some provision might be included along the lines of article 9, paragraph 2, of the Convention on Special Missions,¹³ which read: "When members of a permanent diplomatic mission or of a consular post in the receiving State are included in a special mission, they shall retain their privileges and immunities as members of their permanent diplomatic mission or consular post in addition to the privileges and immunities accorded by the present Convention." It had already been pointed out during the discussion that a delegation to a conference was rather similar to a special mission; if that was so, care should be taken to use similar terminology in both sets of articles. The expression "representatives", as used in article 62, for example, had a different meaning from that given it in the Convention on Special Missions. It was desirable to eliminate that divergence.

45. Mr. AGO said that he had doubts about article 63 as a whole. Indeed, it was simply inconceivable that one and the same delegation should represent two different States; when one and the same person was charged with the duty of representing two States, there were nevertheless two separate delegations. Paragraph 1 was therefore superfluous.

46. Paragraph 2 provided that a member of a delegation of one State might represent another State, provided that he did not represent both of them simultaneously. Consequently, only a low-ranking member of the delegation of the first State could represent the second State. That might conceivably occur at a conference, but it was

out of the question in an organ such as the General Assembly of the United Nations. Paragraph 2 should therefore be deleted.

The meeting rose at 6 p.m.

1056th MEETING

Tuesday, 26 May 1970, at 10.45 a.m.

Chairman: Mr. Taslim O. ELIAS

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

Organization of work

1. The CHAIRMAN announced that, after consulting Mr. Bedjaoui, the officers of the Commission had agreed that the Commission would consider his third report on succession of States in respect of matters other than treaties (A/CN.4/226) on 29 and 30 June and 1 July. Mr. Bedjaoui had been requested to submit the remaining articles of his draft (articles 3, 4, 5 and 6) by 20 June.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1 and 2)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 63 (Appointment of a joint delegation by two or more States) (*continued*)

2. The CHAIRMAN invited the Commission to resume consideration of article 63 in the Special Rapporteur's fifth report (A/CN.4/227/Add.1).

3. Mr. USHAKOV said that article 63 really contained two completely separate provisions. Paragraph 1 dealt with the same situation as article 5 of the Convention on Special Missions.¹ It was based on the idea that two or more States could send a joint delegation to an organ of an international organization or to a conference. He would deal first with the case of an organ of an international organization. It could, of course, be assumed in theory that States, being sovereign, could decide to send a joint delegation; but in reply it could be argued that an international organization, which was

¹² See *United Nations Juridical Yearbook*, 1967 (ST/LEG/SER-C/5), pp. 319-320. (United Nations publication, Sales No.: E.69.V.2).

¹³ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 100.

¹ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 100.

also sovereign, could refuse to accept it. It might be provided that, subject to the relevant rules of the organization, two or more States could send a joint delegation to an organ of an international organization, but such a provision would be practically valueless. On the other hand, the possibility of sending joint delegations to conferences might be entertained, since there were precedents for it. The organs he had in mind were those attended by delegations representing States; organs in which persons sat in their individual capacity posed a quite different problem, and it might be asked what the term "delegation" meant, as applied to them. It was true that the Special Rapporteur accepted the use of the term in that context, but the fact remained that the situation was completely different and should be regulated in a different way. Consequently, the term "delegation" should not be used indiscriminately in the two cases.

4. Article 63, paragraph 2, dealt with persons, not delegations. The issue was not whether such persons were members of one delegation or another, but their nationality. Hence the situation was completely different. What paragraph 2 meant was that a State might appoint a national of another State as a member of its delegation. True, Mr. Yasseen had been entirely convincing when he had affirmed that a sovereign State could appoint anyone it wished as a member of its delegation to an organ of an international organization or to a conference,² but he had not taken that view with regard to the Convention on Special Missions, article 10, paragraphs 2 and 3 of which required the consent of the receiving State. The Special Rapporteur had reproduced that rule of consent in article 11 of his draft on the permanent missions of member States,³ whereas in article 63, paragraph 2, he was proposing an entirely contrary rule, for the sending State might appoint as a member of its delegation, not only any national of another State it wished, but even a national of another State who was a member of the delegation of that State.

5. Some members of the Commission had advocated the adoption of two contrary rules, one for the permanent missions of member States, and the other for delegations to organs of international organizations or to conferences, but he could not agree. In his opinion, paragraph 2 of article 63 should be divided into two separate articles, one relating to the nationality of members of delegations to organs of international organizations, the other to the nationality of members of delegations to conferences. The two articles would be based on the corresponding articles of the Convention on Special Missions and of the draft articles on the permanent missions of member States, and they would refer only to the diplomatic staff of delegations, since the sending State must be left free to employ service staff, for instance, who did not have its nationality. It would not be enough, however, merely to reproduce the second sentence of article 11 of the draft on permanent missions, because it was not a matter of bilateral relations, as in the case of those missions,

but of tripartite relations, involving the sending State, the host State and the organ of the international organization or the conference, which possessed the same right of refusal as the host State. Lastly, although paragraph 2 had some meaning when applied to organs attended by persons representing States, that was not so in the case of organs attended by persons in their individual capacity. For instance, article 2 of the Statute of the International Law Commission provided that no two members of the Commission could be nationals of the same State. The case of conferences, too, was different in that respect.

6. The draft articles on delegations to organs of international organizations and delegations to conferences should contain two articles similar to articles 8 and 9 of the draft articles on permanent missions, for it seemed obvious that a State might appoint one and the same person to represent it in several organs of an international organization.

7. The CHAIRMAN, speaking as a member of the Commission, said he shared the view of those who thought that an article on the appointment of a joint delegation was necessary, but that the form of the proposed text should be modified.

8. With regard to paragraph 1, it would be advisable to separate the question of a delegation to an organ of an organization from that of a delegation to a conference. Many of the difficulties which had arisen were due to the attempt to deal with both those questions in a single sentence. The Drafting Committee might examine that problem in conjunction with article 0 (Use of terms), in which it was proposed to give separate definitions for the two kinds of delegations.

9. He agreed with the suggestion that paragraph 1 should be qualified by some such expression as "unless allowed by the rules of the organization". He also thought it desirable to adopt a negative formulation on the lines of the second sentence of the passage from the Secretariat study quoted in paragraph (3) of the commentary.

10. The general principle that a delegation should normally represent only one State should be expressed in some form; the information supplied by the Secretariat showed that that principle was not self-evident.

11. Paragraph 2 had been rightly criticized as appearing to give a subjective right to a member of a delegation, whereas the intention was to give an objective right to the State concerned to authorize a member of another delegation to represent it. It had also been pointed out that what should be considered in paragraph 2 was not whether a member of a delegation could act simultaneously as the representative of more than one State, but whether, in the performance of his duties, he was acting on behalf of more than one State.

12. As to the wording of paragraph 2, he was in favour of introducing the element of consent, both of the sending State and of the host State. It was also necessary to refer to the rules of procedure of the organization concerned, because those rules might forbid dual or multiple representation.

² See previous meeting, para. 22.

³ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 203.

13. Reference had been made to articles 5, 6 and 10 of the Convention on Special Missions, but in his view the question whether a separate article on nationality should be introduced had better be left aside until the Commission came to consider article 64.

14. Mr. ROSENNE pointed out that the consent of the host State was relevant only in matters of privileges and immunities; it was not relevant to paragraph 2 of article 63. The consent required was rather that of the other participating States, among which the host State might be included.

15. Mr. EL-ERIAN (Special Rapporteur), summing up the discussion on article 63, said that a number of preliminary questions had been raised. The first related to the fact that article 63 dealt both with delegations to an organ and with delegations to a conference convened by an organization. At the previous session, the Commission had adopted a very reserved attitude to the whole question of conferences.⁴ He had been authorized to prepare some articles on the subject on a provisional basis, but the Commission had not given him any instructions with regard to the substance. The position in the Sixth Committee had been very similar: several representatives had reserved their positions on delegations to conferences convened by international organizations, as he had mentioned in his report (A/CN.4/227, section I, para. 8).

16. It had been rightly pointed out that there was a constitutional difference between an organ, which was a part of an organization, and a conference, which was a meeting of States. In the case of a delegation to an organ, there were relations between the sending State and the organization itself; at a conference, the relations were between the participating States.

17. He suggested that the question whether the draft should include separate provisions on the two kinds of delegation should be settled after all the articles had been considered. If it was then found that substantial differences existed, separate provisions would be drafted on representatives to conferences.

18. Reference had also been made to members of organs who did not sit as representatives of States. But article 63 was intended to deal with the general case, not with special cases of that kind. The Commission would, at some future date, examine the question of the status of international organizations themselves, and it would then have to consider the position of officials and experts of organizations. That would be the appropriate time to examine the problem of individuals who sat in a personal capacity in organs of organizations. If it were desired to include a provision on the subject in the present group of articles, that could be done by means of a separate article or by wording the definition of a "representative" so as to cover those special cases.

19. The question of defining the term "sending State" had also been raised. He had not included a definition because he had considered it unnecessary, at least so far

as permanent missions were concerned; but since some members of the Commission thought that a definition was required in view of the discussion on delegations to organs and conferences, the point could be referred to the Drafting Committee.

20. The expression "convened by an international organization" had been criticized as not being broad enough and it had been suggested that it should be replaced by some other formula, such as "under the auspices of an international organization". It had been argued that, in certain exceptional cases, a conference held under the auspices of an organization was actually convened by a State. The argument was not decisive, because special situations of that type were covered by article 3, under which the special rules of the organization concerned would prevail over the provisions of article 63. He had used the term "convened" because it appeared in the general Convention on the Privileges and Immunities of the United Nations;⁵ as it was now well established, he thought it should be adhered to, since there were no strong grounds for replacing it by something different.

21. Mr. Bartoš had drawn attention to paragraph 2 of article 62. That provision had been taken from the general Convention⁶ and it was appropriate in the context of privileges and immunities. He was prepared to drop it, however, on the understanding that the privileges and immunities of the persons mentioned would be dealt with in connexion with the privileges of members of delegations.

22. He accepted Mr. Ustor's suggestion that a provision on the lines of article 9, paragraph 2, of the Convention on Special Missions should be included in article 62.

23. With regard to the substance of article 63, he thought there was sufficient evidence to justify the inclusion of such a provision. He had mentioned in the commentary that cases of dual or multiple representation occurred in practice, and further instances had been cited during the discussion. The majority of the members favoured the inclusion of a provision on the lines of article 63, but in a modified form.

24. The majority also agreed that such a provision was not incompatible with article 7 (Full powers) and article 9 (Adoption of the text) of the Vienna Convention on the Law of Treaties.⁷ Article 63 of his draft did not deal with the representation of one State by another; it had a more modest purpose, which was to deal with cases where a State chose as its representative a person who belonged to the delegation of another State. Perhaps the wording could be amended so as to bring that point out more clearly.

25. It had been suggested during the discussion that an article on joint representation at conferences might

⁵ United Nations, *Treaty Series*, vol. 1, p. 22, article IV, sections 12 and 13.

⁶ *Ibid.*, p. 24, article IV, section 16.

⁷ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, document A/CONF.39/27 (United Nations publication, Sales No.: E.70.V.5).

⁴ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, p. 3, para. 17.

be sufficient and that it was unnecessary to provide for joint representation at meetings of organs of organizations. In point of fact, the first case of joint representation in an organ had arisen in the Interim Committee of the General Assembly, which was a subsidiary organ of the Assembly.

26. With regard to Mr. Ramangasoavina's suggestion that there should be a saving clause relating to special agreements, that matter was covered by the provisions of articles 3 and 4. The Drafting Committee might consider the advisability of including an explicit provision on the subject in article 63.

27. The useful suggestion had also been made that a special provision on persons of high rank should be included, on the lines of article 21 of the Convention on Special Missions. It should be noted that, under the provisional rules of procedure of the Security Council, Heads of State and Heads of Government were not required to produce credentials in order to appear before the Council.

28. He would prepare for the Drafting Committee an additional draft article on delegations to more than one conference.

29. It seemed to be generally agreed that the draft should include an article dealing with the faculty of a State to appoint as its representative a member of the delegation of another State, as distinct from the question of the representation of one State by another. There was also general agreement that paragraphs 1 and 2 of article 63 should be combined, that the provisions related to an objective right of States, and that there should be a reference to the element of consent.

30. The CHAIRMAN suggested that article 63 be referred to the Drafting Committee.

It was so agreed.⁸

ARTICLE 64

31.

Article 64

Appointment of the members of the delegation

Subject to the provisions of article 67, the sending State may freely appoint the members of its delegation to an organ of an international organization or to a conference convened by an international organization.

32. Mr. EL-ERIAN (Special Rapporteur) said that article 64 was based on the general principle of the freedom of choice of the sending State; it provided for one exception, which related to the size of the delegation, but there was no exception relating to nationality. In his note on the nationality of members of a delegation (A/CN.4/227/Add.1), he had mentioned that his earlier position in connexion with the draft articles on permanent missions had been to make the rule more permissive, but that the Commission had adopted a different approach. In article 64, he was reverting to his original position. It had to be borne in mind that the

number of subsidiary organs of a highly technical character was increasing; moreover, in the case of short conferences, it should not be necessary to obtain the formal consent of the host State to the appointment of one of its nationals as a member of the delegation of another State.

33. Mr. YASSEEN said he approved of both the substance and the drafting of article 64. The reservation relating to article 67 was fully justified for the reasons stated by the Special Rapporteur himself in the commentary.

34. With regard to the nationality of the members of a delegation, the Commission should take a more liberal position on delegations to an organ or a conference, which were of a temporary character, than on permanent missions, and it should provide expressly, either in a separate article or in the context of privileges and immunities, that the sending State might appoint to its delegation nationals other than its own. If no reference was made to the matter, there would be a danger of misunderstanding, since it was provided in other conventions that in principle the members of a delegation must be nationals of the sending State.

35. Mr. CASTRÉN said that article 64, which was a new article, since it was not in the draft which the Special Rapporteur had submitted to the Commission in 1968, seemed acceptable at first sight.

36. With regard to the nationality of the members of a delegation, the Special Rapporteur was quite right in saying that there was no need to make an exception in that regard; but in his opinion the main argument in favour of that opinion was not the fact that certain international organizations were of a highly technical character, as stated in the last sentence of paragraph (1) of the note, but rather that organs and conferences met temporarily and for short periods, as the Special Rapporteur said at the end of paragraph (2) of the note.

37. The Commission could revert to the matter when it was considering privileges and immunities, as the Special Rapporteur suggested. He was not sure that, as Mr. Yasseen feared, the absence of an express provision would be interpreted as prohibiting a sending State from appointing foreign nationals as members of its delegation; perhaps the Drafting Committee could consider that point.

38. Mr. ROSENNE said he was in general agreement with the text of article 64, though he thought the Drafting Committee should consider not only the exception arising under article 67, but also that which would apply if article 63 were retained.

39. During the discussion of the draft articles, objection had been made to the use of the expression "the sending State". He had not been convinced by those objections, and the use of that expression in article 64 seemed to show that it was quite appropriate in general. It applied alike to States sending delegations which participated as members of an organ or in a conference of an international organization and to States sending delegations which participated with the status of observers—that was to say, in a non-voting capacity. At the present

⁸ For resumption of the discussion, see 1073rd meeting, para. 55.

stage in the codification of international law he did not think it would be wise to introduce a definition of the expression "the sending State" into the draft articles, since there were already three international conventions based on drafts prepared by the Commission in which that expression was used. He thought that any possible doubt could be cleared up by the Drafting Committee, which might refer to the "sending State" in article 0, sub-paragraph (a).

40. On the question of nationality, he was prepared to accept the view taken by the Special Rapporteur in his note, but only in so far as article 64 was concerned. The privileges and immunities granted to members of a delegation who were nationals of the host State might well be narrower than those of nationals of the sending State, but he agreed with Mr. Castrén that there was no need to provide for that second exception in article 64.

41. The general principle of the sending State's freedom of appointment was an overriding principle, unless the constituent instrument of the organ or conference in question or some other formal text provided otherwise. There had been instances in which a mere resolution referred to the composition of a delegation. For example, operative paragraph 5 of General Assembly resolution 2166 (XXI), on an international conference of plenipotentiaries on the law of treaties, read: "Invites the States . . . to include as far as possible among their representatives experts competent in the field to be considered". He agreed with a view taken in the Sixth Committee that that phrase was exhortatory and not obligatory, but it might be useful to refer to it in the commentary.

42. Mr. AGO said that, in general, he agreed with the Special Rapporteur on the principle of the sending State's freedom to choose the members of its delegation to a session of an organ or to a conference, but the drafting of the article should take account of certain differences in situation. In the first place, it was once again necessary to take account of the fact, to which he had already drawn attention, that a reference to delegations to sessions of an organ such as a general assembly of members did not cover the situation of a representative to an organ—generally a small one—who was appointed permanently. In the second place, reference should be made to the special rules of certain organizations such as the International Monetary Fund, which required the members of some of their organs to be persons performing specific functions in their own countries, which limited the sending State's freedom of choice.

43. The third point he wished to stress was that the term "delegation" itself was ambiguous, since a delegation comprised both delegates, the number of whom was generally fixed by the rules of procedure of the organ concerned, and a number of other persons who accompanied the delegates, but did not have their status. It was conceivable that a sending State might appoint a national of another State as a technical adviser, for example, but the appointment of foreign nationals seemed less acceptable in the case of delegates in general and heads of delegation in particular. The situation might be different in the case of conferences owing to the

technical nature of some of them, which called for special qualifications. The sending State could be given the faculty to appoint delegates of another nationality more easily in the case of conferences than in the case of sessions of an organ of an organization. In any case the appointment of a national of another country as representative to a small organ of an organization should be ruled out.

44. Mr. USHAKOV repeated that it was impossible to cover two different situations by one and the same formula; the Commission was bound to fail if it continued to use an unacceptable legal technique. The same sources of difficulty as had been found in the previous articles reappeared in article 64: namely, the expression "sending State", used to denote both a State which was a member of an organ and a State participating in a conference, and the term "delegation", whose scope had not yet been defined and whose meaning varied, as other members of the Commission had pointed out, depending on whether it referred to a delegation to a conference or a delegation to an organ. There should either be a single article with two paragraphs, or two separate articles. Apart from the drafting, he supported the principle of the sending State's freedom of choice in the appointment of the members of its delegation.

45. As to the nationality of the members of a delegation, he must protest against any departure from the well-established principle of contemporary international law that the members of a delegation must be nationals of the sending State. Whether a State was represented by its own nationals or by nationals of another State was a matter of great political importance. It was unacceptable that a State should be represented by nationals of another State, even in the case of a delegation to a conference. The Commission should not lose sight of the fact that it was working in the interests of States, and it should not lay down a principle contrary to another principle of contemporary international law which it had itself established.

The meeting rose at 1 p.m.

1057th MEETING

Wednesday, 27 May 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

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

Welcome to Mr. Sette Câmara

1. The CHAIRMAN welcomed Mr. Sette Câmara, who had been elected a member of the Commission to fill the vacancy caused by the death of Mr. Gilberto Amado.
2. Mr. SETTE CÂMARA expressed his gratitude to all those who had given him their support and shown their confidence in him by electing him a member of the International Law Commission. He had been present in the Commission twenty years before, as an adviser to the late Mr. Amado, and had followed the Commission's work with the closest attention ever since. He would try to prove a worthy successor to Mr. Amado, though he knew that he could not replace him; the legacy such men left behind them did not follow the normal law of succession, but became part of the patrimony of mankind.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1 and 2)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 64 (Appointment of the members of the delegation) (continued)

3. The CHAIRMAN invited the Commission to continue consideration of article 64 and the Special Rapporteur's note on the nationality of members of a delegation (A/CN.4/227/Add.1).
4. Mr. BARTOŠ said that, generally speaking, the sending State could freely appoint the members of its delegation, whether the delegation was to an organ or to a conference convened by an international organization. That freedom was not absolute, however; it was limited by customary international law, by the rules of procedure of the organ in question, or, in the case of a conference, by the letter of invitation. The sending State was obliged to comply with the prior conditions laid down by the State or organization convening the conference or by the rules of procedure or practice of the organ, in the case of both delegations and missions. It would be better to use the term "delegation" when the form of representation was temporary, and "mission" when it was permanent.
5. Mr. RAMANGASOAVINA said he approved of article 64 as drafted; although concise, it was extremely flexible. The underlying idea was the same as in article 63: the sending State must be free to choose the members of its delegation. In principle, those members should be nationals of the sending State, and as far as possible each State should appoint representatives who possessed its nationality; but it could happen that a State, particularly a young State during the early years of its international life, did not have sufficient qualified persons to represent it and therefore appointed nationals of the host State or a third State. That practice existed and experts were often exchanged between countries in the same region, even when their languages were different.
6. Article 64 thus reflected the practice and the Special Rapporteur had been quite right in trying to ensure that the sending State's freedom of choice was not limited. That was also in conformity with the principle of the freedom and sovereignty of States, by virtue of which a State could not be obliged to be represented by its own nationals if it was in its interests to employ nationals of another State for that purpose. The Special Rapporteur had rightly refrained from drawing a distinction between nationals of the host State and nationals of a third State; that not only gave the sending State greater freedom of choice, but at the same time guaranteed the representatives in question, whatever their nationality, the same advantages as the other members of the delegation.
7. Sir Humphrey WALDOCK said he agreed with Mr. Yasseen that, in view of the existence of analogous provisions in other conventions, it might give rise to misunderstanding if the Commission said nothing about the nationality of members of a delegation. He could understand the practical considerations which had led the Special Rapporteur to omit any reference to the need for the consent of the host State in the case of its nationals, but he was still not convinced that there was sufficient reason for distinguishing between delegations to organs or conferences of international organizations and permanent missions. It was true that the latter were generally of longer duration, but there were also sometimes long conferences, like the United Nations Conference on the Law of Treaties. It was desirable that the sending State should have full freedom to appoint the members of its delegation, but the host State's interests had to be considered. It was not only a question of privileges and immunities; it might prove embarrassing, for example, if the sending State were to appoint as a technical expert a national of the host State who was employed in some capacity by the host State's government.
8. He did not share Mr. Ushakov's preoccupation with the basic difference between organs of international organizations and conferences convened by those organizations. Such differences did exist and ought to be borne in mind, but they were more differences of degree than of kind. The problem could probably be solved by careful drafting; it might be possible to adapt the formula used in article 51 (A/CN.4/227).
9. In principle, he supported article 64, the essential purpose of which was to underline the sending State's right to freedom of appointment, subject to the restrictions laid down in article 67. He could not agree with the suggestion that it should be divided into two separate articles, since that would result in a clumsy draft.
10. Mr. RUDA said he had no objection to either the substance or the form of article 64. Where the problem of nationality was concerned, however, he thought the wisest course would be to draft an article on the lines of article 11, on the nationality of the members of the permanent mission.¹ The consent of the host State was obviously necessary for the appointment of its nationals

¹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 203.

as members of foreign delegations to organs or conferences of international organizations, though that requirement might perhaps not be necessary for very short conferences. In paragraph (2) of his note on nationality, the Special Rapporteur had said that it was "highly desirable, if not indispensable, that the sending State should enjoy the widest possible freedom in the choice of the members of its delegations to such organs and conferences"; he hoped that, in addition to such general statements of policy, the Special Rapporteur would include in his commentary some actual examples of the existing practice in the matter.

11. Mr. NAGENDRA SINGH said he agreed with Mr. Rosenne that article 64 should be made subject to the provisions of both article 67 and article 63; it was true that article 63 had not yet been put into final form, but the general opinion in the Commission appeared to be in favour of such an article.

12. He found the present formulation of article 64 satisfactory; at first glance it might seem logical to deal with organs and conferences in two separate articles, but the subject-matter was in several respects identical and he thought that a common approach was perhaps justified.

13. He agreed with the Special Rapporteur's decision to depart from the provisions of articles 11 and 54 in formulating article 64, and to leave the sending State completely free to appoint nationals of the host State as members of its delegation; the adoption of that course would serve the interests of the progressive development of international law and help the newly independent States. Moreover, delegations to organs and conferences were generally of an *ad hoc* or temporary character and would normally not cause any embarrassment to the host State. There was no objection to the host State's being notified of the proposed appointment of one of its nationals.

14. It was worth noting that the developing countries were extremely keen to exercise their right as "sending States" to send their own nationals. It was only when they had no suitable technical expert of their own available that they reluctantly appointed a national of the host State, and then only after careful investigation of his trustworthiness and ability. The diplomatic mission of the sending State in the host State made local enquiries and the chances of making a wrong choice were very slight. The host State was proud to have one of its nationals selected on grounds of technical competence, and such assistance should not be denied to developing countries which needed it. It was true, of course, that the freedom of the sending State might be limited by the constituent instrument of the organ or conference, but that contingency was already provided for in article 3.

15. He thought that the term "sending State" covered the three kinds of mission or delegation dealt with in the draft articles; its precise meaning should be easily understandable from the context of the article concerned.

16. Mr. KEARNEY said that, in dealing with article 64, the Commission should conform to the position it had taken previously in dealing with article 11, as

well as to the relevant provisions of existing international conventions. He had been impressed by the fact that the closest analogy to the type of diplomacy now under discussion was to be found in the Convention on Special Missions, which had been adopted by the General Assembly at its last session. Article 10 of that Convention² differed from, and went further than, article 11 of the present draft, in that it contained a third paragraph which read: "The receiving State may reserve the right provided for in paragraph 2 of this article with regard to nationals of a third State who are not also nationals of the sending State". In the light of Mr. Ramangasoavina's remarks about the needs of developing States, there was no need to include such a provision in article 64. There should, however, be a reference to article 11; the Commission would be going too far if it dispensed with limitations on the right of appointment altogether. That might give rise to all kinds of difficulties; for example, the person appointed by the sending State might be under investigation in the host State on a criminal charge.

17. The CHAIRMAN, speaking as a member of the Commission, said that he welcomed article 64 as it stood. He did not consider it proper to include a reference to article 63 at the present stage. The Special Rapporteur had been right to stress the freedom of choice of the sending State and to limit the qualification of that right to the provisions of article 67. He appreciated the problems raised by Mr. Ushakov, but doubted if it would be possible to divide article 64 into two paragraphs or into two different articles.

18. He agreed with the majority that the precise meaning of the term "sending State" would in each case be clear from the context and that it was unnecessary to include a definition or to distinguish between delegations to organs and delegations to conferences.

19. A number of members had expressed misgivings about the problem of nationality; Sir Humphrey Waldock had stressed the point made by Mr. Yasseen, but had refrained from taking any strong line. He himself agreed with Mr. Kearney that difficulties might arise if a sending State appointed a national of the host State who was suspected of fraud or embezzlement and was consequently *persona non grata* to that State. Obviously, the consent of the host State should be made a necessary condition, in order to avoid any embarrassment either to it or to the sending State.

20. Mr. AGO said that the Commission must be clear about what it would be referring to the Drafting Committee. He would therefore repeat that, to be complete, the draft articles must take account not only of temporary delegations, but also of permanent forms of representation to organs of international organizations.

21. As to the nationality of members of delegations, he did not see why the Commission should not follow its custom and lay down as a principle that the permanent representative, the principal delegate, and so on, must be nationals of the sending State. That would avoid the

² See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 100.

misunderstanding to which the word "delegation" might give rise, since it was not clear whether it meant delegates as such, or all the members of the delegation, including those who did not have the same status as the delegates.

22. It would be preferable to leave it to the Drafting Committee, which would be in a better position to judge the question, to decide whether article 64 should be split up into several paragraphs or even several articles. The Commission should not take a final decision of that kind on the basis of one particular article.

23. Mr. EL-ERIAN (Special Rapporteur) summing up the discussion, said he would include in his commentary some examples of actual practice regarding the nationality of members of delegations, as Mr. Ruda had requested.

24. It had been suggested that article 64 should include a reference to article 63, but the Chairman and other members had considered that unnecessary, inasmuch as article 63 did not deal with the choice of individuals, but with the objective right of States to make appointments. His view was that the Commission should accept freedom of appointment as a basic principle, subject only to article 67 on the size of the delegation and to an article on nationality if it was decided to include one.

25. Mr. Ago had referred to the case in which a representative might acquire a status of an intermediate character, between that of a permanent member and that of a temporary member of a delegation. That was a matter to which some reference should be made, perhaps in the commentary. Mr. Ago had also pointed out that the term "delegation" was ambiguous. There were cases, however, in which a delegation consisted of a single delegate, who might nevertheless require administrative or service personnel for his delegation.

26. He was glad to see that several members shared his view about the desirability of adopting a permissive attitude towards nationality. For example, a conference might be convened for only one or two days; to go through the formal process of obtaining the consent of the host State would take time and might even be embarrassing to that State if for some reason it did not wish to take a decision. He was not sure that it was always the wisest course to include a reference to consent.

27. Mr. Kearney had mentioned the possibility that nationals of the host State might be appointed who were suspected of criminal offences. But it should be borne in mind that even under the articles on permanent missions and the Convention on Special Missions, such persons did not enjoy the same privileges and immunities as members who were not nationals of the host State and they would only be protected in respect of their official acts. The Commission should also remember that the legislation of many States provided that their nationals must obtain permission from the government before acting as agent of another State.

28. He did not think that the absence of a reference to nationality would lead to misunderstanding; but if the Commission decided to include an article on nationality, and if it also decided to restrict the sending State's freedom of appointment in that respect, the restriction

might be expressed by some such phrase as "unless there is an objection by the host State".

29. Mr. Kearney had said that the draft Convention on Special Missions provided the closest analogy to the present draft articles. That might be true in the sense that both dealt with *ad hoc* bodies, but there was nevertheless an important difference between them: in the case of special missions, the national of the host State would be a member of a mission to his own government, whereas delegates to organs and conferences were not accredited to the host State. In bilateral diplomacy, what had to be avoided was a situation in which a national of one State represented the views of another State to his own government.

30. Although there were obviously differences of opinion in the Commission on the subject of nationality, he was confident that the Drafting Committee would be able to produce a text acceptable to all members.

31. The CHAIRMAN suggested that article 64 be referred to the Drafting Committee.

It was so agreed.³

ARTICLES 65 and 66

32. The CHAIRMAN invited the Commission to consider articles 65 and 66 in the Special Rapporteur's fifth report (A/CN.4/227/Add.2).

33.

Article 65

Credentials and notifications

1. The credentials of representatives to an organ of an international organization or to a conference convened by an international organization shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent minister or by an appropriate authority designated by one of the above if that is allowed by the practice followed in the Organization.

2. The credentials of representatives and the names of the members of a delegation to an organ of an international organization or to a conference convened by an international organization shall be submitted to the competent organ of the organization if possible not less than one week before the date fixed for the opening of the session of the organ or of the conference.

3. The Organization shall transmit to the host State the notifications referred to in paragraph 2 of this article.

4. The sending State may also transmit to the host State the notifications referred to in paragraph 2 of this article.

Article 66

Full powers to represent the State in the conclusion of treaties

Representatives accredited by States to an organ of an international organization or to a conference convened by an international organization, in virtue of their functions and without having to produce full powers, are considered as representing their State for the purpose of adopting the text of a treaty in that organ or conference.

³ For resumption of the discussion, see 1073rd meeting, para. 70.

34. Mr. EL-ERIAN (Special Rapporteur) said that, as would be seen from the commentary, article 65 was based on rule 27 of the Rules of Procedure of the General Assembly, which had served as a model for the rules of procedure of a number of different organizations. The addition at the end of paragraph 1 was based on article 12 of the draft articles on permanent missions.⁴

35. He had not thought it necessary to include in article 65 an explicit provision on the credentials of heads of government or ministers for foreign affairs. With regard to the time-limit set in paragraph 2, he had considered that one week would be sufficient in the case of delegations to organs or conferences.

36. Paragraphs 3 and 4 referred to notifications to the host State; those notifications were clearly necessary if only because of the facilities which the host State would wish to extend to delegations. It would be noted that paragraph 4 did not lay down an obligatory procedure.

37. Article 66 was based on the relevant provisions of article 7 of the Vienna Convention on the Law of Treaties⁵ and called for no comment.

38. Mr. YASSEEN said that articles 65 and 66 represented a very careful piece of codification in which the Special Rapporteur had succeeded in formulating the provisions that were needed. With regard to article 65, the only objection he had was to paragraph 4, which seemed to him to be superfluous, since it accorded a faculty which the sending State possessed in any event by virtue of its powers under international law.

39. He had no criticism of the substance of article 66. It might be asked whether it was really necessary to include in the present draft articles a provision based on article 7 of the Convention on the Law of Treaties, laying down that the representative of a State to a conference or to an organ was not required to produce his full powers for the purpose of adopting the text of a treaty; but a provision of that kind might perhaps be useful, since the international legal order was not completely uniform and the parties to one convention might not be parties to another. But if such a provision were retained, it would be well to refer to other clauses in the Convention on the Law of Treaties dealing with the full powers of certain persons.

40. Mr. CASTRÉN said that on the whole he approved of the substance and the drafting of article 65, which should be included in the draft articles. The Special Rapporteur had been right to take as his model the first two paragraphs of rule 27 of the Rules of Procedure of the General Assembly, which had already served as model for the corresponding provisions in the rules of procedure of several other international organizations and of various conferences convened by the United Nations. He noted that the Special Rapporteur had also included in paragraph 1 a phrase taken from article 12 stating that

credentials might be issued "by another competent minister" and had added the words "or by an appropriate authority designated by one of the above", which was acceptable.

41. Paragraphs 3 and 4 reproduced practically word for word paragraphs 3 and 4 of article 17,⁶ and those provisions seemed equally applicable to delegations to organs of international organizations and to conferences convened by them. His only suggestion would be that the title of the article should be amended by the deletion of the words "and notifications", since the article dealt with credentials and did not mention any notifications other than the notification of credentials.

42. With regard to paragraph 2, he doubted whether it was really necessary to submit to the competent organ of an organization the credentials of representatives sent to a conference convened by that organization before the opening of the conference, since in practice credentials were often submitted direct to the conference. It would be sufficient if the names of representatives were submitted to the organization together with the State's notification that it would be taking part in the conference.

43. The Special Rapporteur had said that the text of article 66, which was based on the corresponding provisions of article 7 of the Convention on the Law of Treaties, called for no comment. He wondered whether the article was really necessary, however, for it seemed unnecessary to restate a rule that had been stated more fully in another convention which constituted the general source of the law of treaties. It was true, of course, that the draft contained an article—article 14—on the full powers of permanent representatives to represent a State in the conclusion of treaties, but that case had not been covered by article 7 of the Convention on the Law of Treaties, which had been adopted after the Commission had adopted draft article 14 on first reading in 1968.

44. Mr. ROSENNE said he was in general agreement with the substance of paragraphs 1 and 2 of article 65. Those paragraphs, which dealt with credentials, should be entirely separated from paragraphs 3 and 4, which dealt with notification of the composition of delegations. The rules on credentials were fairly well established, whereas those on notification broke new ground, as the Special Rapporteur had pointed out in his commentary. Moreover, in the present context, credentials related solely to the question of relations between the sending State and the organ or conference, whereas notification also touched on that of relations between the sending State and the host State.

45. With regard to the drafting of paragraphs 1 and 2, the Drafting Committee should scrutinize closely the expression "credentials of representatives", which provided one more illustration of the fact that the provisions of paragraph 2 of article 62 were much too wide. On the basis of the existing United Nations practice, formal credentials should be required only from persons entitled to vote at plenary meetings of a conference or at formal

⁴ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 204.

⁵ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/27* (United Nations publication, Sales No.: E.70.V.5).

⁶ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 209.

meetings of an organ, or to sign any binding instrument which might be drawn up by such a conference or organ.

46. In paragraph 1, the words "or by another competent minister or by an appropriate authority designated by one of the above" should be shortened to "or by another competent minister or authority". The matter would in any case usually be covered by the provisions of article 3,⁷ though it was true that in some cases what was involved was the practice of States rather than the practice of an organization.

47. He would urge the Special Rapporteur to include more explanatory material in the commentary, since paragraphs 1 and 2 had little legal content; besides, they did not exhaust the subject of credentials. The commentary should make it clear that the provisions of those paragraphs left current practice intact. One feature of that practice was that credentials were examined and reported on by a credentials committee at a convenient moment during the conference or the session of the organ concerned. Technically, a representative was provisionally recognized until his credentials were accepted by the conference or organ. There had been one case in which the credentials of a delegation had been rejected on the very last day of the conference.

48. He would suggest that paragraphs 3 and 4 should form a new article 65 *bis* and that their provisions should be expanded on the lines of articles 17 and 57. It would be desirable to know the views of the principal host States, but in his opinion article 65 *bis* should deal with the duty of the sending State to notify the organization, the duties of the secretariat or other authority convening the conference, and the duty of the organization to notify the host State. Reference might also be made to the faculty of the sending State to notify the host State, but such a provision was probably not necessary.

49. The practice of organizations in regard to notifying the host State varied, and paragraph 3 of article 65 would be a useful clarification. He understood that the Registry of the International Court of Justice, which administered the agreement on privileges and immunities between the United Nations and the Netherlands, as host to the Court, regularly followed the procedure laid down in that paragraph.

50. He found paragraph 4 somewhat puzzling; he was uncertain of its legal effect. Article 42 (duration of privileges and immunities)⁸ was based on an entirely different approach; neither the credentials nor their notification had any effect on the commencement of privileges and immunities.

51. It was doubtful whether article 66 was necessary, since its provisions duplicated those of article 7, paragraph 2 (c) of the Vienna Convention on the Law of Treaties. There were difficulties in the drafting, partly because of the ambiguity of the term "representative". In the organs of international organizations and in conferences, the adoption of the text of a treaty was normally

a voting function and, as such, it was covered by the credentials of the representative entitled to vote. For example, the vote on the adoption of the Convention on the Law of Treaties at the 36th plenary meeting of the Vienna Conference had been a vote of exactly the same kind, legally, as that on the adoption, on the same occasion, of a resolution paying a tribute to the Federal Government and the people of the Republic of Austria, nor did those decisions differ in character from those by which the Conference had adopted individual articles of the same Convention.⁹

52. The Commission's report might include a statement to the effect that, in United Nations practice, credentials to a conference were taken to include the power to sign the final act, even if the representative did not have power to sign other documents. The question was not regulated anywhere by international law, and a reference to that practice would be of value.

53. Mr. USHAKOV said he wished first to emphasize that he found the ideas expressed in articles 65 and 66 acceptable; but he could not accept the articles themselves, because they laid down rules applicable to completely different situations.

54. As to article 65, he agreed with Mr. Rosenne that it was not possible to put together in a single article rules concerning credentials and rules concerning notifications. The Special Rapporteur was proposing that only the names of members of delegations should be notified. That was quite inadequate; the notifications should be the same as in the case of permanent missions of member States. Moreover, the recipients of the notifications differed according to whether the delegations concerned were delegations to organs of international organizations or to conferences. The difficulties created by the method of dealing with two quite different questions in the same provision appeared again in paragraph 3, which had some meaning when applied to delegations to organs, but none when applied to delegations to conferences. In addition, the expression "host State" had a very different meaning in the two cases. Notifications concerning delegations to organs and notifications concerning delegations to conferences should therefore be dealt with in two separate articles.

55. As to the substance of article 65, he still did not know who were the "representatives" referred to. In paragraph 1, the phrase "if that is allowed by the practice followed in the organization" had some meaning in connexion with delegations to organs, but was meaningless in connexion with delegations to conferences. Similarly, the list of persons who might issue credentials was not appropriate for delegations to conferences. Questions of the same kind arose in regard to paragraph 2; for instance, the expression "the competent organ of the organization" seemed to have little meaning when applied to delegations to conferences. Again, he could not see why the Special Rapporteur had specified

⁷ *Ibid.*, p. 197.

⁸ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, p. 14.

⁹ *United Nations Conference on the Law of Treaties, Second Session, Official Records, Summary Records of Plenary Meetings*. (United Nations publication, Sales No.: E.70.V.6.)

that credentials should be submitted "one week before the date fixed". Lastly, the expression "opening of the session" was meaningless when applied to a body which was continuously in session.

56. In article 66, the use of the expression "in virtue of their functions" was dubious, since the functions of representatives of States to organs of international organizations could differ very widely, so that it was not correct to say that such representatives were authorized to adopt the text of a treaty in virtue of their functions. Moreover, article 66 was contrary to the practice by which only one representative was authorized to adopt the text of a treaty, and not all organs could do so. In the case of permanent missions, only the permanent representative had powers under article 14 to represent his State in the adoption of the text of a treaty, and not all treaties at that, but only a treaty between that State and the international organization to which he was accredited. In the case of conferences, the rule raised no difficulty if the conference was convened to adopt a treaty; but the situation was quite different if the conference was not convened to adopt a treaty, for in that case the representative of a State needed a special authorization. Furthermore, the adoption of a treaty and its signature were governed by different rules.

57. Consequently, in article 66, as in the previous articles, separate rules should be laid down for delegations to organs of international organizations and delegations to conferences. In the case in point, a single article should be drafted for delegations to conferences, stating the precise conditions under which the representative of a State participating in a conference might participate in the adoption, and sign the text, of a treaty.

58. Mr. AGO said that in his opinion articles 65 and 66 bristled with difficulties. He wished first to draw the Special Rapporteur's attention to the need to draft a text which was both consistent with practice and comprehensive; unless that were done, the Commission would have to be less ambitious and content itself with laying down a few rules on the status of permanent missions of member States.

59. With regard to article 65, he agreed with Mr. Rosenne and Mr. Ushakov that the matters contemplated in paragraphs 3 and 4 were completely different from those contemplated in paragraphs 1 and 2. In paragraph 1, the term "representatives" could denote not only representatives appointed to represent a State at a particular session of an organ of an international organization, but also permanent representatives appointed once and for all, who could also represent their State at a session of an organ of an international organization. It might happen, of course, that the same person acted in both capacities, but that would be pure chance. That situation should be taken into account in the drafting of the articles and the Special Rapporteur should therefore supplement paragraph 1 by referring to the two categories of person he had just mentioned.

60. With regard to the persons who could issue representatives' credentials, he considered, unlike Mr. Ushakov, that the list was justified, but he would ask the

Special Rapporteur to examine very carefully the practice followed in international organizations.

61. Paragraph 2 of article 65 raised substantive difficulties; for although the rule laid down was justifiable in the case of representatives appointed to represent a State at a particular session of an organ of an international organization, the same did not apply to permanent representatives appointed once and for all, since they did not need credentials and consequently the rule in paragraph 2 could not apply to them.

62. He also had doubts about the application of article 65 to delegations to conferences. Although the position of those delegations was rather similar to that of delegations to a particular session of an organ of an international organization, he was inclined to think, like Mr. Ushakov, that a single provision would not suffice. Furthermore, the title of the draft articles was "Relations between States and international organizations" and he thought that was an additional reason why the rule laid down was not appropriate for delegations to conferences, even when they were convened by international organizations. It also seemed clear that in the case of conferences, notifications to the host State could be of an entirely different character according to whether the conference met only once or met regularly at the same place.

63. In article 66 two different situations were again involved: for in the case of treaties concluded by organs of international organizations the requirements for credentials were known beforehand, whereas in the case of treaties concluded at conferences the credentials required for negotiation were not the same as those required for the adoption of the Final Act and signature. Moreover, as Mr. Rosenne had pointed out, the case of conferences adopting resolutions also had to be considered.

The meeting rose at 1 p.m.

1058th MEETING

Thursday, 28 May 1970, at 10.15 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Kearney, Mr. Nagendra Singh, Mr. Raman-gasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1 and 2)

[Item 2 of the agenda]

(continued)

ARTICLE 65 (Credentials and notifications) and
ARTICLE 66 (Full powers to represent the State in the
conclusion of treaties) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of articles 65 and 66 in the Special Rapporteur's fifth report (A/CN.4/227/Add.2).

2. Mr. CASTAÑEDA said he supported the basic conception and general formulation of articles 65 and 66.

3. Paragraphs 1 and 2 of article 65 were based on the provisions of article 12,¹ but with two differences. The first was the addition of the words "or by an appropriate authority designated by one of the above", which covered the case in which the credentials were issued by an official other than a minister. The reason for that difference was that whereas it was logical to require credentials issued by a minister in the case of a permanent mission, which was at a high level, the situations covered by article 65 could be very different; it was quite common in the United Nations to accredit a representative to an organ of little importance. In those cases, the credentials were signed by the permanent representative, and consisted of a communication informing the organization that the person concerned had been appointed representative to the organ in question. Such a communication in fact constituted credentials in simplified form. The second respect in which article 65 differed from article 12 was that in the case of permanent missions, the communication of credentials to the organization and the host State was dealt with in a separate article, and rightly so, as that question related to a different legal situation, in which the two States and the organization were involved.

4. As to the proposed time-limit of one week for the communication of credentials, he saw no use in it. In United Nations practice the time-limit varied from twenty-four hours to two weeks; that being so, he thought it would not be appropriate to prescribe a time-limit of one week in article 65. Paragraph 2 might therefore be dropped, provided that the concluding words of article 12—"and shall be transmitted to the competent organ of the Organization"—were added at the end of paragraph 1.

5. Mr. Ago had referred to the difference between representatives to permanent organs and representatives to a session of an organ. It was true that in permanent organs a representative was usually appointed for the duration of the term of office of his country. It should be noted, however, that permanent organs usually met at stated intervals, unlike the Security Council, which could meet at any time. In a body like the Security

Council, therefore, a representative needed permanent immunities, whereas a representative who merely came to Geneva for thirty days for the session of the Economic and Social Council did not need permanent immunities in that city; his situation was very much the same as that of a representative to a session of an organ.

6. Since the situation did not justify any difference in the treatment accorded to the representatives, the Special Rapporteur had very properly not established any difference in article 65.

7. It has been rightly pointed out that article 65 dealt with two different subjects, namely, credentials and notifications. He supported Mr. Rosenne's suggestion that the two subjects should be dealt with in two separate articles on the lines of articles 12 and 17.² Paragraph 4 should be dropped; it was devoid of legal content and merely mentioned a faculty which the sending State obviously possessed.

8. Article 66 raised a number of questions. It contained a rule that belonged more properly to the law of treaties. Nevertheless, he favoured its retention in the present draft because, unfortunately, the unity of the international legal order was not yet a reality. It was quite possible that the convention which would result from the present draft would not have the same parties as the Vienna Convention on the Law of Treaties.

9. He had been impressed by Mr. Rosenne's argument that the adoption of the text of a treaty was not legally different from a vote on its articles. If that argument were accepted, a representative would not need special credentials to adopt such a text. He himself had not fully made up his mind on that issue, but he was inclined to favour the retention of article 66. He would like to know Sir Humphrey Waldock's opinion on the point, however.

10. Mr. RUDA said he noted that the Special Rapporteur's intention in dealing with credentials and notifications in a single article had been to simplify the treatment of the two questions. But many of the problems confronting the Commission were due to that attempt to combine in one provision two subjects that could not readily be taken together, and he therefore supported the idea that they should be dealt with in separate articles.

11. If the term "representatives" in article 65, paragraph 1, were taken to have the same meaning as it had in article 62, paragraph 2, it would include advisers, technical experts and secretaries of delegations, in other words persons to whom credentials were not issued. That contradiction could be removed by omitting the words "of representatives to an organ of an international organization or to a conference convened by an international organization" in paragraph 1 of article 65, so that the paragraph would begin with the words "Credentials shall be issued either by the Head of State . . .".

¹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 204.

² *Ibid.*, p. 209.

12. In paragraph 2, the words "and the names of the members of a delegation", which covered a matter outside the scope of article 65, should be deleted. The purpose of the paragraph was to state what authority credentials should be submitted to; the communication of the names of the members of a delegation was a matter of notification which should be dealt with elsewhere.

13. An attempt had been made in paragraph 3 to draft a very concise rule. Personally, he would prefer a more detailed text on the lines of article 17. In practice, the most important problem was to determine who enjoyed privileges and immunities and, for that purpose, detailed provisions were necessary.

14. He agreed that paragraph 4 should be deleted, but in that case paragraph 4 of article 17 would also have to be dropped.

15. The provisions of article 66 were almost identical with those of article 7, paragraph 2 (c) of the Vienna Convention on the Law of Treaties.³ Subject to Sir Humphrey Waldock's views, he thought the article should be dropped.

16. Mr. BARTOŠ said that in trying to lay down, in article 65, a rule that would be applicable both to delegations to organs of international organizations and to delegations to conferences convened by international organizations, the Special Rapporteur had made a commendable effort at condensation, but he had been unable to avoid the pitfall of imprecision. The Special Rapporteur and the Drafting Committee should consider whether separate rules should be laid down for permanent representatives to an organ and representatives sent specially to one session of an organ. He agreed with Mr. Rosenne that the provisions in paragraphs 1 and 2 and those in paragraphs 3 and 4 should form two separate articles, since the former concerned relations between the States represented and certain international organizations, whereas the latter dealt with relations between the States represented and host States.

17. The rule set out in paragraph 1 brought up the question whether a rule in an international convention could give rise to constitutional powers. Could a head of State, head of government, minister for foreign affairs or other competent minister delegate to some other authority the right to issue credentials to persons representing the State in an organ of an international organization or at a conference, if there was a rule to the contrary in the State's internal law? His experience as a member of various credentials committees showed that the answer to that question was not always the same. It would therefore be advisable to allow the State concerned to rely on the rules of its internal law, and he suggested that the last part of paragraph 1 might be amended to read: ". . . designated by one of the above if that is allowed by the internal law of the State concerned and by the practice followed in the Organization." That would place the State represented and the

international organization on an equal footing, and the Commission would be remaining within contemporary international law by preventing any interference with the constitutional law of States and by not obliging international organizations to change their practice.

18. He agreed with Mr. Ushakov's comments on the use of the expression "the names of the members" in paragraph 2.⁴ The practice was to submit not only the names of the members of a delegation, but also the posts they held in the delegation and their titles. If a member of a delegation was called upon to perform certain functions, it was necessary to show that he satisfied the requisite conditions for performing them; hence, his competence must be stated.

19. With regard to the time-limit, he was glad the Special Rapporteur had used the expression "if possible," as that implied that it was not mandatory, but merely recommended. In conference practice States were free to change the composition of their delegations up to the last moment, since a delegate might die in the interval between his appointment and the beginning of the conference, or there might be a change of government during that interval. On the other hand, it was preferable that the communications in question should be made in advance, not only in the interests of the host State and the organizers of the conference, who needed to know the number of participants in order to make the necessary arrangements, but also in the interests of the other States represented, which sometimes decided on the membership of their delegations in the light of the composition of the delegations of other States. He therefore suggested that the phrase "not less than one week before" should be replaced by some such phrase as "as soon as possible".

20. He was not very satisfied with the words "the opening of the session of the organ", since some organs, such as the Security Council, were continuously in session. Not all States sat on the Security Council: many only attended meetings dealing with matters of direct concern to them, to which they sent special representatives, chosen according to the importance of the matter discussed.

21. The notifications provided for in paragraph 3 should concern the posts and titles of the members of delegations and reference could hardly be made to the notifications referred to in paragraph 2, since credentials were not notified: it was the representatives who submitted their credentials to the conference.

22. He was in favour of deleting paragraph 4, which did not lay down a legal rule, as it used the word "may". The provision might be of some value, however, if it were amended to provide that even if the sending State did not maintain diplomatic relations with the host State, it might send it the notifications mentioned.

23. With regard to article 66, he agreed with all the speakers who had drawn a distinction between the credentials required for establishing the text of a treaty and the credentials required for acceptance of that

³ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/27* (United Nations publication, Sales No.: E.70.V.5).

⁴ See previous meeting, para. 54.

text as a source of international obligations. At the first Conference on the Law of the Sea,⁵ representatives of States had been asked to produce special full powers to sign the international instruments giving rise to obligations which had emerged from the Conference. Article 66 should therefore be made more specific in that respect, for if the Commission adopted an incomplete text it might create difficulties for States. Generally speaking, he thought it wrong to provide detailed solutions for some problems and not for others; the Commission should either confine itself to stating general principles or draw up a complete and detailed set of rules.

24. Mr. USTOR said that for the present he had no comments to make on article 65. With regard to article 66, he noted that paragraph (6) of the commentary stated that that article was based on the relevant provisions of article 7 of the Vienna Convention on the Law of Treaties. He wondered whether the Commission should include a provision which appeared in another multilateral treaty; it might be worth while to ascertain whether instances of copying provisions in that way were to be found in other multilateral treaties or whether article 66 represented the first instance of such a practice. As Mr. Yasseen had observed, if the rule was a sound rule, it should be spread.

25. He supported article 66 in principle, but would point out that, although it referred to the notion of "full powers", it did not define it. The term was defined, however, in article 2, paragraph 1 (c) of the Convention on the Law of Treaties. Since the terms "full powers" and "credentials" were apt to overlap, it might perhaps be well to add something to article 66, as otherwise it might be necessary to fall back on the definition in the Convention on the Law of Treaties.

26. Article 66 was concerned only with the adoption of the text of a treaty, whereas the Convention on the Law of Treaties had separate articles on adoption and authentication. Since article 10 of that Convention provided that the text of a treaty could be authenticated, *inter alia*, by the signature of "the Final Act of a conference incorporating the text", draft article 66 should perhaps include some reference to the signature of the Final Act, in order to avoid confusion.

27. The expression "full powers" in the title of article 66 seemed to refer to a process, whereas the same expression in article 2, paragraph 1 (c) of the Convention on the Law of Treaties referred to a document.

28. Mr. TESLENKO (Deputy Secretary to the Commission), replying to the questions raised by Mr. Rosenne and Mr. Bartoš, said that, at the Vienna Conference on the Law of Treaties and other codification conferences he had attended, the credentials representatives were required to produce for participating in the conference had been regarded as being sufficient for the signature of the Final Act. He had nevertheless cabled to the Office of Legal Affairs in New York asking whether there had been any cases in practice

where, owing to the special character of a particular Final Act, additional powers had been required for its signature.

29. Mr. USTOR said that some special authorization might be necessary for the signature of a treaty, but that such an authorization might be included in the credentials.

30. Mr. TESLENKO (Deputy Secretary to the Commission) said that a distinction should be made between the Final Act of a conference and the instruments it adopted—conventions and, if necessary, protocols. No additional powers were required for signing the Final Act, but either a special authorization, or credentials specifying that the bearer was authorized to sign the instrument in question, were required for signing conventions and protocols.

31. Mr. ROSENNE said that there appeared to be some confusion in the Commission between "credentials" as such and "full powers" as such. Under the Convention on the Law of Treaties, "full powers" were the authorization by which an individual could assume obligations in one form or another on behalf of his State, including the kind of inchoate obligation which resulted from signature to be followed by ratification, whereas the term "credentials" related to the authorization of an individual to represent his State in an organ or at a meeting. It seemed to him that what both article 65 and article 66 were dealing with was something which in the course of time had become little more than a mere ornament, namely, the concept of "plenipotentiaries". Hence much confusion might be avoided if the Drafting Committee could revert to that time-honoured diplomatic conception and distinguish between the plenipotentiary or plenipotentiaries and other members of the delegation. Credentials would be required for the plenipotentiary, but probably no more than notification would be necessary for the other members.

32. Mr. BARTOŠ said that a distinction should be made between the capacities of representatives, according to whether they were acting as participants in a conference and signed the Final Act in that capacity, or acting as plenipotentiaries of a State on behalf of which they accepted an international obligation, even if that obligation was embodied in the text of the Final Act. In the latter case they must be furnished with special full powers as the representatives of States, not as participants in the conference.

33. Mr. ALBÓNICO said that articles 65 and 66 were both in Part IV, which dealt with delegations to organs of international organizations and to conferences convened by international organizations; basically, therefore, they both referred to delegations. The term "delegation" was defined in article 0, sub-paragraph (a), which stated that a delegation was "the person or body of persons charged with the duty of representing a State at a meeting of an organ of an international organization or at a conference". Article 62, paragraph 2, on the other hand, stated that the expression "representatives" included all "delegates, deputy delegates, advisers, tech-

⁵ United Nations Conference on the Law of the Sea, Geneva, 24 February-27 April 1958.

nical experts and secretaries of delegations". It seemed to him, therefore, that article 65 should make clear who were representatives and who were members of delegations; it should specify the persons in whose favour the credentials were issued.

34. Paragraph 1 should state by whom the credentials were issued, but it should also take account of any specific rules which might be prescribed by an organ or conference.

35. In paragraph 2 there seemed to be some confusion between representatives and members of a delegation. As to notifications, he did not consider it important to lay down a time-limit; it would be sufficient to provide that they should be submitted within a reasonable time.

36. He thought that paragraphs 3 and 4 were necessary, since they obviously referred to two different cases. Paragraph 4 presumably referred to conferences held in a State other than that in which the organization had its headquarters.

37. Article 66 reproduced almost word for word article 7, paragraph 2 (c), of the Vienna Convention on the Law of Treaties. In his view, and as another member had pointed out, when a rule on a matter already existed in an international instrument of a generally normative character which had been adopted and ratified, there was no need to include a similar rule in another instrument; the latter instrument should be governed by the rules of general public international law. It was true that as yet there was no generally applicable international legal order, but, as a legal and scientific body, the Commission should try to establish what ought to be done rather than merely what was being done.

38. Mr. NAGENDRA SINGH said he agreed with all those members who had proposed that article 65 should be divided into two separate articles, one on credentials and the other on notifications. He also agreed that the term "delegations" would be better than "representatives", though if that change were made, article 62 would require a consequential amendment. In the context of article 66, however, he understood that a representative would be the head or deputy head of a delegation, but not any other member of the staff.

39. Article 65, paragraph 1, stated that credentials should be issued "either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent minister or by an appropriate authority designated by one of the above". The practice of the specialized agencies appeared to differ in that respect, since he knew from his own experience that IMCO accepted credentials issued by an ambassador. He suggested, therefore, that the provision in paragraph 1 might be made more liberal by deleting the words "or by an appropriate authority designated by one of the above" and substituting the words "or by any other appropriate authority".

40. The suggestion had been made that the meaning of the word "practice" in the final clause of paragraph 1 should be widened so as to include not only the practice followed in the organization, but also that recognized

under municipal law. That would lead to a very confusing and dangerous situation, since it was difficult to imagine who would settle conflicts arising between the law and practice of the organization and municipal law. He fully appreciated the importance of municipal law in binding the State concerned, but when a State adhered to the constituent instrument of an organization it was bound to make its laws conform to the needs of that organization. If a legitimate rule was adopted by the organization, or a practice established, a member State was bound to respect it. The introduction of municipal law as another governing element would lead to a multiplicity of factors regulating the subject and cause confusion. It would be better to limit the reference to practice to that of the organization and not add more conditions which, though legally justified, might lead to conflicts and confusion.

41. With regard to paragraph 2, he supported Mr. Castañeda's suggestion that the Commission should not prescribe any definite time-limit; it could adopt the formula used at the end of article 12^o and merely say that the credentials "shall be transmitted to the competent organ of the Organization".

42. If paragraph 4 were deleted, it would also be necessary to delete paragraph 4 of article 17, which had already been accepted. It had been objected that that paragraph only added to the obligations of the sending State, but it should be noted that while the word "shall" was used in connexion with the organization in paragraph 3, the word "may" was used in paragraph 4. Again, he was not in favour of deleting paragraph 4 of article 17 and allowing paragraph 4 of article 65 to stand. The host State had to be informed of the position and if it was informed by both the organization and the sending State that would be helpful rather than otherwise; it was better to have two sources of information than one. No deletions were necessary.

43. Turning to article 66, he said that although the practice no doubt varied from time to time, he thought the article appeared to be in order. At the Brussels Diplomatic Conference on Maritime Law, for example, which had produced numerous conventions on maritime law, the right of representatives to sign without having full powers was admitted. In IMCO, on the other hand, representatives had to produce credentials stating explicitly that they had full powers to sign. The difficulty might be overcome by including some such phrase as "subject to the practice of those organs or conferences", though that condition was covered by article 3. On balance, he was inclined to think that representatives would generally be allowed to sign without there being any specific mention of full powers in their credentials.

44. Mr. KEARNEY said that, as a result of the discussion, he agreed with Mr. Ushakov that it was necessary to distinguish between conferences convened by international organizations and meetings held by organs of such organizations. Those conferences and meetings

* See *Yearbook of the International Law Commission, 1968*, vol. II, p. 204.

were of a different character and involved different problems of credentials and notifications.

45. In article 65, paragraph 1, the phrase "by an appropriate authority designated by one of the above if that is allowed by the practice followed in the Organization" created certain difficulties, since it was not clear to what that phrase referred. The problem was whether it referred to the "relevant rules of the Organization" mentioned in article 3, since paragraph (5) of the commentary to that article⁷ stated that the expression included the practice prevailing in the organization. Perhaps it would be better to put it another way and say "or in any other manner allowed by the practice of the Organization". In the case of conferences, however, it might be necessary to be more precise, since they generally had no specific rules on the matter.

46. Various members had questioned the value of transmitting notifications to the host State. On the basis of the experience of his own Government, he would say that such notifications were most valuable, particularly when received well in advance, since they enabled the host State to prevent unpleasant incidents. On one occasion, a foreign diplomat who had been withdrawn from Washington as *persona non grata* had unexpectedly turned up in New York as a member of a permanent delegation, without any notification being given to the United States Government.

47. He considered article 66 to be of only marginal value; in any case, its title should be changed. In reply to Mr. Ustor's inquiry about the practice of using the same article in different conventions, he could say that the Inter-American Convention on Human Rights, signed at San José, Costa Rica, in November 1969, had provided that the provision on reservations in that convention should be the same as that contained in the Vienna Convention on the Law of Treaties. There were other precedents, particularly in connexion with intellectual property.

48. Mr. REUTER said that he would not speak on article 65, since other members of the Commission had made the comments he had intended to make.

49. He had no objection to article 66 being deleted if the Commission thought that desirable. If it were to be retained, however, he thought it should be amended as suggested by Mr. Ustor and Mr. Kearney; moreover, he was greatly perplexed about its substance. It was true that the article contained a provision reproduced almost word for word from the Vienna Convention on the Law of Treaties, but, as was well known, only a few brief provisions of that Convention were concerned with international organizations and the problem of their treaty relations. Those provisions could not appropriately be inserted in a text devoted essentially to international organizations, because they would be seen in quite a different light and have quite a different significance in the context of the other articles. Consequently, if the Commission wished to avoid casting doubt on the actual effect of the relevant articles of the Convention on the Law of Treaties, it should either

remain wholly silent on the point or decide to examine the problem and not content itself with a single provision of that Convention. The reason had been given by Mr. Bartoš: representatives to a conference, and especially representatives to an organ, acted as representatives of States, in other words as persons whose powers were determined solely by States. In the case of a conference, it would be absurd to say that delegates were representatives at the conference but had no authority to adopt the text which was the outcome of the negotiations. The provision in article 66 was therefore unnecessary.

50. In the case of organs the provision was misleading, for it was inconsistent to speak of representatives "to" an organ and of a text adopted "in" that organ; the two cases were entirely different. A distinction must be made between representatives to certain organs who acted as representatives of States, and persons who were members of an organ and were subject to its rules. In the latter case, it was perfectly clear that it was not by virtue of their functions as representatives of States that such persons could adopt a treaty, but rather in their capacity as members of the organ, if the adoption of international instruments lay within its competence. The wording of article 66 was ambiguous in that respect, as it implied that any organ of an international organization was by its nature competent to adopt treaties, which was not the case. While that problem caused no difficulties in most of the larger organizations, it did raise considerable difficulties in other organizations, where it was not always clear whether, as a result of the meeting of an organ, the persons concerned, meeting in a kind of conference, had adopted the text of a convention as representatives of States, or whether it was the organ itself which, after deliberation, had adopted a text that was merely an act of the organ. That was a very real situation which gave rise to constant difficulties in the European Communities.

51. Consequently, if article 66 was retained, it would be better to say nothing about representatives to a conference, since the rule was self-evident. As to the rule concerning representatives to an organ, the Commission should be extremely precise: it should state the reservation concerning the relevant rules of the organization, and not employ the expression "in virtue of their functions", which was ambiguous.

52. The CHAIRMAN, speaking as a member of the Commission, said that two questions should be considered in connexion with article 65: Who should issue the credentials referred to in paragraph 1? And was it necessary to include a reference to the relevant rules of the Organization? In regard to the second question it had been suggested that a reference should also be included to the constitutional law of the host State.

53. Paragraph 2 dealt with the submission of credentials, but it had been rightly objected by some members that the idea of notification, which was implicit in that paragraph, tended to complicate the issue. Some members had questioned the need for specifying a time-limit and had suggested that the Commission adopt the language of article 12, but he thought it would be diffi-

⁷ *Ibid.*, pp. 197-198.

cult to adopt that article *in toto*, because of the phrase "or by another competent minister".

54. Mr. Ago's idea of an intermediate stage between paragraphs 1 and 2¹ might be adopted, but it might then be necessary to redefine the word "representatives" when dealing with articles 62 or 0. Alternatively, some other term might be used, such as the word "plenipotentiary" suggested by Mr. Rosenne, but the Commission should be cautious about introducing new terms.

55. It appeared to be the general view that the question of notifications, the subject-matter of paragraphs 3 and 4, could best be dealt with in a separate article on the lines of article 17.

56. He agreed with those members who thought that article 66 would be acceptable if amended as suggested by Mr. Reuter and Mr. Ago. He did not favour deleting the article altogether, because the principle underlying it was highly important for the law of international organizations.

The meeting rose at 1 p.m.

¹ See previous meeting, paras. 58-63.

1059th MEETING

Friday, 29 May 1970, at 9.40 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castén, Mr. El-Erian, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1 and 2)

[Item 2 of the agenda]

(continued)

ARTICLE 65 (Credentials and notifications) and
ARTICLE 66 (Full powers to represent the State in the
conclusion of treaties) (continued)

1. Mr. EL-ERIAN (Special Rapporteur), summing up the discussion on articles 65 and 66, said there was general agreement in the Commission that credentials and notifications should be dealt with separately. There should also be a detailed list of the notifications to be made, as there was in article 17,¹ in order to meet

Mr. Ushakov's objection that the information called for in article 65 was inadequate.

2. It had been pointed out that it was difficult to deal jointly with delegations to organs and delegations to conferences; it might be necessary to draft separate provisions, and possibly even separate chapters, for the two kinds of delegation.

3. The question of credentials had also raised the problem of who were representatives and what was a delegation. During the discussion of article 62,² Mr. Bartoš had objected that all the persons described as "representatives" in paragraph 2 of that article would hardly be entitled to privileges and immunities. He (the Special Rapporteur) had therefore agreed to delete that paragraph and to include an article which would define representatives as persons authorized by the sending State to represent it to the organ of an international organization. A delegation would be deemed to be composed of one or more representatives and might also include administrative, technical and service staff. As to credentials, he suggested that only representatives who voted should be required to have them; that should be subject, however, to the organization's rules of procedure or to the verification of credentials by its Credentials Committee.

4. Some doubt had been expressed as to whether the words "another competent minister" should be used in connexion with the issuing of credentials; it had been suggested that the situation would be adequately covered by the phrase "an appropriate authority". His view was that the present formulation should be retained, since otherwise it would be necessary to delete the phrase "another competent minister" in article 12. In any case, the Commission should await the views of governments and put the paragraph into final form at its next session.

5. Mr. Kearney had expressed some misgivings about the expression "the practice followed in the Organization", but he thought that the issue of credentials was governed more by the practice than by the rules of procedure or the constituent instrument of an organization. The question would, of course, be reconsidered on second reading, but he personally did not share Mr. Kearney's fears.

6. Instead of the time-limit provided for in paragraph 2, Mr. Bartoš had suggested some such wording as "as soon as possible", but it seemed to him that from a practical point of view it would be useful to remind governments that credentials must be submitted, if possible, not less than one week before the date fixed for the opening of the session.

7. A number of members wished to delete paragraph 4. The same situation had arisen in connexion with article 17 (formerly article 15) at the twentieth session,³ but it had been finally agreed that the sending State should be given the option of transmitting notifications to the host State. If paragraph 4 of article 65 were

² See 1052nd, 1053rd and 1054th meetings.

³ See *Yearbook of the International Law Commission, 1968*, vol. I, pp. 147-148 and 240-242.

¹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 209.

deleted, it would be necessary to explain why the corresponding paragraph of article 17 had been retained.

8. Mr. Yasseen, supported by some other members, had objected that article 66 was already covered by article 7 of the Vienna Convention on the Law of Treaties⁴ and that it was unnecessary to repeat that provision. But as the same States would not necessarily be parties to both instruments, he (the Special Rapporteur) considered that the present draft should be as self-contained as possible, without, of course, contradicting anything in the Convention on the Law of Treaties. After all, some of the General Assembly's rules of procedure repeated certain provisions of the Charter.

9. The CHAIRMAN suggested that articles 65 and 66 be referred to the Drafting Committee.

It was so agreed.⁵

ARTICLES 67 and 68

10.

Article 67

Size of the delegation

The size of a delegation to an organ of an international organization or to a conference convened by an international organization shall not exceed what is reasonable and normal, having regard to the functions of the organ or conference, the needs of the particular delegation and the circumstances and conditions in the host State.

Article 68

Precedence

Precedence among heads of delegations to an organ of an international organization or to a conference convened by an international organization shall be determined by the alphabetical order, in accordance with the practice established in the Organization.

11. Mr. EL-ERIAN (Special Rapporteur) said that article 67 was based on article 16.⁶ Delegations to organs of general competence, such as the General Assembly of the United Nations or the assemblies or conferences of the specialized agencies, were necessarily much larger than delegations to organs dealing with a limited subject. The same applied to delegations to large conferences like the United Nations Conference on the Law of the Sea, which had had five committees.

12. Article 68 corresponded to article 19.⁷ The Commission would remember that during its twentieth session the Secretary-General had summarized the position in the United Nations in a note dated 3 July 1968.⁸ He himself had obtained some information from the legal

advisers of the International Labour Organisation, the International Atomic Energy Agency and the Universal Postal Union. The general rule appeared to be that heads of delegations took precedence according to their rank; in case of equality of rank, they took precedence in alphabetical order, though heads of delegations who served as chairmen of committees were generally given special precedence.

13. Mr. TAMMES said that since the phrase "reasonable and normal" already appeared in the Conventions on diplomatic and consular relations, as well as in article 16 of the draft articles on permanent missions, it could not be omitted from article 67. It was particularly necessary because delegations to major conferences and to organs of general competence, such as the General Assembly, often included a large number of persons who were entitled to the facilities, privileges and immunities referred to in article 69.

14. Yet although he could, in principle, accept an article based on article 16, he had certain doubts about the drafting of article 67, particularly in regard to the word "functions", which in the context of an organ of an international organization seemed to him to refer to a definite place and a lasting role in some institutional machinery, whereas in the context of a conference it would seem to fall outside that framework and refer rather to a specific task to be performed. That was perhaps a minor point, but it must be borne in mind that a conference, even if convened by an international organization, had a legal status of its own.

15. Mr. KEARNEY suggested that the difficulty referred to by Mr. Tammes might be remedied by some such phrase as "having regard to the functions of the organ or the purposes of the conference".

16. With regard to article 68, if an organ had a specific practice according to which precedence was accorded on the basis of the time and date of the submission of credentials, there seemed to be no reason why that practice should not be followed rather than alphabetical order; but the phrase "shall be determined by the alphabetical order, in accordance with the practice established in the Organization" appeared to make the use of alphabetical order mandatory and to relegate the practice of the organization to second place. From a strictly logical point of view, that raised certain difficulties which required clarification.

17. Mr. RUDA said he agreed with the substance of article 67, which, like article 16, established the principle that the sending State was free to decide the number of members in its delegation. The rule of conduct laid down in those two articles applied to the sending State and not, like article 11 of the Vienna Convention on Diplomatic Relations,⁹ to the receiving State.

18. He was rather concerned, however, about the problem of consultations on the size of the delegation. At the twenty-first session, the Commission had adopted article 50, on consultations between the sending State, the host State and the organization, but had deferred its

⁴ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/27* (United Nations publication, Sales No.: E.70.V.5).

⁵ For resumption of the discussion, see 1061st meeting, para. 3 and 1073rd meeting, para. 99.

⁶ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 208.

⁷ *Ibid.*, p. 211.

⁸ *Ibid.*, p. 163.

⁹ United Nations, *Treaty Series*, vol. 500, p. 102.

decision as to the position of that article in the draft.¹⁰ Members should now begin to consider whether article 50 should not apply, not only to permanent missions, but to all the rest of the draft.

19. He agreed with Mr. Kearney that article 67 should refer to the "purposes" of the conference rather than its "functions".

20. He supported article 68. It was the first article to include the expression "heads of delegations to an organ... or to a conference"; a reference to "heads of delegations" might perhaps be usefully included in other articles as well.

21. Mr. CASTRÉN said that as the delegations referred to in article 67 were of a temporary character, it might perhaps not be advisable, either from the point of view of the host State or from that of privileges and immunities, to limit their size. It was true that in some organizations of a universal character, such as the United Nations, the number of delegates to the general assembly—but not the number of experts and secretaries—was limited, but those cases were covered by article 3. For conferences convened by international organizations the general practice recognized no restrictions and, even though a delegation to a conference was a kind of special mission and the Convention on Special Missions contained a provision similar to article 67,¹¹ there was an essential difference between the two kinds of mission, which lay in the bilateral character of special missions proper. Conferences convened by international organizations, on the other hand, concerned a number of States and so called for more liberal rules.

22. The wording of article 67 closely followed that of article 16, the only significant change being due to the difference between the situation of a delegation and that of a permanent mission to an international organization, as explained in the commentary.

23. Article 68 appeared to be generally acceptable, but it might be preferable, in the case of conferences, to follow the alphabetical order used by the protocol department of the State on whose territory the conference met, rather than the practice of the organization which convened the conference, as the Special Rapporteur proposed.

24. Mr. NAGENDRA SINGH said he supported the substance of articles 67 and 68, which closely followed the pattern and principle of previous corresponding articles. He agreed with Mr. Kearney that article 67 should refer to the "purposes" of the conference; alternatively, the word "functions" might be replaced by the words "nature of the activities".

25. He had no quarrel with the suggestion that article 68 should follow the precedent established in article 19, but he would point out that the question of the time and date of presentation of credentials was not as important in the case of conferences as it was

in that of permanent missions to international organizations of a universal character. All the delegations to a conference arrived together and left together. Either a sub-paragraph should be added dealing with conferences separately, or article 68 should be left unchanged.

26. He agreed with Mr. Ruda that article 50 should be made to apply to permanent observer missions, although, in view of the difference in nature between organs and conferences, it could hardly apply to delegations to conferences unless its scope was widened.

27. Mr. ROSENNE said that among the rules of procedure of international organizations which dealt with the size of delegations were rule 25 of the General Assembly, which used the words "as may be required by the delegation", rule 18 of the Economic and Social Council, which used the words "as may be required", and rule 1 of the Vienna Conference on the Law of Treaties, which used the same phrase. He believed that similar language should be used in article 67; he was not convinced that it should be so limitative as article 16.

28. He had the same difficulty as Mr. Tammes over the words "functions of the organ or conference". He wondered whether the real test was not the objectives pursued by the sending State in relation to the activities of the organ or conference at any given moment. During the United Nations Conference on the Law of the Sea, a certain vote taken by the First Committee on a critical issue had created a delicate political situation which had required his Government to make radical changes in the composition of its delegation. To replace the word "functions" by "purposes" would not cover the purposes of the sending State.

29. The phrase "the circumstances and conditions in the host State" was almost wholly irrelevant, since there was no analogy between article 67 and article 16. In the case of conferences, it would make a very great difference whether they were held in a city which was accustomed to act as a host to conferences or somewhere else. The different situations of delegations to conferences and delegations to organs should be dealt with on their merits; he would not exclude the possibility that article 67 might be drafted as two paragraphs or even as two articles. But the problem was not merely one of drafting technique; it would also be necessary to establish by inquiry whether the two types of delegations were really on the same footing.

30. He agreed with Mr. Ruda that article 50 should apply to the subject-matter of article 67. It seemed to be the Special Rapporteur's intention that consultations should be held in the case of delegations both to organs and to conferences.

31. With regard to article 68, he maintained the general reservations he had expressed in 1968 concerning article 17 (later 19);¹² the whole question of precedence was susceptible of so many interpretations that he doubted whether article 68 served any useful purpose. The title, at least, should be amended to limit

¹⁰ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, p. 18.

¹¹ *Ibid.*, Supplement No. 30, p. 100, article 8.

¹² See *Yearbook of the International Law Commission, 1968*, vol. I, p. 243, para. 66.

the article to precedence among heads of delegations. Moreover, he questioned whether United Nations practice was adequately reflected in the last sentence of paragraph (3) of the commentary, which stated that "In both cases a certain precedence is accorded to heads of delegations who serve as chairman of a committee of the organ concerned".

32. When the Committee of Experts for the Progressive Codification of International Law, a forerunner of the International Law Commission, at its meeting on 21 January 1926, had discussed the same problem as that dealt with in article 68, it had decided to replace the expression "rank and precedence" by "order of delegations".¹³ The Drafting Committee might perhaps consider whether the same question did not arise at the present time.

33. Mr. YASSEEN said that he approved of article 67 in principle; it was flexible, laid down acceptable criteria and covered every aspect of the matter. The Commission was not drawing up the rules of procedure of a conference or an international organization, but stating a general rule which took account of all the factors involved. It was essential, therefore, to consider the host State, which accepted a large number of obligations in that capacity, but should not be required to assume obligations not connected with the performance of international functions. Article 67 set reasonable criteria, in particular that of the needs of the delegation, which might vary at different times and from one delegation to another. He did not agree with Mr. Kearney that the article should refer to the "purposes" rather than the "functions" of a conference. The term "functions" was readily understandable and conveyed the object of the article very well. He was, however, prepared to accept any drafting improvements the Drafting Committee could suggest.

34. With regard to article 68, it might be advisable not to limit it to precedence among heads of delegations, but to make provision for precedence among the other delegates as well. The alphabetical order was necessary, in any event, but there were exceptions nevertheless, both at conferences and in organs of international organizations, so it would be well to refer not only to the practice followed in the organization with regard to the use of alphabetical order, as the proposed text implied, but also to the practice establishing certain exceptions, for example, when delegates accepted certain positions in an organ or at a conference.

35. The Special Rapporteur had mentioned precedence among heads of delegation of the same rank. He would appreciate it if the Special Rapporteur would say whether treatment differing with the personal rank of a head of delegation would not be incompatible with the sovereign equality of States.

36. Mr. USHAKOV said he approved in principle of the idea underlying article 67, but the article should be divided into two parts to take account of the two differ-

ent situations it dealt with: two different rules could not be stated in one and the same formulation. That also applied to article 68, in which the word "delegation" did not mean the same thing when applied to a conference as it did when applied to an organ. In the case of a conference, the definition of the word did not raise any difficulty, but the Commission had not yet defined what it meant in the case of an organ. The Special Rapporteur proposed that, in addition to a head of delegation or a representative, a delegation should comprise members of the diplomatic, administrative and technical staff, as well as members of the service staff and perhaps even private staff. But according to article I, paragraph (n),¹⁴ the term "organ of an international organization" meant "a principal or subsidiary organ, and any commission, committee or sub-group of any of those bodies", so the composition of a delegation to an organ could hardly be the same in all those cases. Hence, until the meaning of the expression "delegation to an organ" had been clearly defined, it was impossible to talk of heads of delegation or of precedence among them, or even of the size of a delegation, which obviously could not be the same for a sub-group as for a larger organ.

37. Legal technique required that every rule must be precise and be susceptible of only one interpretation, otherwise it was not a rule. Consequently, all the terms used in a provision must be clearly defined, and they must be clearly defined again whenever the context changed. Conventions usually contained an article on the use of terms, and the Commission had considered it desirable to give a specific definition in the Convention on Special Missions of the meaning of such terms as "permanent diplomatic mission" and "consular post", which might seem perfectly comprehensible to the man in the street, but required strict definition for the purposes of the jurist.

38. Furthermore, every legal rule must provide either for a single course of action by a subject of law, or for several specific courses of action, or for a free choice between several possibilities. In the last case, the use of the word "or" in a legal text opened up, juridically, unlimited possibilities, which could only be restricted by practical considerations. For example, when it was provided in article 5 of the Convention on Special Missions that two *or more* States might send a joint special mission, that meant, legally, that a hundred States might send a joint special mission. When the Commission said in article 64 that the sending State might freely appoint the members of its delegation to an organ *or* a conference, it was stating a legally absurd rule, for the sending State was not defined in the same way in both cases: in one case it was a State which was a member of an organ and in the other a State participating in a conference. To introduce the principle of freedom of choice into that provision was tantamount to saying that a State which was a member of an organ might appoint the members of its delegation to a conference and vice versa. That showed why it was important to

¹³ League of Nations document C.196 M.70 1927 V [C.P.D.I. 95 (2)], p. 114.

¹⁴ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 196.

define every term and not to use the word "or" in stating a rule applicable to a single course of action. Again, it was not permissible in legal drafting to lay down rules simply by reference to other rules which were applicable to different cases or themselves referred to other provisions even further removed from the text being prepared.

39. All those considerations prompted him to urge that the Special Rapporteur should prepare, for the Drafting Committee, as many articles as were necessary to make the rules stated absolutely clear, both for permanent observer missions and for delegations to organs and delegations to conferences.

40. Mr. RAMANGASOAVINA said he approved of the substance of article 67. The purpose of the provision was to limit the size of delegations to organs of international organizations or to conferences, and the Special Rapporteur had devised a formulation that was sufficiently flexible to allow for the diversity of such organs and conferences. The article was, however, merely indicative, since many States limited the size of their delegations of their own accord, because their resources were limited and the place where the organ or conference met was far from their territory. He agreed with other members of the Commission that the meaning of the provision was obscured by the fact that the word "functions" related both to the organ and to the conference; he would suggest redrafting to read: "having regard to the nature of the conference, the functions of the organ, the needs of the delegation and . . .".

41. He also approved of the substance of article 68, which confirmed the practice followed by organs of international organizations and by conferences. But in order to allow other considerations to be taken into account in determining precedence, he would suggest that the comma between the words "alphabetical order" and "in accordance" should be deleted and the conjunction "and" inserted in its place.

42. Mr. AGO observed that the two articles under consideration presented few difficulties. He had only two comments to make on article 67, which related to drafting. First, in the French version it would probably be better to speak of a delegation "*à un organe*" than a delegation "*auprès d'un organe*", in order to keep to the customary French terminology. Secondly, it should be clearly understood that the term "delegation" applied only to delegations to sessions and not to representatives permanently appointed to an organ.

43. He wondered, however, whether article 67 was really necessary. The Commission should not be led into drawing too close a parallel between delegations and permanent missions, whose situation raised special problems. It was true that permanent missions might sometimes be too large, but the problem was quite different in the case of delegations to sessions or organs of international organizations or to conferences. If they had a fault, it was rather that they were often not large enough. Consequently, the inclusion in the draft of a provision such as article 67 might give a false impression and frustrate the aim in view, which was to impress

upon States that they should send delegations of an adequate size. Another question about article 67 was who could invoke the rule it stated. Unless that was made clear, the article would not be of much value. He was prepared to agree to its retention, however, if the Commission wished it.

44. With regard to article 68, he would merely like the Special Rapporteur to make sure exactly what the present practice was, for it was his impression that in certain international organizations special precedence was given to ministers.

45. Mr. USTOR said that the subject-matter of articles 67 and 68 was generally regulated in the rules of procedure of organizations and conferences. The Special Rapporteur had singled out the more important of the rules usually applied and had incorporated them in those two articles so that they would serve as residuary rules in cases where the rules of procedure were silent.

46. The size of delegations was occasionally regulated in the rules of procedure, but only cursorily. As a general rule, the composition of the delegation of a sending State was not subject to any restriction. The residuary rule in article 67 would apply in all such cases and he could therefore understand Mr. Ago's doubts concerning the retention of the article.

47. If article 67 were to be retained, he thought greater stress would have to be placed on the needs of the sending State and of the particular delegation. He agreed with Mr. Rosenne that circumstances and conditions in the host State were of secondary importance, if indeed they were relevant at all.

48. Rules of procedure sometimes dealt with questions of the composition of delegations other than those relating to size, such as the rank of heads of delegation and, in some cases, the professional qualifications of representatives. For example, it had been provided that delegations to the General Assembly's commemorative session, marking the twenty-fifth anniversary of the United Nations, were to be headed, if possible, by Heads of Government. Nevertheless, he agreed with the Special Rapporteur that there was no need to lay down residuary rules to cover cases of that kind.

49. It was advisable to include an article on precedence, but it should be noted that there were other points involved besides those contemplated in article 68. One of them was the seating arrangement at meetings, which was usually in alphabetical order, sometimes with a system of rotation. Another was the rank of participants, especially senior officials.

50. He thought that articles 67 and 68 should be retained and the details left to the Drafting Committee.

51. The CHAIRMAN, speaking as a member of the Commission, said he recognized the drafting imperfections of article 67, but he still thought it necessary to include an article on the size of delegations. The words "having regard to the functions of the organ or conference" should be carefully scrutinized. The Drafting Committee should consider alternative wording such as a reference to the nature or purpose of the organ or conference rather than to its functions. On the other

hand, a strong case had not been made out for the deletion of the reference to "the circumstances and conditions in the host State". In view of the responsibility of the host State for the safety and welfare of the members of delegations, conditions prevailing in that State might warrant limitation of the size of delegations at any time.

52. The point made by Mr. Ruda in regard to article 50 was a valid one. The Drafting Committee would have to find an appropriate place for that article, possibly in Part I or at the end of the whole draft.

53. Article 68 was equally necessary, despite the problems it raised. Mr. Rosenne had referred to the League of Nations Committee of Experts for the Progressive Codification of International Law, and his point seemed to be that the question in article 68 was one not so much of precedence as of the order of delegations. Seating order, for example, was not a question of precedence. Nevertheless, some kind of rule on precedence was necessary, not only for ceremonial occasions, but also because it had a bearing on the contents of article 69.

54. A number of special cases had been mentioned by various speakers, but they could not all be included, and they could be dealt with appropriately in the commentary to article 68.

55. Mr. EL-ERIAN (Special Rapporteur) said that, except for two or three members, the Commission accepted that an article on the size of delegations was necessary. Despite the temporary character of delegations, problems did arise in practice with regard to their size. It had been said that the provisions of article 67 were more restrictive than the existing rules of procedure, but the reference to "the needs of the particular delegation" seemed to cover that point.

56. Rules of procedure generally regulated the number of representatives, but not the number of advisers, secretaries and other members of a delegation. Consequently, if no provision on the lines of article 67 were included, it would be possible for a sending State, without violating the rules of procedure, to commit abuses with regard to the number of other members of the delegation, such as advisers, who were not covered by those rules.

57. It had been generally agreed during the discussion that the word "functions" was not suitable where conferences were concerned. The Drafting Committee would consider the alternative words which had been suggested, such as "purposes" and "nature". It might perhaps be necessary to deal with delegations to organs and delegations to conferences in two separate paragraphs.

58. It seemed to be generally agreed that it would be useful to have an article on precedence, limited to heads of delegation. The concluding phrase in article 68, "in accordance with the practice established in the Organization", covered more than just the question of the alphabetical order to be used; as was shown by the comma which preceded it, it made the whole system of precedence subject to the practice established in the organization. The main point of the article was to stress

that the seniority rule was not applicable to organs or conferences. That rule was satisfactory where permanent representatives were concerned, but in the case of delegations to meetings of organs or to conferences, there might well be fifty representatives who submitted their credentials on the same day.

59. He agreed that article 50 should apply to the subject-matter of article 68. The Drafting Committee would have to consider placing article 50 in such a position as to show that its application was general.

60. Mr. Yasseen had inquired about the "case of equality of rank" mentioned in the penultimate sentence of paragraph (3) of the commentary. In United Nations practice, permanent representatives took precedence over permanent representatives *ad interim*; the precedence of permanent representatives among each other was determined in accordance with alphabetical order.

61. He had referred to the League of Nations Committee of Experts for the Progressive Codification of International Law in his first report;¹⁵ the question considered by that Committee had not been identical with that dealt with in article 68.

62. The CHAIRMAN suggested that articles 67 and 68 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁶

ARTICLE 69

63.

Article 69

Facilities, privileges and immunities

Alternative A

The provisions of Part II, Section 2, of the present articles shall apply, as appropriate, to delegations to organs of international organizations and to conferences convened by international organizations.

Alternative B

Representatives to organs of international organizations and to conferences convened by international organizations shall enjoy the following facilities, privileges and immunities:

(a) Immunity from any form of arrest or detention and from seizure of their personal baggage;

(b) Immunity from the criminal jurisdiction of the host State;

(c) Immunity from legal process of any kind in respect of words spoken or written and all acts done by them in their capacity as representatives;

(d) Inviolability of all papers and documents;

(e) The right to use codes and to receive papers or correspondence by courier or in sealed bags;

(f) Exemption in respect of themselves and their spouses from immigration restrictions, alien registration or national service obligations in the State they are visiting or through which they are passing in the exercise of their functions;

(g) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

¹⁵ See *Yearbook of the International Law Commission, 1963*, vol. II, p. 170.

¹⁶ For resumption of the discussion, see 1077th meeting, para. 32.

(h) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also

(i) Such other privileges, immunities and facilities, not inconsistent with the foregoing, as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise as part of their personal baggage) or from excise duties or sales taxes.

64. Mr. EL-ERIAN (Special Rapporteur), introducing article 69, said that the facilities, privileges and immunities of delegations to organs of international organizations and to conferences convened by international organizations were governed by the Conventions on the privileges and immunities of the United Nations¹⁷ and of the specialized agencies.¹⁸ Those Conventions gave members of such delegations functional immunity, but not diplomatic immunity.

65. In the commentary to article 69 he had cited a number of authors; they were in general agreement that representatives to international conferences should enjoy full diplomatic status. He had also mentioned the Convention regarding Diplomatic Officers, signed at Havana in 1928.¹⁹ It was significant that that Convention, though signed at a time when representatives to conferences had not acquired the prominence they now had, accorded them full diplomatic status.

66. With regard to the article on conferences proposed by the United Kingdom during the Sixth Committee's discussion of the draft Convention on Special Missions, it should be remembered that that Committee had not discussed the substance of the matter, but had only debated whether to include such an article in the draft Convention.²⁰

67. He wished to urge the extension of privileges and immunities to delegations to organs and conferences. It was paradoxical that a cabinet minister or under-secretary of State representing his country at a United Nations meeting should have fewer privileges and immunities than a third secretary on the permanent mission of his country in New York. He was aware of the difficulties, especially in view of the large number of persons involved, and he had accordingly submitted two alternative texts. Under the brief text of alternative A, the provisions of Part II, section 2, would apply to delegations to organs of international organizations and to conferences convened by international organizations. The text stated that those provisions would apply "as appropriate". It was true that some members had criticized the use of that expression, but he saw no reason why the Commission should deny itself a drafting tool which could be useful in difficult circumstances. Besides, the expression "as appropriate" had been used by the United Kingdom delegation itself in its proposed article on conferences.

68. Alternative B was longer and regulated the matter on the lines of article V of the Convention on the Privileges and Immunities of the United Nations. There was an important difference, however. Under sub-paragraphs (a) and (b), representatives would be given full immunity from any form of arrest or detention and full immunity from the criminal jurisdiction of the host State. As far as civil proceedings were concerned, sub-paragraph (c) laid down that immunity was extended only in respect of words spoken or written and all acts done by representatives in their capacity as representatives, as in the Convention on the Privileges and Immunities of the United Nations.

69. Mr. BARTOŠ said that a large number of States were very unwilling to accept any extension of facilities, privileges and immunities, as the General Assembly debate on the articles on special missions had made quite clear. Although the Commission had been quite cautious in that case, some States had taken the view that it had nevertheless provided for unduly extensive privileges and immunities.

70. Alternative A for article 69 had the defect of being imprecise, in that it covered all members of the delegation regardless of their position within it; in other words, unlike the Convention on Special Missions, it did not distinguish between representatives, members of a delegation having diplomatic status, members of the technical and administrative staff and members of the service staff. Moreover, all those persons would have, under alternative A, more privileges and immunities than were accorded under any existing rule of diplomatic law relating to other kinds of State representation. Hence alternative A could be accepted only if it was stipulated that it applied solely to members of delegations belonging to certain categories. If the Special Rapporteur meant that delegations were composed of the persons who were regarded by the Convention on the Privileges and Immunities of the United Nations as being assimilated to representatives, that must be stated expressly in the article. Alternative B suffered from the same defect: it made no distinctions between the different classes of staff.

71. The Commission should declare, in principle, for one system or another, and decide the extent to which it wished to accord privileges and immunities to certain members of delegations. Otherwise, it would find itself in a very awkward position. For instance, if an international organization had not requested extensive privileges and immunities, would it have to be accorded all those listed in alternative B without having asked for them, or were those privileges and immunities to be regarded as a maximum, their extent in any specific case being determined by the constitution of the international organization concerned and the treaties it had concluded with the host State? That question should be settled. Personally he did not think that all the privileges and immunities listed were indispensable, but only those whose purpose was to ensure freedom of decision and expression within organs. In short, he thought the Commission should consider the privileges and immunities listed very carefully and set their limits most

¹⁷ United Nations, *Treaty Series*, vol. 1, p. 16.

¹⁸ *Op. cit.*, vol. 33, p. 262.

¹⁹ League of Nations, *Treaty Series*, vol. CLV, p. 261.

²⁰ See *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, Agenda item 87, document A/7799, paras. 175-178.

explicitly; otherwise, it might either not grant enough to enable members of delegations to perform their functions, or grant too much.

72. Mr. USHAKOV said that alternative A was unacceptable, because of the expression "as appropriate"; it was not clear what meaning was to be ascribed to that expression or who could decide the question. The Commission's essential task was to codify existing rules and to state precisely what was appropriate and what was not. On that question the differences of opinion in the Commission were sometimes very marked and at the level of the whole international community they became absolutely insuperable.

73. Alternative B was not acceptable either. He must once again emphasize that the question of delegations to organs of international organizations and the question of delegations to conferences must be considered separately. Where privileges and immunities were concerned, it was necessary to distinguish between members of delegations and the delegations themselves, which was not done in the draft articles. A series of articles should therefore be drafted for each of those categories. The articles dealing with delegations to conferences should be based on articles 13, 14, 17 and 19 to 49 of the Convention on Special Missions, since delegations to conferences were analogous to special missions, and some further articles could be added if necessary. Articles based on the Convention on Special Missions should also be drafted for delegations to organs of international organizations, but the situation of such delegations differed from that of delegations to conferences, inasmuch as it could hardly be said that privileges and immunities could be extended to them as delegations.

74. The best course would be to draft articles concerning delegations to conferences and articles concerning delegations to organs of international organizations; then, on the basis of those texts, the Commission could decide whether any particular article was necessary or not. Perhaps the Special Rapporteur could undertake to submit such articles to the Drafting Committee. He himself was willing to help by submitting his ideas to the Drafting Committee, provided that it was free to submit to the Commission all the articles needed to regulate the two situations he had mentioned.

75. Mr. ROSENNE said he would like to have answers to two questions. The first related to the difficult choice between alternatives A and B for article 69 and more specifically to the last sentence of paragraph (7) of the commentary, which read: "Should the Commission prefer alternative B, additional provisions would be needed, e.g. concerning waiver of immunity, duration of privileges and immunities and persons covered by them other than representatives". He would like the Special Rapporteur to say which of the articles of the present draft he considered should apply if the Commission chose alternative B.

76. His second question related to Mr. Ushakov's suggested paper: would it not be preferable for such a paper to be submitted to the Commission itself, rather than to the Drafting Committee?

77. Mr. USHAKOV said the question was one for the Commission to decide.

78. The CHAIRMAN said that the Commission had always welcomed suggestions from its members, especially suggestions in writing. The texts submitted by the Special Rapporteur were the basis of the Commission's work, but if any member had alternative ideas, it would be appropriate for him to submit them to the Commission.

79. Mr. USHAKOV said that when the Commission had decided on the method to be adopted in dealing with article 69, it might be necessary to draft a number of new articles and that task would be best performed by the Special Rapporteur himself.

80. Mr. EL-ERIAN (Special Rapporteur) said he was always at the disposal of the Commission and would be willing to draft a set of provisions giving members of delegations to organs and conferences the same privileges as members of special missions. Such an approach, however, would mean giving them full diplomatic status. It would be better if the Commission discussed the question of principle first and decided on the general approach to article 69 before he undertook the preparation of those additional articles. He would reply later to the remaining questions which had been raised.

The meeting rose at 1.10 p.m.

1060th MEETING

Monday, 1 June 1970, at 3.10 p.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1 and 2)

[Item 2 of the agenda]

(continued)

ARTICLE 69 (Facilities, privileges and immunities) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 69 in the Special Rapporteur's fifth report (A/CN.4/227/Add.2).

2. Mr. EL-ERIAN (Special Rapporteur) said that, in reply to questions asked at the previous meeting, he would give some additional explanations regarding the two alternatives he had put forward for article 69.

3. If the Commission decided to adopt alternative A, which gave representatives to organs and conferences the same privileges as permanent representatives, some adjustments would be necessary to adapt those privileges to their case. For example, exemptions of fiscal character, which presupposed a long sojourn, were not applicable to delegates to sessions of organs or to conferences.

4. If the Commission adopted alternative B, a number of additional provisions would have to be drafted to deal with such matters as waiver of immunity, duration of privileges and immunities and what persons other than representatives were entitled to those privileges and immunities: members of the family, for example. He had thought it best not to prepare those additional provisions until the Commission decided which of the alternatives it wished to adopt.

5. In paragraph (3) of the commentary, he had referred to the 1928 Convention regarding Diplomatic Officers.¹ Another interesting example was the Agreement of 17 August 1951 between the French Government and the United Nations regarding the sixth session of the General Assembly, which had been held in Paris that year; under that Agreement, representatives accredited to the Paris session of the General Assembly had been granted the same privileges, immunities, exemptions and facilities as were accorded to diplomatic officers accredited to the French Government.

6. Mr. CASTRÉN said that the provisions on the facilities, privileges and immunities of delegations to organs and conferences should be based strictly on the theory of functional necessity. It should also be borne in mind that, as a rule, the functions of those delegations were of relatively short duration, even as compared with those of special missions, not to mention that they differed in character from special missions. Consequently, such delegations could not be assimilated to special missions where facilities, privileges and immunities were concerned. Their status and that of their members also differed from the status of diplomatic missions and of permanent missions to international organizations and their members. It therefore seemed necessary to draw up special rules on the facilities, privileges and immunities to be accorded to delegations and their members, who did not need all the rights, freedoms and other advantages generally accorded to ordinary diplomats and to permanent representatives. Furthermore, several of the rules in articles 22 to 44² governing the legal status of permanent representatives could hardly apply to delegations and their members, because of the short time for which they remained in the host State.

7. In view of those general considerations, he could not accept either of the two alternatives proposed for

article 69. Alternative A, which was very liberal, seemed to go even further than alternative B, for it placed the delegations in question on the same footing as permanent missions, by making the provisions relating to the latter apply to them "as appropriate"—a phrase even more imprecise than the words "*mutatis mutandis*" used by the Special Rapporteur in some of the other articles of his draft. It was true that he proposed another reservation when he said, in paragraph (7) of the commentary, that if the Commission adopted alternative A, some adjustments would be needed, for instance, with respect to privileges and exemptions of a fiscal character. But the biggest lacuna in alternative A was that it only mentioned delegations, and did not mention the legal status of their members.

8. Alternative B was based mainly on the relevant provisions of the 1946 Convention on the Privileges and Immunities of the United Nations,³ which established a fairly liberal régime that might also be used, with some modifications, as a model for establishing the legal status of representatives to international conferences. The main difference between the Special Rapporteur's proposal and the Convention was that the Special Rapporteur, in sub-paragraph (b), proposed to grant representatives to conferences and delegates to organs full immunity from the criminal jurisdiction of the host State, whereas in the Convention, the immunity from jurisdiction was limited to words spoken or written and all acts done by representatives in their capacity as such. The Special Rapporteur stated in the commentary that authors generally agreed that representatives to international conferences enjoyed full diplomatic privileges, and that was also provided in the 1928 Convention regarding Diplomatic Officers. But he was reluctant to accept the Special Rapporteur's proposal regarding unlimited immunity from criminal jurisdiction. The immunity from any form of arrest or detention provided for in sub-paragraph (a) of alternative B seemed to him a sufficient safeguard to protect representatives, in the performance of their functions, against any unduly strict measures that might be taken by the host State.

9. If sub-paragraph (b) was retained, he would propose that in sub-paragraph (c), either the word "other" should be inserted before the words "legal process", or the reference should be to civil and administrative jurisdiction, since criminal jurisdiction had already been mentioned in the preceding paragraph.

10. As the Special Rapporteur said in paragraph (7) of the commentary, should the Commission prefer alternative B, additional provisions would be needed concerning such matters as waiver of immunity, duration of privileges and immunities and the persons covered by them other than representatives. Perhaps a provision corresponding to article 41, on nationals of the host State and persons permanently resident in that State, a provision corresponding to article 44, on non-discrimination, and certain provisions on the legal status of delegations themselves should be added. But he did not see any need to reproduce, with certain adjustments, all the

¹ League of Nations, *Treaty Series*, vol. CLV, p. 261.

² See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, pp. 4-15.

³ United Nations, *Treaty Series*, vol. 1, p. 16.

corresponding articles of the Convention on Special Missions.⁴

11. Sub-paragraphs (a) and (h) of alternative B overlapped, as both of them dealt with the régime applicable to the personal baggage of representatives. Sub-paragraph (i) might cause misunderstanding in that it seemed to provide for an ill-defined extension of privileges, immunities and facilities beyond what had already been specified in the previous sub-paragraphs; it might be thought that the provisions in sub-paragraphs (a) and (h) were sufficient and that sub-paragraph (i) could be deleted.

12. Mr. TAMMES said that neither of the two suggested alternatives was very simple. In alternative A, the formula "shall apply, as appropriate" did not cover all situations. For example, the provisions of article 40 (Privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff) were not applicable *mutatis mutandis* to delegations to organs and conferences. If alternative B were chosen, a great many articles would have to be adapted. For example, explicit provisions would have to be included on the duration of privileges and immunities and the nationality of representatives. There was also the question of the duty of the host State to take all appropriate steps to prevent any attack on the person, freedom or dignity of representatives, referred to in article 30 of the draft. That duty had been the subject of a communication to the Commission from the President of the Security Council.⁵

13. There were really more than two options before the Commission. In view of the importance attached to immunity from criminal jurisdiction, alternative B should be divided into two further alternatives: one with and one without that immunity.

14. Three points should be borne in mind in examining the choice between the various possibilities: first, the distinction, if any, which it was proposed to make between categories of representatives within a delegation; second, the legal difference, if any, between representation in organs and representation at conferences; third, the authority of the principles underlying the United Nations Conventions in force, in relation to the ideas on which article 69 was based.

15. On the first point, it seemed to him that it would not be in accordance with existing practice to make the scope of privileges and immunities dependent upon a person's position in his delegation. Representatives, alternate representatives, experts and advisers normally worked in different subsidiary bodies of the organ or conference concerned; all of them spoke on behalf of their delegations, prepared drafts and voted. It was only the final formal vote which was cast by the representative or alternate. The work performed by the various members of a delegation was equally important and it was a condition of the final result that all the members of

a delegation should do their best to bring it about. No useful purpose would be served by making conditions more agreeable for one member of the delegation than for another.

16. On the second point, he believed that there was a difference between the legal situation of an organ and that of a conference. The presence of the seat of an organ in a country was an established fact regulated by an agreement with the host State, whereas the holding of a conference was subject to the specific consent of the host State, which could attach conditions to its consent. Even if alternative A were in force, article 5 of the draft⁶ would always make it possible for a State giving its consent to the holding of a conference to contract out of any general obligation to grant particular privileges and immunities.

17. On the third point, he believed that the basic idea underlying Article 105 of the Charter, the Conventions on the privileges and immunities of the United Nations and the specialized agencies⁷ and the Headquarters Agreement⁸ had not been altered by any different tendency in later agreements. On the contrary, the fact that the number of accessions to, and ratifications of, the general Convention was still increasing was an indication that the cautious approach to privileges and immunities of the late 1940s was far from obsolete.

18. Article IV, section 14, of the Convention on the Privileges and Immunities of the United Nations read: "Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connexion with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded". The notion of complete immunity from criminal jurisdiction would hardly fit into such a scheme. It was a matter in which practical and factual considerations were more important than technical legal considerations. Even from the legal point of view it would be a semantic *tour de force*, in the case of persons who were members of a delegation of limited duration, to regard representative status as symbolic of the sovereignty of the sending State.

19. He favoured alternative B, but the inclusion of immunity from criminal jurisdiction should be reconsidered.

20. Mr. SETTE CÂMARA said that alternative A would accord unduly broad privileges and immunities, the only restriction being that introduced by the words "as appropriate". But who would decide what constituted "appropriate" privileges and immunities? If the

⁴ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 99.

⁵ See 1054th meeting, para. 1.

⁶ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 198.

⁷ United Nations, *Treaty Series*, vol. 33, p. 262.

⁸ *Op. cit.*, vol. 11, p. 12.

decision were left to the host State—even in consultation with the organization concerned—that State would have excessive powers in deciding the status of representatives.

21. Privileges and immunities were always a delicate question and anyone who had had the experience of directing a mission, whether permanent or temporary, would agree that it was a question which it was desirable to settle in clearly defined terms. For that reason, he would prefer an enumeration of privileges and immunities. The enumeration in alternative B was an abridged version of the existing texts. If the Commission decided to choose that alternative, he would speak again on points of detail.

22. Mr. ALBÓNICO said that alternative B was based on the Conventions on the privileges and immunities of the United Nations and the specialized agencies and on Article 105 (2) of the Charter.

23. In contrast with the tendency of certain writers to advocate broader privileges, there was a marked trend in the opposite direction on the part of national courts. For example, the Chilean Supreme Court, in a judgement of 20 December 1969, had adopted a restrictive interpretation of the provisions on privileges and immunities in the Vienna Convention on Diplomatic Relations;⁹ the case had related to an offence begun in Chile by a diplomatic agent accredited to that country, but continued elsewhere when he had been transferred, and the Court had found that the Chilean courts had jurisdiction. He could cite numerous other decisions by courts in Latin American countries in which a restrictive approach to privileges and immunities had been adopted on the basis of the functional necessity principle. The 1928 Convention regarding Diplomatic Officers cited by the Special Rapporteur in paragraph (3) of the commentary had been drawn up at a time when the great expansion of international organizations of a universal character had not yet been foreseen.

24. Delegations to conferences and to sessions of organs had two well defined characteristics: their short duration and their specialized nature. In view of those characteristics, members of such delegations did not require the same privileges and immunities as permanent representatives; they only required what was necessary to enable them to perform their duties.

25. For those reasons, he favoured alternative B, subject to the inclusion of provisions on such matters as waiver of immunity, duration of privileges and immunities and duties of third States. On that basis, the Drafting Committee could prepare a set of articles that could be submitted to governments for their comments.

26. Mr. ROSENNE said there could be no doubt that article 69 was the most important in the present group of articles. That being so, the question arose whether it should not constitute a separate section, as was to some extent suggested in paragraph (1) of the general comments on Part IV (A/CN.4/227/Add.1).

27. The choice between the two alternative methods of approach was not easy; one of the difficulties was that practical and administrative convenience would have to be balanced against theoretical considerations. In discussing the whole question, it was necessary to bear in mind that the rules now being drafted were residuary rules by virtue of articles 3, 4 and 5, and would be resorted to only when no other rule applied. His own general position, which he had stated in 1968 during the general debate on the present agenda item,¹⁰ was that the time had come to try to evolve a more closely integrated system for the status, privileges and immunities of the different types of representative, on the basis of guidance furnished in the political organs. In that connexion, he drew attention to General Assembly resolution 2328 (XXII). Though headed "Question of diplomatic privileges and immunities", the agenda item concerned had included a sub-item dealing with the privileges and immunities of representatives of Member States to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, and the resolution envisaged a higher degree of uniformity than at present existed in the matter.

28. That view was supported by the statement of the Legal Counsel at the 1016th meeting of the Sixth Committee, in which he had said that the Secretary-General, in interpreting diplomatic privileges and immunities, would look to the provisions of the Vienna Convention on Diplomatic Relations in so far as they appeared relevant, *mutatis mutandis*, to representatives to United Nations organs and conferences.¹¹

29. During the discussion in the Sixth Committee on the United Kingdom proposal to include an article on conferences in the Convention on Special Missions,¹² it had been generally agreed that the Conventions on privileges and immunities, the Convention on Diplomatic Relations, the Convention on Consular Relations and the Convention on Special Missions should be placed on the same general level as precedents. Those instances gave a clear indication of the direction of political thinking on the matter and would justify the adoption of alternative A and the enunciation of a representative-functional approach. However, all the articles in Part II would need to be closely scrutinized before the final decision could be made.

30. Whichever alternative, as a matter of drafting technique, received the support of the majority in the Commission, it was clear that the details would have to be left for the Drafting Committee to work out and the task of that Committee would not be an easy one.

¹⁰ See *Yearbook of the International Law Commission, 1968*, vol. I, pp. 9-10.

¹¹ See *Official Records of the General Assembly, Twenty-second Session, Annexes*, Agenda item 98, document A/C.6/385, para. 4.

¹² See *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, Agenda item 87, document A/7799, paras. 175-178.

⁹ United Nations, *Treaty Series*, vol. 500, p. 96.

31. He believed that it was a mistake to place all the emphasis on the privileges and immunities of representatives and their conduct; there should be some reference to the fundamental duties of the host State. None was to be found in the commentary, yet those duties formed the subject of article 29 of the Convention on Diplomatic Relations, article 40 of the Convention on Consular Relations,¹³ article 29 of the Convention on Special Missions and article 30 of the present draft. It was surprising that there was no reference to them in the concluding sentence of paragraph (7) of the commentary.

32. Failure to deal with the duties of the host State would be all the more likely to be misunderstood in view of the communication sent to the Chairman by the President of the Security Council on 14 May 1970. The Commission should send an answer drawing attention to the Commission's work on the subject and to the relevant provisions of the international conventions based on that work.

33. At the second reading, the texts of articles 1-49 should be adjusted so that they would not be so closely centred on permanent missions and could be made applicable to all representatives of States covered by the draft. The Drafting Committee might consider adopting the system followed in the Convention on Consular Relations in dealing with honorary consuls.

34. Certain provisions would be necessary regardless of the alternative adopted. For instance, a provision on the lines of article 9, paragraph 2, of the Convention on Special Missions would be needed, either to replace, or to be combined with, paragraph 4 of article 9 of the present draft; it should be expressed in general terms so as to cover all representative functions contemplated by the draft. An article corresponding to article 21 (Status of the Head of State and persons of high rank) of the Convention on Special Missions would also be needed. That would deal with the problem of a cabinet minister who headed a delegation and found that he was in theory entitled to more limited privileges and immunities than a counsellor or secretary from the permanent mission or permanent diplomatic mission who was a member of the same delegation.

35. He was not unduly disturbed by the difficulty of drafting articles to apply under the formula in alternative A. It would not be necessary to cover all possible violations; after all, representatives were not the kind of people who habitually committed offences.

36. Lastly, there was the question whether the differences between a meeting held at a headquarters city, such as New York or Geneva, and one held elsewhere were great enough to need to be reflected in the draft. That point might be covered by the idea that the draft articles constituted residuary rules.

37. Mr. AGO said that neither of the two alternatives was really satisfactory. Alternative A was a typical

example of *petitio principii* and should in any case be rejected. Some of the rules to which it referred, using the expression "as appropriate", were applicable, others were not and others, again, might be applicable with some changes. Thus it did nothing to solve the problems that arose.

38. Alternative B was also open to many objections. In any event, it was impossible to try to provide in one article for a single régime applicable to two different situations: that of representatives to organs who were appointed permanently and that of delegations to particular sessions of organs or to conferences, which were temporary. The situation of representatives to organs of international organizations was generally provided for in the rules of the organization, but that of delegates to a conference was not. Hence all the more attention should be devoted to the régime applicable to the latter. In any case, the scope of the facilities, privileges and immunities for representatives to organs proposed by the Special Rapporteur in alternative B was far more limited than that of the facilities, privileges and immunities accorded by the Swiss Government, for example—which was not one of the most generous—to representatives of States on the Governing Body of the ILO, the Executive Board of WHO and similar bodies, particularly with regard to personal inviolability and inviolability of residence, immunity from all jurisdiction and exemption from dues and taxes. There seemed to be no reason why that should be so. Furthermore, the meaning of sub-paragraph (i) was not clear. The Commission would be wrong to leave it entirely to the Drafting Committee to settle all those points, which were matters of substance. He appreciated that the Commission wished to speed up its work, but he urged further reflexion.

39. Mr. USTOR said he preferred the Special Rapporteur's alternative A, because he believed that representatives to organs and to conferences should have privileges and immunities very similar to, if not identical with, those of members of permanent missions. His preference was not based on purely theoretical grounds, but on the great body of material already in existence, including the Conventions on diplomatic and consular relations and the Convention on Special Missions, the provisions of which could be adapted, with the necessary changes, to the needs of article 69. In the case of Customs duties, for example, the delegations referred to in article 69, being of a temporary character, would not, of course, have the same requirements as permanent delegations. Nevertheless, the leading representatives, that was to say the head of the delegation and his alternates, should have the same basic rights as permanent representatives, such as personal inviolability and immunity from civil and criminal jurisdiction. As Mr. Ago had said, those were the basic rights which were recognized by Switzerland as a host State.

40. Mr. RUDA said there could be no doubt that with article 69 the Commission was entering on the most important part of the draft. The Special Rapporteur had submitted two alternative solutions for the very important problem of facilities, privileges and immunities, but

¹³ United Nations, *Treaty Series*, vol. 596, p. 296.

he (Mr. Ruda) felt bound to agree with Mr. Ago that neither was completely satisfactory. In paragraph (5) of the commentary, the Special Rapporteur had stated his position that the representatives in question should be accorded, in principle, and with particular reference to immunity from criminal jurisdiction, diplomatic privileges and immunities such as those accorded to members of permanent missions to international organizations. The Special Rapporteur had given two reasons for his position: first, that there was a tendency in contemporary international law to widen the scope of privileges and immunities in general and, secondly, that missions to organs and conferences were temporary in character and could therefore be roughly equated with the special missions of bilateral diplomacy. There appeared, however, to be certain contradictions in the Special Rapporteur's chain of reasoning; he could agree with him up to a point, but could not share his conclusions, and he feared that alternative A would not lead the Commission in the right direction.

41. The Special Rapporteur's alternative B was based on the Conventions on the privileges and immunities of the United Nations and the specialized agencies. Sub-paragraphs (a) to (h) said nothing about immunity from civil jurisdiction, but sub-paragraph (i) provided for "such other privileges, immunities and facilities, not inconsistent with the foregoing, as diplomatic envoys enjoy . . .". Yet article 31 of the Vienna Convention on Diplomatic Relations expressly provided that a diplomatic agent should enjoy immunity from the civil and administrative jurisdiction of the receiving State, subject to certain exceptions. What, then, was the legal situation of representatives under article 69 with respect to immunity from civil jurisdiction?

42. Mr. NAGENDRA SINGH said he preferred alternative B to alternative A. There were numerous sources for article 69, but the most important ones, and the ones which the Commission should take as its guide, were the Conventions on the privileges and immunities of the United Nations and the specialized agencies. Other sources of the law for article 69 were the Conventions on diplomatic and consular relations, the Convention on Special Missions, the draft articles on permanent missions and those already approved on permanent observer missions.

43. In the Convention on Diplomatic Relations, the representative character was paramount, whereas in the draft articles on permanent missions the functional aspect was the most important. In article 69, it was necessary to distinguish between the full representative, or head of delegation, and his advisory, administrative and service staff. To do so, the Commission should take article 37 of the Convention on Diplomatic Relations as a model. It was also of the greatest importance to specify clearly when privileges and immunities would begin and when they would end. Again, immunity from criminal and civil jurisdiction should be granted only for the duration of the conference and could not be expected to extend beyond that period.

44. In his view, the most important immunities which

should be included in article 69 were the inviolability of the representative's person, and of his documents, residence and correspondence, as provided for in articles 29 and 30 of the Convention on Diplomatic Relations. There was some overlapping between the provisions concerning immunities and facilities for personal baggage in sub-paragraphs (a) and (h) of alternative B. A provision on the lines of article 35 of the Convention on Special Missions could be inserted with advantage.

45. Mr. YASSEEN said that alternative A left unsettled the question how the facilities, privileges and immunities to be accorded in each case would be determined.

46. The method of enumeration used in alternative B should therefore be adopted, as it had been for permanent missions. But the enumeration should be exhaustive, and paragraph (i) was therefore inappropriate since it provided no means of determining what facilities, privileges and immunities were or were not inconsistent with what was required by the status of representatives to organs and delegations to conferences.

47. Instead of concerning itself with matters of detail, the Commission should discuss method, for only the adoption of an appropriate method would make it possible to break the deadlock. As members knew, he was an advocate of the functional theory. The facilities, privileges and immunities to be accorded should be determined by the functions of representatives to organs and delegations to conferences. All the provisions concerning permanent missions should be taken into consideration, those which were suitable should be retained and further provisions should also be considered if necessary. What was essential in the present instance, as it had been before in the case of permanent missions, was to make as complete an enumeration as possible of the facilities, privileges and immunities to be accorded to representatives to organs and to delegations to conferences. It was also necessary to include provisions on the status of those facilities, privileges and immunities.

48. The Special Rapporteur could do that work himself and submit a proposal to the Drafting Committee for consideration. It might perhaps be advisable to take as a guide the rules already accepted by host States, so that the draft would truly reflect international practice.

49. Mr. CASTAÑEDA said that, in weighing the comparative merits of alternatives A and B, it was necessary to consider what really reflected the practice of international organizations. He believed that, basically, those organizations granted the same privileges and immunities to delegations to organs and conferences as they accorded to members of permanent missions, with some exceptions. In alternative A, those exceptions were covered by the phrase "as appropriate", but, as Mr. Ago had rightly pointed out, that phrase begged the question. As suggested by the Special Rapporteur in paragraph (5) of his commentary, the exceptions appeared to derive from the temporary character of the task of the delegations in question.

50. On balance, he was inclined to prefer alternative A, subject to one or two exceptions, such as those relating to the exemptions of a fiscal character referred to in

paragraph (7) of the commentary. He also agreed with Cahier, quoted by the Special Rapporteur in paragraph 4 of his commentary, that the present trend should be towards uniformity in the status of *ad hoc* diplomacy, delegates to conferences and representatives of States to meetings of organs of international organizations.

51. Sir Humphrey WALDOCK said he was afraid that if the Commission adopted alternative A, the reaction of most governments would be that it had taken the line of least resistance and had not considered the problem in sufficient depth. He was no happier about alternative B, which, although it listed a number of exemptions, omitted others and concluded with a sweeping final clause, in sub-paragraph (i), which was open to almost any interpretation.

52. There appeared at present to be two contradictory trends with regard to privileges and immunities. The Special Rapporteur had emphasized the trend towards granting representatives to organs and conferences full diplomatic status, but it was also possible to observe a trend towards greater restriction of privileges and immunities. To his mind the question was one that could only be resolved by a careful study of existing practice; in particular, the Commission might obtain valuable guidance from a study of the practice in Switzerland, which must have had as much experience of the questions now before the Commission as any other State, if not more.

The meeting rose at 6 p.m.

1061st MEETING

Tuesday, 2 June 1970, at 9.40 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Welcome to Mr. Alcívar

1. The CHAIRMAN welcomed Mr. Alcívar, who had been elected a member of the Commission to fill one of the casual vacancies caused by the election of two former members as Judges of the International Court of Justice.

2. Mr. ALCÍVAR expressed his gratitude to the members for electing him.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1 and 2)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 66 (Full powers to represent the State in the conclusion of treaties) (resumed from the 1059th meeting)

3. Mr. TESLENKO (Deputy Secretary to the Commission) said that, during the discussion of article 66, the Secretariat had been asked whether credentials to participate in a United Nations conference had always been considered sufficient to empower a representative to sign the Final Act of the conference.

4. At the time, he had answered that to his knowledge such credentials had usually been considered sufficient for the signature of Final Acts, but that he was referring the question to the Legal Counsel, since a definite answer could only be given after studying the records of all United Nations conferences.¹

5. He had now received a cable from the Legal Counsel stating that in United Nations practice credentials to participate in a conference had always been considered sufficient for the signature of the Final Act, because the Final Acts of United Nations conferences had not embodied substantive obligations. Those Final Acts had always been of a purely formal character and the text of the instrument adopted at the conference had frequently been annexed to them. Even in the case of the Final Act of the 1964 United Nations Conference on Trade and Development, which contained various recommendations and principles, special credentials had not been required for signature. The Legal Counsel added that, in any event, article 66 reproduced *mutatis mutandis* the relevant portion of article 7 of the 1969 Vienna Convention on the Law of Treaties,² and he presumed that the United Nations would make its practice conform to that text.

6. He (Mr. Teslenko) wished to add that in some cases the treaty or convention adopted at a conference was not annexed to the Final Act, but was actually incorporated in it. That had been the case with the 1969 Vienna Convention on the Law of Treaties.

7. Mr. ROSENNE thanked the Deputy Secretary and the Legal Counsel for their enlightening replies to the questions raised by Mr. Bartoš and himself during the discussion of article 66. He suggested that, regardless of the decision which would be taken on article 66, the Commission should find some way of including the substance of those replies in the commentary.³

¹ See 1058th meeting, paras. 28 and 30.

² *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/27* (United Nations publication, Sales No.: E.70.V.5).

³ For resumption of the discussion, see 1077th meeting, para. 24.

ARTICLE 69 (Facilities, privileges and immunities) (*re-summed from the previous meeting*) and

ARTICLE 70 (Conduct of delegations to organs of international organizations and to conferences convened by international organizations and end of functions)*

8. The CHAIRMAN invited the Commission to resume consideration of article 69 in the Special Rapporteur's fifth report (A/CN.4/227/Add.2).

9. Mr. Kearney said it had been asked during the discussion whether there were any differences between delegates to conferences and representatives to organs of organizations. Personally, he could see little or no difference between them: both represented the sending State in an international forum. Treaties or other kinds of agreement were produced both at sessions of organs and at conferences convened by international organizations, and the purpose of both was to reach agreed solutions of international problems. Accordingly, the work they did provided no real justification for dividing the two types of representative into groups entitled to different kinds of protection, privileges and immunities. If it was considered that a representative to an organ of an international organization needed to be protected from the civil and criminal jurisdiction of the host State, it was hard to see why a delegate to a conference should not need the same protection. He was not entering into the question whether the persons concerned should enjoy all diplomatic privileges and immunities; he merely wished to stress that, whatever the privileges granted, there should be no distinction between the two categories.

10. The position with regard to a possible distinction between permanent representatives to organs and temporary representatives was similar. So far as privileges and immunities were concerned, it made no difference whether the same individual or different individuals attended the various meetings of the same organ at stated intervals. The protection and privileges needed would be the same and there was no logical reason for making any distinction. Consequently, all the representatives concerned should be treated in the same way.

11. As to the choice between alternative A and alternative B for article 69, in the final analysis there seemed to be comparatively little difference between them, especially as the Special Rapporteur intended to expand alternative A by giving more details.

12. It had been asked how much latitude was allowed by the expression "as appropriate" in alternative A and by the provisions of sub-paragraph (i) in alternative B. That was a matter connected with the problem of the settlement of differences between the sending State, the host State and the organization over the provisions on privileges and immunities. The provisions of article 50 on consultations were too weak to be relied on for the settlement of any serious difference. The draft should therefore include a provision on the lines of article VIII, section 30 of the Convention on the Privileges and

Immunities of the United Nations,⁴ under which all differences arising out of the interpretation or application of that Convention were to be settled by reference to the International Court of Justice unless another mode of settlement was agreed upon. Section 30 continued with the words: "If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion. . . . The opinion given by the Court shall be accepted as decisive by the parties." For the purposes of the present draft, that provision should be amended so as to refer to any difference between an organization authorized to request an advisory opinion from the Court, or an international organization for which arrangements could be made to request such an opinion, and one of its members.

13. The provision in question had been in existence since its adoption by the General Assembly in 1946 and had not given rise to any difficulties. It had contributed to the smooth operation of the Convention. There was, of course, a reluctance in certain quarters to accept mandatory reference to the International Court of Justice, but in the present instance a substantial precedent existed, and it should be followed. In the absence of such machinery, it would be almost impossible to settle the extremely difficult legal problems that could arise if, for example, a representative or delegate should fail to comply with provisions such as those of article 45, paragraph 1, of the draft⁵ and one of the parties involved in the dispute were to invoke the provisions of article 60 of the Convention on the Law of Treaties, on the termination or suspension of the operation of a treaty as a consequence of its breach.

14. The fact that the present draft dealt with the rights and interests of three parties—the sending State, the host State and the organization—made it extremely desirable to include a provision on the lines of section 30 of the 1946 Convention on the Privileges and Immunities of the United Nations. Such a provision would do something to allay the concern which had been expressed in connexion with both alternative A and alternative B.

15. With regard to the extent of the privileges and immunities that should be enjoyed by representatives, he thought they should be limited to a reasonable extent. But it must be borne in mind that the Commission was proposing, for observers, virtually the full extent of diplomatic privileges and immunities. From the viewpoint of consistency it was difficult to see how representatives to organs and conferences, who were plenipotentiaries, could be treated less favourably than observers. The temporary nature of the delegation was not an adequate distinction, because the Convention on Special Missions gave members of those temporary missions full diplomatic privileges and immunities.

16. One possible reason for limitation was the fact that certain privileges might not be of any substantial practical use. For example, certain fiscal exemptions would

* The text of this article was not discussed; see paras. 44-45 below.

⁴ United Nations, *Treaty Series*, vol. 1, p. 30.

⁵ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, p. 16.

hardly be justified for representatives attending a conference of three or four weeks' duration. It would be placing a considerable burden upon the host State to ask it to adapt its taxation structure so as to grant exemption from, say, sales tax to such temporary representatives. The problem was particularly complex in a federal system in which sales tax was levied by the states of a federal union.

17. Another dubious area would be the obligation of the host State to provide office space—an obligation which seemed hardly relevant in the case of delegations to a short conference. Possibly, a distinction should be made between a representative to an organ, who could usually rely on his permanent mission, and a representative to a conference held elsewhere than at the seat of an organ of the organization convening it.

18. He was therefore in agreement with those members who had urged that the various privileges and immunities at present extended to other representatives should be examined in order to see which of them were appropriate for the kind of representative to which Part IV of the draft referred.

19. Mr. RAMANGASOAVINA said that the Special Rapporteur had submitted the same idea in two different forms. Under the general formulation in alternative A, the persons concerned enjoyed all the privileges and immunities necessary for the performance of their functions, though the expression "as appropriate" was too vague. Alternative B, on the other hand, set out the specific privileges and immunities to be accorded in the case in point, subject to a general reservation, but the Special Rapporteur's selection still reflected the idea that the privileges and immunities concerned were those necessary for the performance of functions. A comparison of alternative B with the list of facilities, privileges and immunities in Part II, section 2, showed, if he was not mistaken, that only seven of the twenty-one items in that section were embodied in alternative B. Obviously, the provisions relating to such matters as the accommodation of the permanent mission (article 23), the settlement of civil claims (article 34), exemption from social security legislation (article 35) and exemption from dues and taxes (article 36) did not normally apply to the persons covered by article 69.

20. The Drafting Committee might, of course, go into further detail by drawing up a comparative table showing the respective situations of permanent representatives, observers, special missions and permanent missions to international organizations. In any event, subparagraph (i) of alternative B constituted a saving clause covering the cases not provided for in the other subparagraphs. If any difficulties arose, the procedure laid down in article 50 ought to make it possible to find a solution.

21. Furthermore, the privileges and immunities accorded to officials and experts under the Convention on the Privileges and Immunities of the United Nations were practically the same as those in alternative B. He was therefore in favour of that alternative, though the Drafting Committee would have to be asked to complete it by

selecting from among the possible privileges and immunities all those that were necessary to enable the persons concerned to perform their functions.

22. Mr. USHAKOV said he was sorry that the discussion resulting from the submission of the two alternatives for the privileges and immunities accorded to members of delegations to conferences and to organs continued to be so general. It seemed necessary, in any case, as it had been before, to deal separately with separate situations and, consequently, to have a separate set of articles on each of them. It was only when it had received the comments of governments that the Commission would be able to decide, on second reading, whether the articles should be combined or whether there should be cross-references.

23. The discussion on article 69 had also shown that there should be separate articles, first on the privileges and immunities of delegations as such, and secondly on the privileges and immunities of the various classes of persons who were members of delegations, namely, delegates, diplomatic staff, technical and administrative staff, service staff and members of families. To draft those articles was the task of the Special Rapporteur and he was willing to undertake it. The Commission should then discuss the articles. But as there was not much time left, he proposed that the Drafting Committee should prepare a more or less definitive text for such articles as the Special Rapporteur might prepare, it being understood that there would be separate articles for delegations to conferences and delegations to organs. The Commission would take a decision on the Drafting Committee's text. Otherwise it might fail to complete consideration of the draft during the session, though that was its main task.

24. The CHAIRMAN, speaking as a member of the Commission, said it was generally agreed that representatives to organs of organizations and to conferences convened by international organizations should be accorded some kind of privileges and immunities. The main difficulty was the nature of those privileges and immunities.

25. Mr. Ushakov had suggested that the representatives concerned should be placed on the same footing as members of special missions and had stressed the particular relevance of articles 13, 14 and 17 of the Convention on Special Missions. Other members had accepted the Special Rapporteur's idea, which was that those representatives should be granted the privileges accorded to permanent missions. Whatever the approach adopted, the Commission must give specific directives to the Drafting Committee.

26. There had been general support for the idea of using the 1946 and 1947 Conventions on the privileges and immunities of the United Nations and the specialized agencies as a basis for the privileges and immunities of the representatives in question. Attention had also been drawn to the recent tendency to increase rather than restrict the privileges and immunities of representatives. His view was that they should be given the same privileges and immunities as those accorded in the United Nations to permanent missions.

27. With regard to alternative A, it had been suggested that a list of exceptions should be drawn up; such an approach would be consistent with paragraph (7) of the commentary. As to alternative B, Mr. Yasseen had made the useful suggestion that privileges and immunities should be listed in greater detail.

28. He did not favour the suggestion that separate sets of articles should be drafted for each category of representatives. The best approach was to adopt the formula in alternative B, but to instruct the Special Rapporteur and the Drafting Committee to expand the list it contained. Repetition of the same provision in sub-paragraphs (a) and (h) should be avoided and sub-paragraph (i) should be dropped altogether. The privileges and immunities accorded to the representatives concerned should not be less than those accorded to permanent representatives.

29. Mr. EUSTATHIADES said that the Commission should not take its decision on the basis of a theory. It was true that the theory of representation was convenient for justifying the utmost extension of the privileges and immunities of those who really possessed a permanent representative character, namely, the members of permanent diplomatic missions. But the theory of representation was based on a rather outmoded idea of the courtesy and respect due to a sovereign. In the present instance it would lead to unduly liberal provisions, when the Commission ought to keep to the privileges and immunities necessary for the performance of functions.

30. Both the alternatives were based on the idea of function. As it stood, alternative A showed more clearly than alternative B that functional necessities were the same for delegates to organs and conferences as for permanent delegations to international organizations. The main objection to alternative A was that the phrase "as appropriate" left matters to the discretion of the countries concerned. Alternative B was therefore preferable, provided that it was completed, and suggestions for its completion had been made by Mr. Castrén, Mr. Nagendra Singh and Mr. Ramangasoavina. Sub-paragraph (i) could not be retained, and it was precisely that sub-paragraph which would have to be replaced by additional particulars.

31. A third solution would be to combine the two alternatives, taking account of the fact that the persons concerned belonged to two different categories. First, there were delegates to organs which were more or less permanent; secondly, there were the delegates to conferences, to whom delegates to sessions of organs could be assimilated. On that basis, article 69 could be drafted to read:

"Facilities, privileges and immunities shall be accorded to delegations to organs of international organizations and to delegations to conferences convened by international organizations to the extent necessary for the performance of their functions.

"Delegations to organs of international organizations shall enjoy, *inter alia* . . .

"Delegations to sessions of organs of international organizations and delegations to conferences convened

by international organizations shall enjoy, *inter alia* . . .".

32. Delegations to organs of international organizations could be more or less assimilated to permanent missions. Delegations to sessions of organs and to conferences, on the other hand, must be treated more like special missions, because of their temporary character.

33. The Commission must not make everyone an ambassador and grant excessive privileges and immunities. There were limits to what governments could do. It would also be well to study the example of Switzerland.

34. Mr. EL-ERIAN (Special Rapporteur) said that the main difficulty with article 69 was that it had been presented in the form of two alternatives. As various members had pointed out, his intention in submitting the article in that form had been to indicate a method of approach rather than a particular concept. He had himself stated in paragraph (7) of the commentary that additional provisions would be needed, whether in the form of a reference to the privileges and immunities of special missions or permanent missions or of a detailed list.

35. Sir Humphrey Waldock had emphasized the need for a closer study of actual practice with regard to privileges and immunities. Perhaps the most important embodiment of that practice was to be found in the general Convention on the Privileges and Immunities of the United Nations, which had served as a prototype for a number of regional conventions, such as those of the League of Arab States and the Organization of African Unity. The general Convention, however, had been adopted so soon after the signing of the United Nations Charter that it inevitably contained a number of inconsistencies and ambiguities concerning the exact scope of the privileges and immunities accorded. Later, the trend had been towards granting complete diplomatic privileges and immunities, subject only to adjustments for temporary missions. Examples of that trend were to be found in the agreement between the United Nations and the French Government concerning the convening of the sixth session of the General Assembly in Paris in 1951, and in the Agreement between the United Nations and the Government of Thailand relating to the Headquarters of the Economic Commission for Asia and the Far East, signed at Geneva on 26 May 1954. Article VI of the latter instrument provided that "Representatives of governments participating in the work of the ECAFE, or in any conferences which may be convened by the United Nations . . . shall be entitled in the territory of Thailand while exercising their functions . . . to the same privileges and immunities as . . . members of diplomatic missions of comparable rank".⁶ He would prepare a working paper giving a more comprehensive review of existing practice.

36. He agreed with Mr. Ago that in the case of missions to conferences which were not of a temporary character, such as the Geneva Disarmament Conference, and in the

⁶ United Nations, *Treaty Series*, vol. 260, pp. 44 and 46.

case of the Governing Body of the ILO and the Executive Board of UNESCO, it was also appropriate to grant exemptions of a fiscal character which presupposed a long sojourn.

37. Many members had pointed out that the phrase "as appropriate" in alternative A seemed to give arbitrary power to the host State, but that had not been his intention. What he had intended was that, in principle, the rules governing permanent missions should apply, subject only to the adjustments rendered necessary by the temporary character of the mission.

38. It had been suggested that representatives should be given the privileges and immunities necessary for the performance of their functions, but that raised the question of the functional theory as opposed to the representational theory. It was significant that, whereas Article 7 of the Covenant of the League of Nations had referred to diplomatic privileges and immunities, those responsible for drafting the United Nations Charter had referred, in Article 105 (2), to "such privileges and immunities as are necessary for the independent exercise of their functions", because they had not been sure that the term "diplomatic" would be appropriate.

39. The Commission should bear in mind that in article 69 it was stating a residuary rule which was without prejudice to any treaty rules, and that it was trying to introduce an element of uniformity based on both the representational and the functional theories. The system should be broadly the same as that governing diplomatic privileges and immunities, but the analogy was rather with special missions in bilateral diplomacy.

40. As to the drafting, there was now more or less general agreement that alternative B should be taken as a basis for an exhaustive list of specific privileges and immunities, and that could be supplemented by other articles concerning waiver of immunity and the like.

41. A majority of the Commission seemed to favour the extension of privileges and immunities rather than the restrictive approach adopted in 1946, when the views of governments had not been requested and when, for reasons of urgency, it had not been possible to resort to the painstaking procedure followed by the Commission.

42. Mr. YASSEEN said that he would like to make it clear, in order to avoid any misunderstanding, that in considering the scope of the facilities, privileges and immunities to be accorded to certain classes of person, he had been guided, in principle, by the functional theory; by that he did not mean matters connected with the exercise of the function, but the function as a whole. What he had in mind was the theory which justified granting the facilities, privileges and immunities necessary for the proper performance of the functions. In the present instance he had regarded the representative character of an agent as being part of his function. It was within those limits that he understood the functional theory, not within the narrow limits of the actual exercise of the function.

43. Mr. USHAKOV pointed out that he had said that the Convention on Special Missions could be taken as a model only in the case of delegates to conferences, but

not in the case of delegates to organs, since the Commission had not yet defined the latter terms. For the time being, the draft articles were applicable only to delegates to certain organs, and it seemed practically impossible to draft articles covering representation to all organs.

44. The CHAIRMAN suggested that the Commission should regard article 70 as raising problems similar to those raised by article 69 and refer both articles to the Drafting Committee on the same basis.

45. Mr. BARTOŠ said he had understood that the Commission would not transfer its responsibility for deciding matters of substance to the Drafting Committee, which had no power of decision. The choice between the two alternatives proposed for article 69 was not merely a matter of drafting and the Commission should therefore tell the Drafting Committee which alternative it was to take as a basis.

46. The CHAIRMAN said that the majority of the members of the Commission were in favour of alternative B and wished the Drafting Committee to examine and improve it.

47. Mr. USHAKOV said that the Commission usually referred articles to the Drafting Committee without taking a decision on the substance, leaving the Committee free to revise the text in the light of all the comments made. There was no reason to follow a different procedure for article 69.

48. The CHAIRMAN said he thought Mr. Bartoš was right. The Commission should inform the Drafting Committee which of the two alternatives it preferred.

49. Mr. USHAKOV said he could not see on what basis the Commission could decide to choose between the two alternatives, since in many of the cases no choice was possible. It would be better to refer article 69 as a whole to the Drafting Committee and leave the Committee completely free to revise the text.

50. The CHAIRMAN suggested that the Commission, while reserving full freedom of action, should refer articles 69 and 70 to the Drafting Committee, with the request that it produce a text on the general lines of alternative B.

51. Mr. AGO said he had no objection to the Chairman's suggestion where article 69 was concerned, but he thought that procedure would be rather hasty in the case of article 70, since it had not yet been discussed at all and was closer to alternative A than to alternative B.

52. The CHAIRMAN said that private consultations with members had given him the impression that the course he suggested would be acceptable; however, he was willing for article 70 to be discussed if Mr. Ago considered it necessary.

53. Mr. AGO said he was prepared to accept the Chairman's suggestion, provided that it was clearly understood that the Drafting Committee was authorized to apply the same criteria to article 70 as to article 69.

54. The CHAIRMAN said that articles 69 and 70

would be referred to the Drafting Committee on that understanding.

It was so agreed.⁷

55. Mr. ROSENNE said he hoped that the Drafting Committee would specify the duties of the host State in greater detail.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

PART III. *Permanent observer missions to international organizations* (resumed from the 1052nd meeting)

ARTICLE 0 (Use of terms)⁸ and

ARTICLE 51 (Establishment of permanent observer missions)⁹

56. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce that Committee's texts for articles 0 and 51.

57. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following texts:

Article 0 *Use of terms*

For the purposes of the present articles:

(a) A "permanent observer mission" is a mission of representative and permanent character sent to an international organization by a State not member of that organization;

(b) The "permanent observer" is the person charged by the sending State with the duty of acting as the head of the permanent observer mission.

Article 51 *Establishment of permanent observer missions*

Non-member States may establish in accordance with the rules or practice of the Organization permanent observer missions for the performance of the functions set forth in article 52.

58. The Special Rapporteur had submitted a revised version of article 0 which included, in addition to sub-paragraphs (a) and (b), a number of definitions. In view of that fact, he suggested that consideration of article 0 should be deferred until the entire series of definitions was available.

59. In the case of article 51, the main focus of the discussion had been on the problem of mutuality of consent and on the need to establish that the setting up of a permanent observer mission to an international organization was properly authorized. It had been suggested that there should be a specific reference to the need for an agreement between the organization and the sending State; alternatively, some term such as "arrange-

ments" might be used. The Drafting Committee had considered the various possibilities and had concluded that the necessary requirement should be expressed by the phrase "in accordance with the rules or practice of the Organization". That formulation differed from the one used in article 3,¹⁰ but the Drafting Committee believed that it covered the situation when the organization, by a specific agreement with the sending State, authorized the establishment of the permanent observer mission, since that authorization would then, in effect, be a part of the organization's practice.

60. Mr. ROSENNE said that, in view of the close link between article 0, sub-paragraph (a), and article 51, he wondered whether it was really right to postpone consideration of that sub-paragraph. It would be difficult to discuss the other articles if their terms of reference, so to speak, had not been settled.

61. Mr. KEARNEY (Chairman of the Drafting Committee) said he had no objection to dealing with the two articles together. Since sub-paragraphs (a) and (b) of article 0 depended on article 51, it might be better to discuss the latter article first.

62. Mr. BARTOŠ said he agreed with Mr. Rosenne; it would be more logical for the Commission to adopt article 0 provisionally, since otherwise it would not be able to adopt the subsequent articles. Personally, he approved of the article.

63. The CHAIRMAN suggested that members of the Commission should say whether they approved of article 0, sub-paragraphs (a) and (b).

64. Mr. ROSENNE observed that "article 0" was normally used by the Commission to designate an article which preceded an article 1; in the present case, however, it was really an addition to article 1. It would be simpler if the present article 0 became article 1/Add.1; the article 0 in Part IV would then become article 1/Add.2.

65. The final clause in sub-paragraph (a) should be amended to read: ". . . by a State not a member of that Organization" with a capital "O".

66. With regard to sub-paragraph (b), he had some misgivings about introducing the idea of "acting as the head of the permanent observer mission", because of the risk of confusion with the expression "acting permanent observer". He suggested that the text be amended to read: "The 'permanent observer' is the person appointed by the sending State as the person in charge of the permanent observer mission".

67. Mr. USHAKOV pointed out that the Commission did not usually approve articles on the use of terms until it had completed consideration of the whole draft. Hence it could only approve article 0 provisionally and would have to revert to it later. In any case, the article was not complete, as the Special Rapporteur and the Drafting Committee intended to add all the terms necessary for understanding the part of the draft to which it related.

⁷ For resumption of the discussion, see 1077th meeting, para. 50.

⁸ For previous discussion, see 1043rd meeting, paras. 32-46, and 1044th meeting, paras. 1-23.

⁹ For previous discussion, see 1044th meeting, paras. 24-51, and 1045th and 1047th meetings.

¹⁰ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 197.

68. The CHAIRMAN suggested that the Commission should approve article 0 on a provisional basis.

*It was so agreed.*¹¹

69. Mr. ROSENNE said that, in the English text of article 51, the word “establish” ought to be placed immediately before the words “permanent observer missions”. He was not convinced that the words “in accordance with the rules or practice of the Organization” could be interpreted in the way suggested by the Chairman of the Drafting Committee. It would be desirable to have some firmer wording which would not merely echo article 3.

70. Mr. USHAKOV said he agreed with Mr. Rosenne. The phrase “in accordance with the rules or practice of the Organization” was unnecessary, but as it was a compromise, he would not ask for its deletion.

71. Mr. USTOR said he preferred the original text of article 51 submitted by the Special Rapporteur. He was prepared to accept the new text, however, on the understanding that “the rules or practice of the Organization” must be in conformity with the principle of the sovereign equality of States, as well as with the principle of universality, which was of paramount importance where international organizations of a world-wide character were concerned.

72. Mr. BARTOŠ said he was in favour of article 51 as it stood. He could accept the drafting amendment to the English text proposed by Mr. Rosenne, but not the deletion of the phrase “in accordance with the rules or practice of the Organization”, which involved a question of substance and had nothing to do with the universality of the organization or the sovereignty of States. It must be clearly understood that no State could force a permanent observer mission on an international organization and its member States.

73. Mr. CASTRÉN said he was not entirely satisfied with the text of article 51, but was prepared to accept it as a compromise. The reference to the rules of the organization duplicated article 3, but article 51 was clearer than that article because it mentioned practice explicitly, whereas practice was only referred to in the commentary to article 3. He too considered that, as Mr. Kearney had implied when introducing article 51, no State was entitled to demand acceptance as an observer in the absence of any relevant rules or practice of the organization, and he hoped that that interpretation would be mentioned in the commentary.

74. Mr. KEARNEY (Chairman of the Drafting Committee) said he was prepared to accept Mr. Rosenne's suggestion concerning the drafting of article 51.

75. The CHAIRMAN said that two members of the Commission had reservations concerning article 51, but would not press them. He suggested that the Commission should adopt article 51, as amended by Mr. Rosenne.

*Article 51, as amended, was adopted.*¹²

ARTICLE 52 (Functions of a permanent observer mission)¹³

76. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 52:

Article 52

Functions of a permanent observer mission

The functions of a permanent observer mission consist *inter alia* in maintaining liaison and promoting co-operation between the sending State and the Organization, ascertaining activities and developments in the Organization and reporting thereon to the Government of the sending State, negotiating when required with the Organization, and representing the sending State at the Organization.

77. The article contained a number of changes from the Special Rapporteur's original text, which were designed to meet various points raised during the discussion. The main issue had been whether the article should contain an enumeration of the most important functions of a permanent observer mission or merely mention one principal function and then refer to the functions listed in article 7. The Drafting Committee had decided on a mixed approach; it had listed certain functions in descending order of importance, but had abandoned the attempt to say that one function was more important than another. It had also dropped the expression “*mutatis mutandis*”. It had added the words “when required” to show that engaging in negotiations was not one of the principal functions of permanent observer missions. Lastly, it had listed the function of representing the sending State “at the Organization”, rather than “to the Organization”, since the representation of such missions was generally not to any organ, but took place within the context of the organization itself.

78. The CHAIRMAN, speaking as a member of the Commission, suggested that the words “when required” should be placed after the words “with the Organization”.

79. Mr. EUSTATHIADES proposed that the French text be improved by replacing the phrase “*s'informer dans l'Organisation des activités et de l'évolution des événements*” by “*s'informer des activités et de l'évolution des événements au sein de l'Organisation*”.

80. Mr. TESLENKO (Deputy Secretary to the Commission) pointed out that the phrase criticized by Mr. Eustathiades reproduced article 7, paragraph (d) word for word; if the Commission decided to change it, it would have to explain why the French text of article 52 did not reproduce the wording of article 7, whereas the English text was the same in both articles.

81. Mr. USHAKOV said that the English text of article 52 was a translation of the French text, which the Drafting Committee had taken as a basis. Perhaps the words “when required” should be replaced by “if required”.

¹¹ For resumption of the discussion, see 1065th meeting.

¹² For further discussion see 1082nd meeting, paras. 91-96.

¹³ For previous discussion, see 1048th and 1049th meetings.

82. Mr. EL-ERIAN (Special Rapporteur) said that the words "when required" reflected the difference between the representation of member States and that of non-member States.

83. Mr. ROSENNE said that if article 14 was retained, the introduction of the concept of negotiation in article 52 would require the introduction of a corresponding provision regarding permanent observers.

84. After a brief discussion, in which Sir Humphrey WALDOCK, the CHAIRMAN, Mr. ALCÍVAR and Mr. KEARNEY took part, it was decided to place the words "when required" after the word "Organization".

Article 52, as amended, was adopted.

The meeting rose at 1.5 p.m.

1062nd MEETING

Wednesday, 3 June 1970, at 10.25 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Welcome to Mr. Thiam

1. The CHAIRMAN welcomed Mr. Thiam, who had been elected a member of the Commission to fill one of the vacancies caused by the election of two former members as Judges of the International Court of Justice.

2. Mr. THIAM expressed his gratitude to the members for electing him.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1 and 2)

[Item 2 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

3. The CHAIRMAN invited the Commission to consider the Drafting Committee's texts for articles 52 bis to 57 bis.

ARTICLE 52 bis (Accreditation [appointment] to two or more international organizations or assignment to two or more permanent observer missions)¹

4. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 52 bis:

Article 52 bis

Accreditation [appointment] to two or more international organizations or assignment to two or more permanent observer missions

1. The sending State may accredit [appoint] the same person as permanent observer to two or more international organizations or assign a permanent observer as a member of another of its permanent observer missions.

2. The sending State may accredit [appoint] a member of the staff of a permanent observer mission to an international organization as permanent observer to other international organizations or assign him as a member of another of its permanent observer missions.

5. In his note on assignment to two or more international organizations or to functions unrelated to permanent missions (A/CN.4/227) the Special Rapporteur had referred to two situations. The first was when the same person was accredited as a permanent observer to two or more international organizations, and the second, referred to in paragraph 3 of the note, was when a State accredited the same mission as a permanent mission to an international organization of which that State was a member and as a permanent observer mission to another international organization of which it was not a member. In article 52 bis, the Drafting Committee had considered only the first situation, since the second had seemed to it rather unlikely. The only question to be decided by the Commission, therefore, was whether to use the word "accredit" or the word "appoint".

6. Mr. ROSENNE said that he was not entirely happy about the way in which the matters mentioned in the Special Rapporteur's note had been disposed of. The question of diplomatic appointments could be disregarded for the time being and included in article 9² in due course, but the second situation, far from being unusual, was a very common one in Geneva. He suggested, therefore, that paragraph 1 should read: "The sending State may accredit [or appoint] the same person as permanent representative or permanent observer to two or more international organizations or to another international organization or assign a permanent observer as a member of one of its permanent missions or of another of its permanent observer missions".

7. He preferred the word "appoint" to the word "accredit", although he would not press the point.

8. Mr. USHAKOV said that he would prefer the word "accredit", which was consistent with the term used in article 8.³ It should be stated in the commentary that the

¹ For previous discussion, see 1049th meeting, paras. 50-67.

² See *Yearbook of the International Law Commission, 1968*, vol. II, p. 202.

³ *Ibid.*, p. 201.

Commission would consider at the second reading the possibility of ensuring that that term and other terms were used in a uniform manner throughout the draft articles. In substance, article 52 *bis* was the counterpart of article 8.

9. Mr. SETTE CÂMARA said that he preferred the word "appoint", since he thought that accreditation was a procedure which was not completed until the person in question had actually delivered his credentials.

10. The CHAIRMAN suggested that the Commission should adopt article 52 *bis*, subject to the deletion of the word "appoint," and that it should ask the Special Rapporteur to explain the distinction in the commentary.

Article 52 bis was adopted on that understanding.

ARTICLE 53 (Appointment of the members of the permanent observer mission)⁴

11. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee was submitting article 53 in the form proposed by the Special Rapporteur.

Article 53 was adopted.

ARTICLE 54 (Nationality of the members of the permanent observer mission)⁴

12. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 54, accompanied by a note:

Article 54

*Nationality of the members
of the permanent observer mission*

The permanent observer and the members of the diplomatic staff of the permanent observer mission should in principle be of the nationality of the sending State. They may not be appointed from among persons having the nationality of the host State, except with the consent of that State which may be withdrawn at any time.

NOTE

As regards the suggestion made by the Special Rapporteur in paragraph 3 of his "Note on assignment to two or more international organizations or to functions unrelated to permanent missions" (A/CN.4/227), the Committee decided to include in article 9, which dealt with accreditation, assignment or appointment of a member of a permanent mission to other functions, a reference to permanent observer missions.

13. Mr. USHAKOV said that if the Commission was not intending for the time being to draft for permanent observer missions an article identical with article 9, it should be explained in the commentary to article 52 *bis* that the reason for the omission, as implied in the note, was that the Commission had decided to include a clause concerning permanent observer missions in article 9 on second reading.

14. Mr. KEARNEY (Chairman of the Drafting Com-

mittee) said that the Special Rapporteur would take the note into consideration in his commentary.

Article 54 and the note accompanying it were adopted.

ARTICLE 54 *bis* (Credentials of the permanent observer)⁵

15. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 54 *bis*:

Article 54 bis

Credentials of the permanent observer

1. The credentials of the permanent observer shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent minister if that is allowed by the practice followed in the Organization, and shall be transmitted to the competent organ of the Organization.

2. A non-member State may specify in the credentials submitted in accordance with paragraph 1 of this article that its permanent observer shall represent it as an observer in one or more organs of the Organization when such representation is permitted.

16. Article 54 *bis* derived from the Special Rapporteur's note on the question of credentials in relation to permanent observers (A/CN.4/227). The main subject of discussion in the Drafting Committee had been the extent of the formalities required to establish the *bona fides* of the permanent observer and it had been generally agreed that he should be able to present credentials in substantially the same form as permanent representatives. The Committee thought that the commentary should contain some reference to its reasons for reaching that conclusion, since in some organizations credentials in simplified form were accepted.

17. Article 54 *bis* did not contain provisions similar to those of article 13, paragraph 2,⁶ because there was no general rule in international practice that non-member States could be represented by permanent observers at meetings of organs of international organizations.

18. Mr. ROSENNE said that in his opinion article 54 *bis* was unnecessary and the point could be dealt with in the commentary. Great caution should be exercised before adopting a provision such as that contained in paragraph 2, even on first reading, since there were cases where non-member States might participate in the work of organs of international organizations with full voting rights; for instance, States which, though not Members of the United Nations, were Parties to the Statute of the International Court of Justice could participate in the United Nations General Assembly for the purpose of electing judges. Paragraph 2 should therefore either be redrafted or deleted.

19. Mr. USHAKOV said it would be better if in the French text the word "*permise*" at the end of paragraph 2 were replaced by the word "*admise*", used in

⁴ For previous discussion of articles 53 and 54, see 1050th meeting, paras. 1-13.

⁵ For previous discussion, see 1050th meeting, paras. 14-45.

⁶ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 205.

paragraph 1. In the English text the word "allowed" should be used in both places.

20. Mr. REUTER said that in the French text of paragraph 2 it would be more correct to speak of an observer "*auprès d'un ou de plusieurs organes*" than of an observer "*dans un ou plusieurs organes*". At the beginning of the paragraph the verb "*préciser*" should be replaced by "*spécifier*", which was closer to the English.

21. Mr. EUSTATHIADES said that paragraph 2 might appear to be unnecessary because the situation it dealt with could be covered by paragraph 1; the credentials issued under paragraph 1 could specify that representation was confined to a particular organ.

22. Mr. USHAKOV said that article 54 *bis* had been drafted on his proposal. Paragraph 2 referred to the fact that in addition to observers of organizations whose representation in an organ was officially allowed, observers of non-member States might also be authorized to represent those States in an organ. But a permanent observer did not automatically represent the sending State in an organ unless he was specifically empowered to do so, any more than did a permanent representative. Article 54 *bis*, therefore, simply repeated what was in article 13. The sending State could always appoint an observer other than the permanent observer to represent it in a particular organ, but it was necessary to state clearly that a permanent observer could represent a non-member State as an observer in one or more organs when such representation was allowed.

23. With regard to Mr. Reuter's suggestion that the word "*préciser*" should be replaced by "*spécifier*", he would point out that the word "*préciser*" was used in article 13.

24. Mr. KEARNEY (Chairman of the Drafting Committee) said he noted that Mr. Rosenne did not think that paragraph 2 was sufficient to cover all circumstances, while Mr. Eustathiades thought it did not add enough to justify its inclusion. The Drafting Committee had considered the case of an observer who might change his status to that of a representative, but had decided to restrict paragraph 2 to the situation of an observer proper. After all, the occasions when an observer became a representative of his State to the organ of an international organization were extremely limited and, when they did exist, were governed by special rules or by the statute of the organization. It was possible that the paragraph was not really necessary, but in his opinion it provided a certain amount of clarification.

25. The CHAIRMAN suggested that the Commission should adopt article 54 *bis*, subject to certain amendments to the French text, where the words "*dans un ou plusieurs*" would be replaced by the words "*auprès d'un ou de plusieurs*". On second reading, the Commission would consider the question of replacing the word "*préciser*" in the French text by the word "*spécifier*" in articles 54 *bis* and 14.

Article 54 bis was adopted on that understanding.

ARTICLE 54 *ter* (Full powers to represent the State in the conclusion of treaties)

26. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 54 *ter*:

Article 54 ter

*Full powers to represent the State
in the conclusion of treaties*

1. A permanent observer in virtue of his functions and without having to produce full powers is considered as representing his State for the purpose of adopting the text of a treaty between that State and the international organization to which he is accredited.

2. A permanent observer is not considered in virtue of his functions as representing his State for the purpose of signing a treaty (whether in full or *ad referendum*) between that State and the international organization to which he is accredited unless it appears from the circumstances that the intention of the parties was to dispense with full powers.

27. The article had been included because article 52 mentioned among the functions of a permanent observer mission that of "negotiating when required with the Organization"; the Commission might wish to consider whether there should be a provision on the lines of article 14, paragraph 1.⁷ Since it was in fact highly unlikely that permanent observer missions would ever have to conclude treaties between the sending State and the organization, article 54 *ter* had been enclosed in square brackets.

28. Mr. SETTE CÂMARA asked why a distinction was made between adopting the text of a treaty and signing it.

29. Mr. KEARNEY (Chairman of the Drafting Committee) said that it was general practice to adopt the texts of bilateral treaties by initialling them, but that did not have the same effect as signature.

30. Mr. ALBÓNICO said he had doubts about the desirability of keeping article 54 *ter*, because the situation it contemplated, although conceivable in the case of a permanent representative—hence article 14—was a most unlikely one where observers were concerned, since in such circumstances a non-member State would appoint a plenipotentiary for the purpose. A permanent observer's function was to maintain liaison; in that capacity he sent in reports, but he did not conclude treaties, much less sign them. Moreover, the case was covered by articles 2 and 7 of the Vienna Convention⁸ and in any case it was one which very rarely occurred.

31. Mr. ROSENNE said that since he had reservations on article 14, he would have to reserve his position with respect to article 54 *ter*, although that provision should remain in the present draft so long as article 14 remained. He did not know whether it was in fact unusual for permanent observer missions to conclude treaties, and

⁷ *Ibid.*, p. 206.

⁸ See *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/27* (United Nations publication, Sales No.: E.70.V.5).

hoped that the Secretariat would enlighten the Commission on the point.

32. Mr. USTOR said that article 54 *ter* should be retained because the Commission already had article 14 concerning permanent missions and it would be impossible to make no reference to the same situation in the case of permanent observer missions. He agreed with Mr. Kearney that adoption usually took place by initialing, as was stated in article 10 (b) of the Convention on the Law of Treaties.

33. Mr. BARTOŠ said he was surprised to hear some members of the Commission who had criticized the Special Rapporteur for merely inserting references to the corresponding articles concerning permanent missions in cases where the rules were similar complaining that there was duplication when the rules were reproduced. In his view a cross-reference would have sufficed, but since it had been thought advisable to restate the provision in question, he had no objection, and would support article 54 *ter*.

34. Sir Humphrey WALDOCK said he agreed that, since the Commission had adopted article 14, it should also adopt article 54 *ter*. If reference were to be made to the Convention on the Law of Treaties, the true analogy was rather with article 7, paragraph 2 (b) of that Convention, which referred to heads of diplomatic missions; paragraph 2 (c) was concerned only with the full powers of representatives for the purpose of adopting the text of a treaty in an international conference, organization or organ. As to article 9 of the Convention, on the adoption of the text, that was in extremely general terms; no procedural requirements were laid down and there was nothing in that article to prevent adoption taking place in whatever manner might be agreed.

35. It seemed to him that, if the Commission wished to cover in Part III the matter dealt with in article 54 *ter*, the article was on the correct lines.

36. The adoption of article 54 *ter* would be unlikely to prejudice the future work of the Commission on the treaties of international organizations, because it approached the matter from the point of view of the State dealing with the organization, not from the point of view of the organization itself.

37. Mr. REUTER said that for all the reasons which had been stated, he was in favour of retaining article 54 *ter* if article 14 was retained. Although he did not wish to anticipate the information to be supplied by the Secretariat, he was quite sure that a large number of treaties were negotiated, and consequently adopted, between permanent missions and international organizations, notably in the vast field of technical assistance. Consequently, article 54 *ter* would be of great value, since permanent observers were a useful institution for States which, for one reason or another, were not members of the United Nations.

38. The CHAIRMAN said it appeared to be generally agreed that article 54 *ter* should be retained.

39. Mr. USTOR said that he was satisfied that article 54 *ter* was in harmony with the Convention on the

Law of Treaties. Although the text of a treaty could be adopted orally, in practice there was generally some written agreement in bilateral diplomacy.

40. Mr. RUDA suggested that the words "in virtue of his functions" in paragraph 2 should be deleted.

41. The CHAIRMAN said that the Special Rapporteur would make a note of that suggestion.

Article 54 ter was adopted.

ARTICLE 55 (Composition of the permanent observer mission)⁹

42. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 55:

Article 55

Composition of the permanent observer mission

1. In addition to the permanent observer, a permanent observer mission may include members of the diplomatic staff, the administrative and technical staff and the service staff.

2. When members of a permanent diplomatic mission, a consular post or a permanent mission in the host State are included in a permanent observer mission, they shall retain their privileges and immunities as members of their diplomatic mission, consular post or permanent mission in addition to the privileges and immunities accorded by the present articles.

43. Paragraph 1 reproduced unchanged the text proposed by the Special Rapporteur for article 55, which was itself derived from article 15.¹⁰

44. Paragraph 2 had been added by the Drafting Committee. Its purpose was to make it clear that when a diplomatic or consular officer became a member of a permanent observer mission, he did not on that account lose any of the privileges and immunities he previously enjoyed. There was no similar provision in the corresponding article on permanent missions, and it would be indicated in the commentary that the Commission proposed to introduce such a provision in Part II.

45. The paragraph was based on existing practice. In New York, many permanent observers to the United Nations were on the diplomatic list in Washington; other members of permanent observer missions were frequently drawn from the staff of the consulate of the sending State in New York. The practice at Geneva was similar.

46. The only problem was whether paragraph 2 should continue to form part of article 55 or should be placed elsewhere in the draft.

47. When the time came for the second reading of article 55, the Commission should consider whether Part III should include a provision on the lines of paragraph 2 of article 8,¹¹ to the effect that the sending State could accredit a member of the staff of a permanent mis-

⁹ For previous discussion of articles 55, 56 and 57, see 1050th meeting, paras. 46-55.

¹⁰ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 207.

¹¹ *Ibid.*, p. 201.

sion as permanent observer to other international organizations.

48. Mr. SETTE CÂMARA said that "consular post" seemed to be an unsatisfactory expression to use in referring to what was usually described as a consular office or mission.

49. Mr. RAMANGASOAVINA proposed that paragraph 2 should be amended in order to obviate the impression created by the phrase "in addition to" that the privileges and immunities were duplicated, when in fact they were merely cumulative. The second phrase, after the words "permanent observer mission", should be replaced by the phrase "the privileges and immunities they enjoy in this capacity shall be compatible with the privileges and immunities accorded by the present articles".

50. Mr. EUSTATHIADES said that he too thought that the phrase "in addition to" was ill-conceived, since it suggested an expression of opinion as to the extent of the privileges and immunities of the persons referred to in paragraph 2, whereas the intention was to state that the two sets of privileges and immunities would exist simultaneously. In his view, the concluding part of the paragraph, beginning with the words "in addition to", might be deleted if the Commission decided, contrary to its usual practice, not to reproduce the precise terms of the provision upon which article 55 was based, namely article 9 of the Convention on Special Missions.¹³

51. Mr. USHAKOV proposed that in the French version of paragraph 2 the words "*ils conservent*" should be used rather than "*ils gardent*", as in article 9 of the Convention on Special Missions. The word "permanent" should be inserted before "diplomatic missions" the second time that that expression occurred; it was used in the first line and in article 9 of the Convention on Special Missions.

52. Mr. YASSEEN said that the same wording should be used as in article 9 of the Convention on Special Missions. The words "in addition to" were acceptable, since a person should not be deprived of the privileges and immunities he enjoyed in another capacity as a result of the fact that he was a member of an observer mission.

53. Mr. BARTOŠ said that the wording of article 55 was perfectly satisfactory. The privileges and immunities accorded to members of permanent diplomatic missions, consular posts, permanent missions and permanent observer missions were not the same, and it was only right that a person performing more than one function should enjoy the privileges and immunities attached to each.

54. Mr. REUTER said that the precedent of the Convention on Special Missions was not sufficient reason for retaining the text as it stood. The question was not so simple as that, since certain privileges and immunities were attached to the person, and consequently might be enjoyed simultaneously, while others were attached to the function, and were consequently alternatives. It

would be more accurate, therefore, to put the sentence negatively and say that when members of a permanent diplomatic mission, a consular post or a permanent mission were included in a permanent observer mission they did not thereby lose the privileges and immunities which they enjoyed in those capacities.

55. Mr. RAMANGASOAVINA said he agreed with Mr. Yasseen and Mr. Reuter. It was true that article 55 reproduced the wording of article 9 of the Convention on Special Missions, but since that wording might cover persons of high rank, it was natural that it should accord them privileges and immunities not usually granted to ordinary diplomatic staff. That situation did not occur in the case of permanent observer missions.

56. Mr. BARTOŠ said he did not agree. Count Bernadotte, for example, had been both an observer and a mediator.

57. Mr. THIAM said that he too thought that some form of words must be found to render precisely what the Commission meant. He proposed that the phrase "in addition to" should be replaced by "without prejudice to".

58. Mr. ROSENNE said that he fully agreed with Mr. Yasseen, Mr. Reuter and Mr. Ramangasoavina. He found paragraph 2 difficult to understand in the present context. There was no analogy with special missions; observer missions had a permanent character. A provision of that kind could, however, be of some use in the case of delegates to conferences.

59. Article 55 was not the proper place for the provisions of paragraph 2. They had nothing to do with the composition of the observer mission and should be included in the section on privileges and immunities.

60. Mr. KEARNEY (Chairman of the Drafting Committee) explained that the term "consular post" had been taken from the Convention on Consular Relations.¹³ The term "diplomatic mission" without the qualification "permanent" had been taken from the Convention on Diplomatic Relations.¹⁴

61. He was attracted by the suggestion that the expression "without prejudice to" should be used instead of "in addition to".

62. Paragraph 2 had been placed in article 55 simply because the question had arisen during the discussion of that article. There was much to be said for Mr. Rosenne's proposal that the provision should be placed in the section on privileges and immunities.

63. Mr. EUSTATHIADES suggested that the French text of paragraph 1 should be brought into line with the second sentence in paragraph 1 of article 9 of the Convention on Special Missions, which was better French and closer to the English.

64. The CHAIRMAN, speaking as a member of the Commission, suggested that, in paragraph 2, the words "they shall retain" should be replaced by "they shall not

¹³ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 100.

¹³ United Nations, *Treaty Series*, vol. 596, p. 262.

¹⁴ *Op. cit.*, vol. 500, p. 96.

lose”; the concluding words “in addition to the privileges and immunities accorded by the present articles” would then be dropped.

65. Speaking as Chairman, he said that, if there were no objection, he would consider that the Commission agreed to adopt paragraph 1 of article 55, and to refer paragraph 2 back to the Drafting Committee for reconsideration in the light of the discussion.

*It was so agreed.*¹⁵

ARTICLE 56 (Size of the permanent observer mission)¹⁶

66. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 56:

Article 56

Size of the permanent observer mission

The size of the permanent observer mission shall not exceed what is reasonable and normal, having regard to the functions of the Organization, the needs of the particular mission and the circumstances and conditions in the host State.

67. The text was almost identical with that proposed by the Special Rapporteur, which itself derived from article 16.¹⁷

68. During the discussion in the Commission, concern had been expressed at the reference to “the functions of the Organization”, but the Drafting Committee had come to the conclusion that those functions had some part in determining the proper size of a permanent observer mission.

Article 56 was adopted.

ARTICLE 57 (Notification)¹⁸

69. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee had made no change in the text proposed by the Special Rapporteur, which was based on article 17.¹⁹

70. Mr. ROSENNE, referring to the expression “host State” in paragraph 3, said that in article 10 of the Convention on Diplomatic Relations, article 24 of the Convention on Consular Relations and article 11 of the Convention on Special Missions, the language used was more specific: those provisions referred first to the Ministry of Foreign Affairs of the receiving State and then to such other ministry or organ as might be agreed.

71. His remark also applied to article 17, on permanent missions. Since it was not now possible to change both article 17 and article 57, a note should be made of the point for the second reading.

72. Mr. EL-ERIAN (Special Rapporteur) explained that when the Commission had drafted article 17 at the twentieth session, it had not followed the example of the instruments governing inter-State relations because of the difference in the two situations. Unlike diplomatic missions in bilateral diplomacy, permanent missions were not always situated in the capital city. He would comment further on the matter at the second reading.

73. Mr. BARTOŠ said that it would be preferable not to amend the text at the present stage, but to ask the Special Rapporteur to take note of Mr. Rosenne’s comments and to mention in the commentary that some members of the Commission had made a suggestion to that effect.

Article 57 was adopted.

ARTICLE 57 bis (Chargé d'affaires ad interim)

74. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 57 bis:

Article 57 bis

Chargé d'affaires ad interim

If the post of permanent observer is vacant, or if the permanent observer is unable to perform his functions, a chargé d'affaires *ad interim* shall act as head of the permanent observer mission. The name of the chargé d'affaires *ad interim* shall be notified to the Organization either by the permanent observer or, in case he is unable to do so, by the sending State.

75. Article 57 bis represented an addition to the draft articles proposed by the Special Rapporteur. Its text followed that of article 18 (Chargé d'affaires *ad interim*) on permanent missions.²⁰

76. Some doubt had been expressed in the Drafting Committee about the appropriateness of the term “chargé d'affaires *ad interim*” when used in connexion with permanent observer missions. The Committee had come to the conclusion, however, that it was reasonable to use the expression because of the representative functions performed by observers, albeit on a limited scale.

77. Mr. RUDA said that he had no objection to the substance of article 57 bis, but had some hesitation over the use of the expression “chargé d'affaires *ad interim*”. As far as he knew, the expression normally used was “permanent observer *ad interim*”. Perhaps the Secretariat would obtain some information about current practice from United Nations Headquarters.

78. Mr. BARTOŠ said that he too thought that the term “chargé d'affaires *ad interim*” was not used in the case of permanent observers.

79. He suggested that the words “in case he is unable to do so” towards the end of the article should be deleted to avoid situations such as had already occurred in which, as a result of a change of régime or government, permanent observers who had become *persona non grata* to their governments refused to resign their functions and to notify the name of their successor.

¹⁵ For resumption of the discussion, see 1065th meeting, para. 5.

¹⁶ See footnote 9.

¹⁷ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 208.

¹⁸ See footnote 9.

¹⁹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 209.

²⁰ *Ibid.*, p. 211.

80. Mr. USHAKOV said he saw no reason for deleting the words. It was always open to a sending State to notify the fact that it no longer considered a certain person as its representative and that it was terminating his functions; but the situation dealt with in article 57 *bis* was different, and in any case there was a reference to it in other conventions.

81. Mr. CASTRÉN reminded the Commission that during its consideration of article 18, it had decided after much discussion to adopt the term "chargé d'affaires *ad interim*".²¹ It was used by the United Nations Secretariat, as stated in paragraph (3) of the commentary to article 18.

82. Mr. EUSTATHIADES said that in his view it was not certain that the appointment of an observer *ad interim* was an obligation. It might therefore be preferable to say that an observer *ad interim* "could" act as head of the mission if the post was vacant. In some cases the observer mission's functions might have been temporarily suspended by the sending State itself; consequently, the appointment of an observer *ad interim* should not be an obligation.

83. The CHAIRMAN said that the Secretariat would ascertain what the practice was at United Nations Headquarters.

84. Mr. EL-ERIAN (Special Rapporteur) said that in practice a permanent observer mission usually had several members. It was therefore logical that if the head of the mission was absent, one of the other members should take his place, and it was important for the secretary-general to know to whom he should address himself in case of emergency.

85. The position was different in small technical international organizations in which the permanent observer mission might well consist of only one person. That case should be borne in mind.

86. Mr. YASSEEN said that the appointment of a chargé d'affaires *ad interim* was not an obligation, but a faculty. There was no rule of international law that a permanent mission must be continuous. It would be better to find some neutral wording to the effect that the sending State might appoint a chargé d'affaires *ad interim* and that the appointment was notified either by the permanent observer or by the sending State.

87. The CHAIRMAN suggested that the Commission should refer article 57 *bis* back to the Drafting Committee for reconsideration in the light of the discussion, with particular reference to Mr. Bartoš's suggestion that the words "in case he is unable to do so" should be deleted and to Mr. Yasseen's suggestion that the contents of the first sentence should be expressed as a faculty rather than as an obligation.

*It was so agreed.*²²

The meeting rose at 1.5 p.m.

1063rd MEETING

Thursday, 4 June 1970, at 10.5 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1 and 2)

[Item 2 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to consider the texts of articles 58 and 59 proposed by the Drafting Committee.

ARTICLE 58 (Offices of permanent observer missions)¹

2. Mr. KEARNEY (Chairman of the Drafting Committee), said that the Drafting Committee proposed the following text for article 58:

Article 58

Offices of permanent observer missions

1. The sending State may not, without the prior consent of the host State, establish offices of the permanent observer mission in localities other than that in which the seat or an office of the Organization is established.

2. The sending State may not establish offices of the permanent observer mission in the territory of a State other than the host State, except with the prior consent of such a State.

3. The text was based on article 20,² the corresponding article in Part II. At the second reading, the Commission should consider whether the word "localities" should be replaced by "locality" in the English text.

Article 58 was adopted.

ARTICLE 59 (Use of [flag and] emblem)³

4. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 59:

¹ For previous discussion of articles 58 and 59, see 1050th meeting, paras. 58-63.

² See *Yearbook of the International Law Commission, 1968*, vol. II, p. 212.

³ See footnote 1.

²¹ See *Yearbook of the International Law Commission, 1968*, vol. I, 968th meeting, paras. 63-82, 969th meeting, paras. 1-53, and 985th meeting, paras. 47-54.

²² For resumption of the discussion, see 1065th meeting, para. 12.

Article 59

Use of [flag and] emblem

1. The permanent observer mission shall have the right to use the [flag and] emblem of the sending State on its premises.

2. In the exercise of the right accorded by this article, regard shall be had to the laws, regulations and usages of the host State.

5. The text differed from that of the corresponding article in Part II, article 21,⁴ in two ways. In the first place, the words "flag and" had been placed between square brackets both in the title and in the text of paragraph 1. The purpose was to draw the attention of governments to those words so as to elicit their views on whether the display of the flag on the premises of a permanent observer mission should be permitted. In view of the different functions of a permanent observer mission, some reduction in the visible signs of its presence might be considered.

6. For the same reason, the Drafting Committee had decided not to include the provision in the second sentence in paragraph 1 of article 21 reading: "The permanent representative shall have the same right as regards his residence and means of transport". So far as it had been possible to ascertain, there appeared to be no established custom regarding the display of the flag either on the residences or on the vehicles of permanent observers in New York.

7. Mr. USHAKOV said that if the words "flag and" in the title and in paragraph 1 were left in square brackets, the consequence would be that a permanent observer mission would only be entitled to display the emblem of the sending State on its premises. Paragraph 2 would then be pointless, since it had been drafted specially with the use of the flag in mind. The Commission should either delete the square brackets, keep paragraph 2 and explain in the commentary that it awaited comments from governments on the use of the flag, or it should make no change in the title and in paragraph 1 but delete paragraph 2.

8. Mr. BARTOŠ said that he knew from personal experience that it was often essential that the premises of a permanent observer mission should be distinguished by the flag of the sending State, especially when the mission was functioning in a disturbed area or in contested territory, or when it was a neutral mission working in a region where there was acute political tension between States.

9. Moreover, the article made no reference to the right to use the flag on motor vehicles, although for the same reasons that right should be granted. On several occasions when observer missions had complained of attacks upon their vehicles, the host State had made use of the excuse that the authorities concerned had been unaware of their identity and had not therefore been able to provide them with the requisite protection.

10. It should also be noted that while paragraph 1 conferred a right on a permanent observer mission, para-

graph 2 gave the host State a means of taking away the use of that right in practice by appropriate regulation. In some countries the flags of foreign countries could only be flown on the day of their national holiday, in other words once a year. Some limitation should therefore be placed upon regulations made by the host State.

11. Consequently it would be better to delete the square brackets in the title and in paragraph 1, or at any rate to state in the commentary that some members of the Commission had asked for their deletion. The commentary should mention that some members of the Commission had considered that it would be useful to allow the use of the flag and emblem on the official vehicles of a permanent observer mission. It should also emphasize that the regulations of the host State should be reasonable and should not be so strict as to annul the right accorded in paragraph 1.

12. Mr. CASTRÉN said that the fact that the word "flag" appeared in the title and in paragraph 1, even though it was in square brackets, was sufficient reason for retaining paragraph 2; but it should be explained in the commentary that the Commission was awaiting the comments of governments before coming to a decision on the point.

13. Mr. NAGENDRA SINGH suggested that article 59 should be retained as it stood with the words "flag and" in square brackets so as to draw attention to the need for government comments on the inclusion or deletion of those words.

14. He also urged the retention of paragraph 2, which reproduced the corresponding provision in article 21.

15. Mr. ALBÓNICO said that he too was in favour of retaining the square brackets.

16. Mr. KEARNEY (Chairman of the Drafting Committee) said that although the discussion in the Commission regarding paragraph 2 had been mainly about the use of the flag, the provisions of that paragraph also had a practical purpose where the use of the emblem was concerned. In New York City, for example, there were a variety of regulations regarding the display of emblems; for instance, emblems were required to be safely affixed so that they would not blow off in a high wind and injure passers-by. If a permanent observer mission put up its emblem, it must obviously comply with regulations of that kind.

17. Sir Humphrey WALDOCK said he supported the Chairman of the Drafting Committee on the point of fact. In the United Kingdom, there were elaborate laws on the control of the display of signs and emblems in public places, for aesthetic or other reasons. There was therefore clear scope for the application of paragraph 2 to emblems, and he could see no reason why that paragraph should be dropped.

18. The CHAIRMAN, speaking as a member of the Commission, said that in Nigeria, too, there were a number of regulations on the subject.

19. Mr. USHAKOV said that he would not press for a vote on his proposal, but would ask the Commission to consider a new wording for paragraph 2 on second

⁴ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 212.

reading if the reference to the flag was to be deleted from the title and paragraph 1.

20. Mr. ROSENNE said that the case for retaining paragraph 2 appeared unassailable.

21. He thought that the commentary should be expanded. It should not merely state that article 59 was based on article 21; it should justify the formulation adopted by giving a summary of the points brought out in the discussion.

22. At the second reading, the Commission should consider replacing the words "regulations and usages of the host State" at the end of paragraph 2 by the words "regulations and usage in the host State".

Article 59 was adopted.

The meeting rose at 10.30 a.m.

1064th MEETING

Friday, 5 June 1970, at 9.45 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1 and 2)

[Item 2 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to consider the Drafting Committee's texts for articles 60, 60-A to 60-J, 61 and 61-A.

ARTICLE 60 (General facilities)¹

2. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 60:

Article 60

General facilities

The host State shall accord to the permanent observer mission the facilities required for the performance of its functions.

¹ For previous discussion, see 1051st meeting, paras. 1-44, and 1052nd meeting, paras. 1-27.

The Organization shall assist the permanent observer mission in obtaining those facilities and shall accord to the mission such facilities as lie within its own competence.

3. He said it might be helpful if he first described the method of work adopted by the Drafting Committee in dealing with the entire set of articles 60, 60-A to 60-J, 61 and 61-A. There had been a sharp division of opinion in the Committee, just as there had been in the Commission itself, on whether there should be a very short article which would deal with the problem simply by referring to section 2 of Part II on the facilities, privileges and immunities of permanent missions, or whether there should be a complete set of articles in the facilities, privileges and immunities of permanent observer missions. The Committee had adopted a solution which fell between those two extremes: it was presenting a series of articles in which it had attempted to divide the articles in section 2 into groups for purposes of reference. First, it had tried to separate into groups the persons who were entitled to privileges and immunities, and, secondly, it had tried to arrange the articles themselves by subject, so that governments and other interested bodies would know what the subject-matter was without constant cross-reference. The Committee had reviewed each individual facility, immunity and obligation on the basis of a draft submitted to it by the Special Rapporteur and it had concluded that, since there was substantial identity between so many articles, it was possible to use the reference method.

4. Article 60 differed slightly from article 22² in that it referred to "facilities" rather than to "full facilities"; the Drafting Committee had wished to make it clear that "full facilities" might include some aspects of assistance which permanent observer missions did not need.

5. Mr. USHAKOV said that, although he approved of article 60, he could not accept the system of references used in the draft articles as a whole. The Drafting Committee, which had had before it the full text, submitted to it by the Special Rapporteur, of the corresponding articles on the permanent missions of member States adapted to meet the case of permanent observer missions, had been able to establish from clearly and precisely worded articles that the facilities, privileges and immunities were the same in both cases. It had decided to draft the articles on permanent observer missions simply by inserting references to the articles on permanent missions. He disapproved of that method for practical, logical and legal reasons.

6. From the practical point of view, all that the Commission would achieve would be a saving of words and paper; the number of articles would remain the same, since reference had to be made to all the corresponding articles on permanent missions of member States. Again, it had only been after long and patient work that the Drafting Committee and the Commission had reached the conclusion that permanent observer missions should be granted the same facilities, privileges and immunities

² For the texts of articles 22 to 50, see *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, pp. 4-18.

as the permanent missions of member States, but it did not follow that States would come to the same conclusion without seeing the full text. Moreover, the Commission was assuming that States would not amend articles referring to other articles already adopted, but it was impossible to be sure that that would be the case. States decided the rules of international law: the Commission proposed, States disposed. The use of references would therefore make it very difficult, if not impossible, to amend the articles. Furthermore, there were no grounds for assuming that States would consider, as the Commission seemed to think they would, that the four parts of the draft constituted a whole and must result in a single convention. If they decided otherwise, what would become of the articles which consisted only of references? It was therefore obvious that use of the method would be a hindrance to States when they came to examine and approve the draft articles.

7. Moreover, it was illogical to reproduce in full some ten articles that were identical with the corresponding articles for permanent missions of member States and merely to give references in the case of other articles.

8. Lastly, the method raised serious difficulties from the legal point of view. In article 60-A, for example, the reference to articles 23 and 24 gave the term "permanent observer missions" a broader meaning than was given in the definition in article 0. In his opinion, therefore, the method of simply giving references to other articles was confusing, even though it was agreed in principle that the privileges, immunities and facilities were the same in both cases. He would revert to the subject at the second reading.

9. Mr. NAGENDRA SINGH said that there had been complete agreement in the Drafting Committee on one question of substance, namely, that permanent observer missions should have the same privileges and immunities as permanent missions. In view of that agreement, he would have thought that the Special Rapporteur's original draft article 60 would have satisfied everybody, since it expressed forcefully and effectively in three lines what was now being submitted in a series of articles. However, he considered himself bound by the decision of the Drafting Committee to adopt the compromise formula it had evolved. He wished to pay a tribute to the Special Rapporteur for the very competent work done by him in preparing his fifth report.

10. Mr. RUDA said that article 60 should include the expression "full facilities" used in article 22; the functions of permanent observer missions might not be exactly the same as those of permanent missions, but in his view both categories of missions should have full facilities.

11. He, too, would have preferred the Special Rapporteur's original text for article 60. He reserved his position on articles 60, 60-A to 60-J, 61 and 61-A until the second reading.

12. Mr. CASTRÉN said that, as a member of the Drafting Committee, he accepted the text in a spirit of compromise, but he agreed with Mr. Nagendra Singh and Mr. Ruda that the Commission could equally well

adopt the text originally proposed by the Special Rapporteur; it should, however, add a reference to members of the families of observer missions. Article 60 would then begin by saying "The permanent observer mission and its members and the members of their families" and end with the words "... to the permanent mission and its members and to the members of their families."

13. Mr. ROSENNE said he was prepared to accept the Drafting Committee's compromise text, but he hoped that it would be suitably redrafted on second reading.

14. Sir Humphrey WALDOCK said that, as the Chairman of the Drafting Committee had pointed out, the present text was a provisional one; its purpose was to show governments that the Commission had given the problem careful consideration and had concluded that the facilities, privileges and immunities granted to permanent missions should be applicable in the same manner to permanent observer missions. He hoped that eventually the text could be shortened, but he considered it undesirable to use the very short and sweeping formula originally proposed by the Special Rapporteur. He did not have any strong feelings about the insertion of the word "full" before "facilities", since the word was qualified in any case by the reference to functions.

15. Mr. REUTER said that, in general, he accepted the wording proposed for articles 60, 60-A to 60-J, 61 and 61-A, which he regarded as a provisional compromise aimed at eliciting reactions rather than as a final solution. It must be clearly understood, however, that the expression "in the case of permanent observer missions" could be read in two ways. In one, where it replaced the expression "*mutatis mutandis*", it was taken in a general sense and meant that the provisions laid down for the permanent missions of States members in general applied in a similar way to observer missions in general. The other meaning was more specific, and seemed to establish a distinction between missions proper, their members and the sending State. The meaning to be attached to the expression became clear from the general context of each article. For the time being, he was satisfied with that solution, since the meaning of the provisions was clear, but it was, of course, a defect in the drafting which the Drafting Committee had not been able to eliminate entirely.

16. Mr. USTOR said that the Commission and the Drafting Committee had been in unanimous agreement that permanent observer missions should be given the same facilities, privileges and immunities, with a few exceptions, as permanent missions. The problem had been how to express the identity between them. Perhaps the best solution would have been to repeat all the articles on permanent missions, but the majority of the members of the Drafting Committee had taken the view that such an enumeration of the rules would not be regarded as satisfactory by the General Assembly. Some members of the Committee had been inclined to adopt the Special Rapporteur's original text for article 60, since it was certainly the most concise, but that text presented certain difficulties, especially in connexion with the inclusion of article 29, which referred not only to

the mission and its members but also to couriers and diplomatic bags. The Drafting Committee had therefore adopted the articles now before the Commission on the understanding that they were only provisional and designed to convey to governments the idea that the Commission was in favour of granting the same facilities, privileges and immunities to permanent observer missions as to permanent missions.

17. The CHAIRMAN said it seemed to be generally agreed that the Commission was submitting the present series of articles on a provisional basis only and that they were intended to show governments that the Commission had given careful consideration to all the relevant articles. It was also clear that the Commission considered that a shorter formulation, similar to the Special Rapporteur's original text, should be prepared in due course.

18. Mr. USHAKOV said his understanding was that only the drafting was provisional and that the Commission was definitely adopting the substance.

19. The CHAIRMAN suggested that the Commission should adopt article 60, subject to the comments made by members.

Article 60 was adopted.

ARTICLE 60-A (Accommodation and assistance)

20. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 60-A:

Article 60-A

Accommodation and assistance

The provisions of articles 23 and 24 shall apply also in the case of permanent observer missions.

Article 60-A was adopted.

ARTICLE 60-B (Privileges and immunities of the permanent observer mission)

21. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 60-B:

Article 60-B

Privileges and immunities of the permanent observer mission

The provisions of articles 25, 26, 27, 29 and 38, paragraph 1 (a) shall apply also in the case of permanent observer missions.

Article 60-B was adopted.

ARTICLE 60-C (Freedom of movement)

22. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 60-C:

[Article 60-C

Freedom of movement

The provisions of article 28 shall apply also in the case of members of the permanent observer mission and members of their families forming part of their respective households.]

23. The Commission should decide whether that article should be submitted within square brackets, the purpose of which was to show that some members considered that freedom of movement might be different in the case of permanent observer missions from what it was in the case of permanent missions.

24. The CHAIRMAN suggested that the square brackets should be removed and that the Special Rapporteur should be asked to make an appropriate reference in the commentary.

It was so agreed.

Article 60-C was adopted with that amendment.

ARTICLE 60-D (Personal privileges and immunities)

25. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 60-D:

Article 60-D

Personal privileges and immunities

1. The provisions of articles 30, 31, 32, 35, 36, 37 and 38, paragraphs 1 (b) and 2 shall apply also in the case of the permanent observer and the members of the diplomatic staff of the permanent observer mission.

2. The provisions of article 40, paragraph 1 shall apply also in the case of members of the family of the permanent observer forming part of his household and the members of the family of a member of the diplomatic staff of the permanent observer mission forming part of his household.

3. The provisions of article 40, paragraph 2 shall apply also in the case of members of the administrative and technical staff of the permanent observer mission, together with members of their families forming part of their respective households.

4. The provisions of article 40, paragraph 3 shall apply also in the case of members of the service staff of the permanent observer mission.

5. The provisions of article 40, paragraph 4 shall apply also in the case of the private staff of members of the permanent observer mission.

26. Mr. USHAKOV said that, although he fully supported article 60-D, he wished to reserve his position on the reference to article 40, paragraph 1. At the previous session, the Commission had overlooked a mistake in that paragraph: it referred to articles 30 to 38, but two of those articles did not relate to personal privileges and immunities, namely article 33, on waiver of immunity, which was a matter for the sending State, and article 34, on settlement of civil claims. They should not therefore have been mentioned.

27. Mr. ROSENNE said it was his understanding that the Commission's acceptance of the present articles was without prejudice to any reservations which had been expressed concerning the corresponding articles adopted in 1968 and 1969.

Article 60-D was adopted.

ARTICLE 60-E (Nationals of the host State and persons permanently resident in the host State)

28. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 60-E:

*Article 60-E**Nationals of the host State and persons permanently resident in the host State*

The provisions of article 41 shall apply also in the case of members of the permanent observer mission and persons on the private staff who are nationals of or permanently resident in the host State.

Article 60-E was adopted.

ARTICLE 60-F (Waiver of immunity and settlement of civil claims)

29. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 60-F:

*Article 60-F**Waiver of immunity and settlement of civil claims*

The provisions of articles 33 and 34 shall apply also in the case of persons enjoying immunity under article 60-D.

Article 60-F was adopted.

ARTICLE 60-G (Exemption from laws concerning acquisition of nationality)

30. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 60-G:

*Article 60-G**Exemption from laws concerning acquisition of nationality*

The provisions of article 39 shall apply also in the case of members of the permanent observer mission not being nationals of the host State and members of their families forming part of their household.

Article 60-G was adopted.

ARTICLE 60-H (Duration of privileges and immunities)

31. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 60-H:

*Article 60-H**Duration of privileges and immunities*

The provisions of article 42 shall apply also in the case of every person entitled to privileges and immunities under the present Section.

Article 60-H was adopted.

ARTICLE 60-I (Transit through the territory of a third State)

32. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 60-I:

*Article 60-I**Transit through the territory of a third State*

The provisions of article 43 shall apply also in the case of the members of the permanent observer mission and members of their families, and the couriers, official correspondence, other

official communications and bags of the permanent observer mission.

Article 60-I was adopted.

ARTICLE 60-J (Non-discrimination)

33. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 60-J:

*Article 60-J**Non-discrimination*

In the application of the provisions of the present Part, no discrimination shall be made as between States.

35. Mr. ROSENNE said he found article 60-J acceptable up to a point, but it should be made clear in the commentary that there was a difference between it and article 44.

36. Mr. EUSTATHIADES said that the omission of the words "*qui ont des missions permanentes d'observation*" from the French text changed the sense of the article, whose meaning was that, once a permanent observer mission had been established, it would not be subject to any discrimination. A certain amount of discrimination did occur, however, in connexion with the establishment of permanent observer missions. He would like an explanation from the Drafting Committee on that point.

37. Sir Humphrey WALDOCK said that the words deleted had been designed to make it clear that the rule of non-discrimination applied only as between States having permanent observer missions. Objection had been taken to them in the Drafting Committee, however, on the ground that they might possibly lead to misunderstanding as to discrimination in regard to the right to establish observer missions and the article had therefore been limited to the provisions of the present part, which dealt with such missions.

38. Mr. BARTOŠ said he agreed with Mr. Eustathia-des that if the phrase in question was deleted, it would no longer be clear to what the non-discrimination applied. Perhaps the point mentioned by Sir Humphrey Waldo-ck could be met by adding the words "as regards permanent observer missions" after the words "between States".

39. Mr. RAMANGASOAVINA said that he, too, was of that opinion. He proposed that the words "relating to permanent observer missions" should be added after the words "the present Part".

40. Mr. EUSTATHIADES said it certainly would be preferable either to specify which part was being referred to or to maintain the phrase in question, but he would not press the matter, in view of the explanations given by Sir Humphrey Waldo-ck.

Article 60-J was adopted.

ARTICLE 61 (Conduct of the permanent observer mission and its members)³

41. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 61:

Article 61

Conduct of the permanent observer mission and its members

The provisions of articles 45 and 46 shall apply also in the case of permanent observer missions.

Article 61 was adopted.

ARTICLE 61-A (End of functions)

42. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 61-A:

Article 61-A

End of functions

The provisions of articles 47, 48 and 49 shall apply also in the case of permanent observer missions.

Article 61-A was adopted.

43. Mr. USHAKOV proposed that, in view of the importance of the commentaries for a proper understanding of the text, the Commission should request the Special Rapporteur to prepare commentaries to all the articles adopted, including those which merely referred to preceding articles.

44. Sir Humphrey WALDOCK said he strongly supported that proposal; it was desirable in each case to indicate that the Commission had considered the matter and was of the opinion that the provision in question applied to permanent observer missions.

45. Mr. USTOR said that there should be a general introduction to the commentary in which it would be explained that the articles were provisional and that the Commission wished to give the same facilities, privileges and immunities to permanent observer missions as to permanent missions.

46. Mr. THIAM asked whether he was correct in assuming that the Commission was adopting the substance of the articles but that the Drafting Committee was to submit a shorter and more concise formulation.

47. The CHAIRMAN said that the Special Rapporteur would include in his commentary the general introduction requested by Mr. Ustor and explain that the draft articles represented a compromise text which the Commission hoped to shorten and improve later.

48. Mr. EL-ERIAN (Special Rapporteur) said that he would endeavour to comply with the requests made by Sir Humphrey Waldock, Mr. Ushakov and Mr. Ustor. He would include two sections in Part III: a general section and a section on facilities, privileges and immunities, preceded by a general commentary. All the views

expressed by members would be reflected in the commentaries on particular articles.

49. Mr. THIAM said he proposed to revert to the substance of the draft on second reading. In his view the articles could have been shorter.

50. Sir Humphrey WALDOCK said that it should be made quite clear that the Commission was adopting the draft articles provisionally and that it had been agreed on first examination that facilities, privileges and immunities should be substantially the same for both kinds of missions.

51. He wished to express his appreciation of the distinguished work done by the Special Rapporteur on a very difficult subject.

52. Mr. BARTOŠ said he agreed with Mr. Ushakov that there should be a commentary to each article. He did not, however, think that the Commission should inform governments in advance that it intended to condense the draft articles on second reading. It could ask governments for their opinion on that point by mentioning that the draft submitted to them was a provisional one, but it was hard to see what would be the purpose of the comments of governments if that were not so.

53. Mr. RAMANGASOAVINA said he approved the way in which the Special Rapporteur proposed to prepare the draft commentaries. He would like to take the opportunity of congratulating the Special Rapporteur: to have got through such an immense amount of work was a very considerable achievement.

54. Mr. USHAKOV said that only the drafting of the articles was provisional; all the members of the Commission were in agreement that the facilities, privileges and immunities to be accorded to permanent observer missions should be the same as those accorded to the permanent missions of member States. The decision on the substance was therefore final.

55. Mr. KEARNEY said that he wished to make it clear that there had not been unanimity in the Commission on the principle that facilities, privileges and immunities should be the same for both permanent and permanent observer missions. He had himself drawn attention to a number of articles where in his view a distinction should be made between them.

56. Speaking as Chairman of the Drafting Committee, he thanked the Special Rapporteur for the very valuable help he had given to that Committee.

57. Mr. REUTER said he agreed with Sir Humphrey Waldock's comments on the need to place permanent observer missions once and for all on the same footing as the permanent missions of member States.

58. He associated himself with the congratulations which had already been addressed to the Special Rapporteur, and wished to assure him of his personal sympathy for having had to work under such difficult conditions.

59. Mr. USTOR said that he too wished to pay a tribute to the Special Rapporteur for his valuable work.

60. Mr. USHAKOV said that he wished to address his sincere congratulations to the Special Rapporteur.

³ For previous discussion, see 1051st meeting, paras. 1-44, and 1052nd meeting, paras. 1-27.

61. Mr. ALCÍVAR said that, as he had joined the Commission so recently, he wished to make a general reservation concerning the draft articles, particularly article 25, paragraph 1, and article 60-C, until the second reading. He also wished to make a reservation about the use of the term “*Estado huésped*” in the Spanish text as a translation of “host State”. Like other members, he wished to congratulate the Special Rapporteur on his outstanding work.

62. The CHAIRMAN said that he, too, wished to associate himself with those who had paid tributes to the Special Rapporteur.

63. Mr. EL-ERIAN, Special Rapporteur, said that he would give careful consideration to the points made by Mr. Bartoš, Sir Humphrey Waldoock and Mr. Kearney and that he would reflect them in his commentary.

TEMPORARY OBSERVER DELEGATIONS AND CONFERENCES
NOT CONVENED BY INTERNATIONAL ORGANIZATIONS
(A/CN.4/L.151)

64. Mr. EL-ERIAN (Special Rapporteur) drew attention to his working paper (A/CN.4/L.151) on temporary observer delegations and on conferences not convened by international organizations. Reference had been made to those two subjects during the discussion and he had therefore thought it appropriate to prepare a note on them.

65. He did not invite comment at that stage. At the second reading, the Commission might wish to try to make its draft as complete as possible and to cover all aspects of diplomatic law concerning relations between States and international organizations.

66. Mr. YASSEEN thanked the Special Rapporteur for the document he had submitted to the Commission. He greatly admired the work of synthesis which the Special Rapporteur had successfully carried out on an intricate subject in which precedents were few and far between. The Special Rapporteur's work was all the more meritorious in that nobody else would have been able to discharge with such success the task entrusted to him by the Commission in the peculiarly difficult circumstances in which he had to carry it out.

67. Mr. EL-ERIAN (Special Rapporteur) said he wished to thank members of the Commission for their kind words of appreciation of his work.

Co-operation with other bodies

[Item 6 of the agenda]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN
JURIDICAL COMMITTEE

68. The CHAIRMAN invited the observer for the Inter-American Juridical Committee to address the Commission.

69. Mr. CAICEDO CASTILLA (Observer for the Inter-American Juridical Committee) said he wished first to associate himself with the tributes which had been paid by the Commission to that great Latin American statesman, writer, thinker, diplomatist and jurist, the late Gilberto Amado.

70. A most important development in inter-American law during the past year was the entry into force, as a result of its ratification by two-thirds of the signatories, of the Protocol of Amendment to the Charter of the Organization of American States,⁴ which had been adopted in 1967 by the Inter-American Conference at Buenos Aires.⁵ One of its results had been to simplify the legal machinery of the organization, since of the two previous legal organs—the Inter-American Council of Jurists and the Inter-American Juridical Committee—only the Committee was retained under the revised charter. There was no need for him to give any further details of the various amendments resulting from the Buenos Aires Protocol; he would refer members to his statement on the subject at the twentieth session.⁶

71. It was a mistake to say, as some commentators had done, that the Organization of American States (OAS) would henceforth deal only with economic and financial matters rather than with political and legal questions. Certain legal rules, such as those relating to non-intervention, continued to be part of the very basis of the inter-American system. Also, many draft conventions were under consideration by the OAS, such as the draft convention on human rights prepared at the end of 1969 by a specialized inter-American Conference held at San José, Costa Rica. Moreover, even economic questions could not be settled satisfactorily without an adequate legal substructure; that applied particularly to economic integration, with its bearing on such branches of the law as private international law.

72. With regard to the work of the Inter-American Juridical Committee in 1969, he must mention first the extensive report it had submitted to the first General Assembly of the OAS on the Committee's past achievements and future work.⁷

73. The Committee had also adopted two decisions: one on government-owned international companies and the other on violations of international “standstill” (*status quo*) commitments.

74. With regard to government-owned international companies, a number of conclusions had been adopted which included the requirement that such companies should be formed by means of treaties. The treaties should incorporate the statutes of the company and specify the municipal law, or the common principles of law, that would govern the company's activities. The companies should enjoy extraterritorial legal personality

⁴ United Nations, *Treaty Series*, vol. 119, p. 48.

⁵ For the text of this protocol, see *International Legal Materials*, vol. vi, No. 2 (March, 1967), pp. 310-354.

⁶ See *Yearbook of the International Law Commission, 1968*, vol. I, pp. 82-83, 957th meeting, paras. 2-15.

⁷ See document CIJ-99 in *OAS Official Documents, OEA/Ser.I/VI.1, 1970*, pp. 57 *et seq.*

and be entitled to certain immunities and privileges such as tax exemptions and special import and export régimes. Provision should also be made either in the treaty or in the statutes for the submission of all disputes to some means of judicial settlement.

75. The Committee also urged those States which had no legislative provisions on the subject to enact legislation to require government approval of mergers of private companies for the purpose of establishing a privately owned international company carrying on business on an international scale.

76. The Committee's decision on the subject of violations of international "standstill" commitments was of particular interest. The question arose in connexion with article XXXVII (Commitments) of the General Agreement on Tariffs and Trade (GATT), which had been added to that Agreement a few years previously by way of an amending protocol, the relevant portion of which read:

"1. The developed contracting parties shall to the fullest extent possible—that is, except when compelling reasons, which may include legal reasons, make it impossible—give effect to the following provisions: . . . (b) refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less developed contracting parties."⁸

77. The main clause of that provision was clear but it had been rendered ineffective by introducing an escape clause, the proviso "to the fullest extent possible—that is, except when compelling reasons . . . make it impossible". Moreover, the first session of the United Nations Conference on Trade and Development, in its recommendation A.II.1, part II, paragraph 2 (Standstill), stated that "No new tariff or non-tariff barriers should be created (or existing barriers increased) by developed countries against imports of primary products of particular interest to developing countries."⁹

78. The Inter-American Committee of the Alliance for Progress had accordingly requested the Inter-American Juridical Committee to consider the best means of obtaining legal compliance with the "standstill" commitments in question. The Committee had now completed its study on the matter and had concluded, first, that it was both necessary and desirable to prepare a new legal formulation of the standstill system; secondly, that the definition of international standstill commitments contained in article XXXVII of GATT was acceptable; thirdly, that the escape clause should be deleted because in practice the expressions "to the fullest extent possible", "compelling reasons" and "legal reasons" made it possible for developed countries to evade compliance with the basic commitment and to act as they pleased; fourthly, that recommendation A.II.1 of the first session of the United Nations Conference on Trade and Development should be embodied in a protocol in order

to give it binding force; and fifthly, that where a developed State proposed to change its duties on products covered by a standstill commitment, notification of its intention should be given to the other contracting parties, especially those interested in the products concerned.

79. The fifth conclusion was an original proposal which would make a real contribution towards the attainment of the desired result. In November 1969, the Latin American countries had embodied it in a proposal submitted by them to the Inter-American Economic and Social Council.

80. At its forthcoming session, to be held from 16 June to 15 September 1970, the Committee would deal with a number of important topics including draft conventions on cheques and bills of exchange negotiated internationally; the inter-American peace system—the American Treaty on Pacific Settlement or "Pact of Bogotá" of 1948¹⁰ had only been ratified by 14 States and an effort would now be made to secure unanimity; the legal status of foreign guerilla fighters in the territory of member States; the treatment of foreign investments, a difficult topic because there was a division of opinion among the members of the Committee and that had prevented agreement being reached in 1969; the revision and modernization of various inter-American conventions, some of which had become obsolete due to changing conditions, such as those on patents and civil aviation.

81. The Convention on Treaties, signed at Havana on 20 February 1928,¹¹ had become obsolete because of regional support for the 1969 Vienna Convention on the Law of Treaties,¹² which was not only a complete instrument, but had been supported by no less than sixteen Latin American States. Other conventions had only been ratified by a few American States and therefore stood in need of revision. In all, the Committee would have to review the position in respect of no less than sixty-four instruments.

82. The Committee hoped that its 1970 session would be attended by an observer from the International Law Commission, as it had been in 1968 when Mr. Ruda had been welcomed by the Committee.

83. The need for continued co-operation between world-wide and regional bodies engaged in the same tasks had never been more urgent. Co-operation between the Commission and the Committee would contribute to the consolidation of the rule of law throughout the world.

84. Mr. RUDA, after thanking the Committee's observer for his valuable statement, said the fact that, following the amendment of the OAS Charter, the Committee now constituted the only inter-American juridical body would no doubt make it possible to obtain more speedy results.

⁸ United Nations, *Treaty Series*, vol. 572, pp. 324 and 326.

⁹ *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No.: 64.II.B.11), p. 29.

¹⁰ United Nations, *Treaty Series*, vol. 30, p. 84.

¹¹ See *The International Conferences of American States 1889-1928* (New York, Carnegie Endowment for International Peace, 1931), p. 416.

¹² *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, document A/CONF.39/27 (United Nations publication, Sales No.: E.70.V.5).

85. The observer had rightly stressed that the Inter-American Juridical Committee dealt with up-to-date topics rather than with traditional subjects of international law. The questions of government-owned international companies and of the violation of standstill commitments in GATT were new and important topics.
86. He extended his good wishes to the Committee in its work of reviewing the inter-American conventions.
87. Mr. NAGENDRA SINGH said that the activities of the Inter-American Juridical Committee were parallel to those of the Asian-African Legal Consultative Committee; those regional bodies must be encouraged by the Commission, which should extend to them any assistance they might require.
88. In wishing every success to the Committee, he noted with interest the new conception of international companies, which was particularly valuable to developing countries.
89. Mr. KEARNEY said that the Commission should welcome the assistance of the Inter-American Juridical Committee. If, for example, that Committee managed to find a solution to the legal problems of foreign investments, its conclusions would be of great interest to the Commission's Special Rapporteur on State responsibility.
90. He noted with interest the Committee's intention to review existing inter-American conventions and urged close co-operation with the other United Nations bodies concerned. For instance, the Committee was dealing with the question of cheques, bills of exchange and negotiable instruments generally and the United Nations Commission on International Trade Law (UNCITRAL) had recently taken up the study of a similar subject. It was highly desirable that, for the same subject, uniform world-wide solutions should be based on regional experience.
91. Mr. ROSENNE, after thanking Mr. Caicedo Castilla for his report, said it was a matter of major importance for the proper discharge of the Commission's responsibilities that it should have authoritative and complete information on the work done by those inter-governmental organizations with which it had established formal relationships. Co-operation was important for the conduct of the whole operation of codification and progressive development of international law, of which the Commission did not have a monopoly although it did have a special position because of its responsibilities of a universal character. The Commission must draw on the experience of the various regions, especially those which had established formal association with the Commission and exchanged observers with it.
92. He shared Mr. Kearney's view that the regional intergovernmental organizations could assist the International Law Commission in the discharge of its responsibilities.
93. Although the Commission was primarily concerned with public international law, he welcomed the information given on the Inter-American Committee's work on private international law and on such subjects as international companies, which contained elements of both public and private law.
94. It was particularly important that the Commission should be represented at regional meetings; he expressed the hope that it would formally entrust its Chairman with the responsibility of representing it at the next meeting of the Inter-American Juridical Committee, and that he would be able to attend.
95. Lastly, he hoped that the experience gained by the Committee in reviewing the sixty-four inter-American Conventions would be of benefit to the Commission.
96. Mr. SETTE CÂMARA said he must thank the observer for the Inter-American Juridical Committee most sincerely for his tribute to the late Gilberto Amado.
97. It was particularly satisfactory for him as a citizen of Brazil, the host country to the Committee, to hear such a comprehensive report of its activities. The Committee was the oldest established intergovernmental body concerned with the study of legal norms and over the years it had built up an impressive record of achievement.
98. Mr. ALBÓNICO, speaking also on behalf of Mr. Castañeda, expressed his appreciation of Mr. Caicedo Castilla's interesting report. He noted that the new structure of the OAS would make its operation more flexible and more effective.
99. If he might make a concrete suggestion to the Inter-American Committee, it would be that it issue a recommendation urging those American States which had not yet ratified the codification conventions concluded as a result of the work of the International Law Commission to do so within the very near future.
100. Mr. USHAKOV thanked the observer for the Inter-American Juridical Committee for his report and congratulated him both on the Committee's work and on his personal contribution to it as rapporteur on a very important subject. The excellent results achieved by the Committee were of great interest not only to the Latin American countries but also to the International Law Commission.
101. He felt sure he was expressing the feelings of all members of the Commission in saying that he hoped that the close and fruitful relationships which had been established between the Committee and the Commission would continue, to their mutual benefit, since they also contributed to the progress of international public law.
102. Mr. BARTOŠ said that he too wished to congratulate Mr. Caicedo Castilla on his report, which contained a great deal of interesting information. Every year, the members of the Commission had the satisfaction of hearing the reports of the observers of the regional Committees, which they subsequently re-read and used to advantage in their work.
103. He was pleased to see that the Committees were taking account of the Commission's reports in their work for the unification of law. It was through the co-operation of those committees which sent observers to the Commission that the latter's work came close to achieving universality. That co-operation should continue to the widest possible extent.

104. Mr. ALCÍVAR, thanking the Inter-American Juridical Committee's observer for his valuable report, said the work of that regional body was of great importance to the maintenance of international peace and security in its region. The American system of pacific settlement of disputes needed to be brought into line with the world-wide system. Many of the now well-established principles of international law had had their origin in Latin America but, in the particular matter of modes of pacific settlement, the American system now lagged behind the world system.

105. With regard to the question of foreign investments, on which there had been a division of opinion in the Committee, he expressed the hope that it would be possible to harmonize the essential idea of the right of peoples to dispose of their national resources and their need to obtain the foreign investments they needed.

106. Lastly, it was important that the Committee should co-ordinate its work with that which the International Law Commission was carrying out on a world basis.

107. Mr. RAMANGASOAVINA thanked the observer for the Inter-American Juridical Committee for his very interesting report. At the 1046th meeting, when the Commission had paid a tribute to the memory of Mr. Amado, members had stressed the valuable contributions by Brazil and by Latin America as a whole to civilization in general and to law in particular. Mr. Caicedo Castilla's report on the Committee's work was further evidence of that. Latin American jurists had made a notable contribution, if not to the unification of law, at any rate to the unification of legal concepts in a world which was divided, if only by distance. The Inter-American Juridical Committee was blazing a trail for the other continents to follow.

108. Mr. THIAM said that he had been interested to note the similarity of the problems encountered by the Latin American countries and the African countries. The African countries were convinced of the need to co-operate with the Latin American countries in the field of international law for four main reasons. First, the newly independent countries, and more particularly those of Africa, needed the general principles of law as a guide to ensure that in their actions they did not diverge from the principles of universal civilization. Secondly, they had to ensure that the solutions they found to their own problems did not conflict with the general principles of law, and that unfortunately was not always the case. Thirdly, relationships between the African States, like those between the Latin American States, had to be so organized as to encourage a closer integration at all levels. And fourthly, relationships with the industrialized countries had to be established in the spirit defined by the Group of 77 at the New Delhi Conference. The similarity of the questions of immediate concern to both groups of countries showed how fruitful co-operation between Africa and Latin America could be.

109. Mr. EUSTATHIADES, speaking also on behalf of Mr. Castrén, said he wished to associate himself with the congratulations and thanks expressed to the observer for the Inter-American Juridical Committee, whose very

interesting report provided further evidence of the valuable work on codification carried out by the Committee in addition to its other meritorious activities extending over so many years.

110. The CHAIRMAN said the Commission and all its members were grateful to the observer for the Inter-American Juridical Committee for his very interesting report, which had enabled the Commission to follow the recent work of that Committee.

111. As the author of a comparative study of the Organization of American States and the Organization of African Unity he had noted with particular interest the revision of the structure of the OAS. He had also been much impressed by the extent of the work of codification undertaken by the Committee, and its prospective review of sixty-four inter-American conventions.

112. The work of the Inter-American Committee, particularly on such subjects as international companies and investment disputes, was of more than purely continental importance. Latin America could take pride in its many eminent jurists, whose ability he had had an opportunity to appreciate at the Vienna Conference on the Law of Treaties, where the Latin American delegations had played a very prominent part. The Commission would always welcome the cross-fertilization of ideas resulting from the co-operation between the two bodies.

The meeting rose at 1.10 p.m.

1065th MEETING

Monday, 8 June 1970, at 3.10 p.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1 and 2)

[Item 2 of the agenda]

(resumed from previous meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(resumed from previous meeting)

ARTICLE 0 (Use of terms) (resumed from the 1061st meeting)¹

1. The CHAIRMAN said that the Commission had already adopted sub-paragraphs (a) and (b) of article 0

¹ For previous discussion, see 1043rd meeting, paras. 32-46, 1044th meeting, paras. 1-23, and 1061st meeting, paras. 57-68.

on a provisional basis at the 1061st meeting. The Drafting Committee had now completed its work and was submitting the text of sub-paragraphs (a) to (k).

2. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following complete text for sub-paragraphs (a) to (k) of article 0:

Article 0
Use of terms

For the purposes of the present part:

(a) A "permanent observer mission" is a mission of representative and permanent character sent to an international organization by a State not member of that organization;

(b) The "permanent observer" is the person charged by the sending State with the duty of acting as the head of the permanent observer mission;

(c) The "members of the permanent observer mission" are the permanent observer and the members of the staff of the permanent observer mission;

(d) The "members of the staff of the permanent observer mission" are the members of the diplomatic staff, the administrative and technical staff and the service staff of the permanent observer mission;

(e) The "members of the diplomatic staff" are the members of the staff of the permanent observer mission, including experts and advisers, who have diplomatic status;

(f) The "members of the administrative and technical staff" are the members of the staff of the permanent observer mission employed in the administrative and technical service of the permanent observer mission;

(g) The "members of the service staff" are the members of the staff of the permanent observer mission employed by it as household workers or for similar tasks;

(h) The "private staff" are persons employed exclusively in the private service of the members of the permanent observer mission;

(i) The "host State" is the State in whose territory the Organization has its seat, or an office, at which permanent observer missions are established;

(j) The "premises of the permanent observer mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the permanent observer mission, including the residence of the permanent observer;

(k) An "organ of an international organization" means a principal or subsidiary organ, and any commission, committee or sub-group of any of those bodies.

3. The CHAIRMAN invited the Commission to consider article 0 sub-paragraph by sub-paragraph, beginning with sub-paragraph (c).

Sub-paragraphs (c), (d), (e), (f), (g), (h), (i), (j)

Sub-paragraphs (c) to (j) were adopted without comment

Sub-paragraph (k)

4. Mr. ROSENNE said that he was puzzled by the words "and any commission, committee or sub-group of any of those bodies". In view of the great variety of subsidiary bodies at the present time, many of which were not composed of representatives of States, it should perhaps be made clear that the commissions, committees,

and sub-groups in question were composed of representatives of States. The same clarification would have to be made on second reading in the case of the corresponding provision in article 1.²

Sub-paragraph (k) was adopted.

Article 0 was adopted.

ARTICLE 55 (Composition of the permanent observer mission)³ (resumed from the 1062nd meeting)

5. The CHAIRMAN said that, at the 1062nd meeting, the Commission had adopted paragraph 1 of article 55 but had asked the Drafting Committee to reconsider paragraph 2 in the light of the discussion.

6. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for paragraph 2:

2. When members of a permanent diplomatic mission, a consular post or a permanent mission in the host State are included in a permanent observer mission, their privileges and immunities as members of their diplomatic mission, consular or permanent mission shall not be affected.

7. Mr. ROSENNE said that that paragraph really had nothing to do with the composition of the permanent observer mission; it more properly belonged to the section on privileges and immunities. He hoped, therefore, that the Drafting Committee would suggest a more suitable place for it.

8. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee had discussed that point and had concluded that it would be desirable to change the placing of article 55 and to renumber it accordingly.

9. Mr. RAMANGASOAVINA said he thought it would be more correct, at the end of the French version, to say "*n'en sont pas affectés*" instead of "*ne sont pas affectés*".

10. Mr. KEARNEY (Chairman of the Drafting Committee) said that it might be advisable for the Commission to consider in what cases, in the present draft articles, the word "permanent" should be inserted before the words "diplomatic mission". It had been used in article 2 of the Vienna Convention on Diplomatic Relations⁴ but not in article 9 of the present draft.⁵

11. The CHAIRMAN suggested that the Commission adopt article 55, paragraph 2, provisionally and reserve its position on the question of the placing of the article, as well as on the point made by Mr. Ramangasoavina, until the second reading.

It was so agreed.

² See *Yearbook of the International Law Commission, 1968*, vol. II, p. 196.

³ For previous discussion, see 1050th meeting, paras. 46-55, and 1062nd meeting, paras. 42-65.

⁴ United Nations, *Treaty Series*, vol. 500, p. 98.

⁵ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 202.

ARTICLE 57 bis (Chargé d'affaires *ad interim*)⁶ (resumed from the 1062nd meeting)

12. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 57 bis:

Article 57 bis
Chargé d'affaires ad interim

If the post of permanent observer is vacant, or if the permanent observer is unable to perform his functions, a chargé d'affaires *ad interim* shall act as head of the permanent observer mission. The name of the chargé d'affaires *ad interim* shall be notified to the Organization either by the permanent observer or, in case he is unable to do so, by the sending State.

13. The article had been referred back to the Drafting Committee with the request that it consider whether some other term than "chargé d'affaires *ad interim*" should be used in connexion with permanent observer missions. The Committee had examined the practice in the matter and had found that that term was not used by the Protocol Section at Headquarters in New York, although it had been used on a number of occasions at Geneva. Since there did seem to be a modicum of practice in support of the term, the Drafting Committee had decided to retain it.

14. Mr. YASSEEN said that at the 1062nd meeting he had suggested that it would be better to find some neutral wording which did not imply an obligation, as did the text submitted to the Commission; that text did not reflect positive law.

15. Mr. CASTRÉN said that the Drafting Committee, after discussing the question at length, had decided not to alter the wording, which was the same at that of article 18,⁷ but simply to ask the Special Rapporteur to state in the commentary that the wording should not be interpreted too strictly, particularly as no sanction was possible. In any case there could not be any obligation, since the mission might consist only of the permanent observer.

16. Mr. EUSTATHIADES said that he sympathized with those who thought it was in the organization's interests to know whom, in the absence of the permanent observer, it should approach in the matter of communications, correspondence, and so on. But he did not think it was possible to lay down an obligation in the text of an article and diminish it in the commentary. The Commission must therefore take a position on the point.

17. Where the mission consisted only of a permanent observer, the procedure proposed by the Drafting Committee could be adopted only when the permanent observer was prevented from acting; but it might be that by keeping the post vacant, the State wished to indicate that for the time being it did not wish to have a permanent observer. The text should therefore be worded in such a way as to make the appointment of a chargé d'affaires *ad interim* facultative and not mandatory.

18. Mr. YASSEEN said he was not convinced by Mr. Castrén's explanations. The fact that an adopted text already existed was not a valid argument, since that text did not reflect the real position and ought therefore to be revised. The establishment of a permanent mission was not an obligation and the sending State should therefore also have the faculty to appoint, or not to appoint, a head of the mission *ad interim*.

19. He could not agree to a solution which consisted in interpreting the article in the commentary in a manner inconsistent with the interpretation that flowed from the terms of the article itself. The wording of article 57 bis should therefore be amended in both the French and the English versions.

20. Mr. ROSENNE said that he entirely agreed with Mr. Yasseen that there was no analogy between article 57 bis and article 18 from the point of view either of the sending State or of the organization. To avoid wording article 57 bis in the categorical form of an obligation, he suggested that the words "shall act" in the first sentence be amended to "may act".

21. Mr. AGO said he too thought that the appointment of a chargé d'affaires *ad interim* should be a faculty and not an obligation.

22. Furthermore, the permanent observer could not be mentioned as an alternative to the sending State, as was done in the second sentence, since the permanent observer always acted on behalf of the sending State.

23. He suggested that the entire article be recast as a single sentence to read: "If the post of permanent observer is vacant, or if the permanent observer is unable to perform his functions, the sending State may notify the Organization of the name of a chargé d'affaires *ad interim* who will act as head of the permanent observer mission".

24. Sir Humphrey WALDOCK said that he shared the views of Mr. Yasseen and Mr. Rosenne. He could also accept Mr. Ago's suggestion that the text should, if possible, be shortened.

25. Mr. USTOR said that if the article was modified as had been suggested, he was afraid that the Commission might have difficulties with article 18. The two articles should be considered together.

26. Mr. BARTOŠ said that he supported Mr. Ago's suggestion: it reflected what he himself had already said about the faculty which the sending State must always enjoy to appoint its representatives directly and to recall them without recourse to any intermediary.

27. Mr. AGO said that, in order to take account of Mr. Ustor's comments, it might perhaps be stated in the commentary to his new text of the article that the Commission was aware that it would probably need to revise the text of the corresponding article on permanent missions of member States.

28. Mr. KEARNEY (Chairman of the Drafting Committee) said that he supported Mr. Rosenne's suggestion to replace the words "shall act" by "may act" in the first sentence. A full stop should be placed after the word "Organization" in the second sentence.

⁶ For previous discussion, see 1062nd meeting, paras. 74-87.

⁷ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 211.

29. Mr. USHAKOV said that he saw no reason to alter the wording of article 57 *bis* seeing that several conventions, including the Vienna Conventions on Diplomatic and Consular Relations and the Convention on Special Missions, contained a similar provision and it had so far raised no difficulties.

30. Mr. RAMANGASOAVINA said that he was in favour of retaining the text proposed by the Drafting Committee, because if the idea of an obligation were eliminated from the first sentence, it would still subsist in the second. But the article could not be interpreted as imposing an obligation, since if the establishment of a permanent observer mission was a faculty under the basic article, which was article 51, the appointment of a chargé d'affaires *ad interim* could not be made an obligation.

31. Mr. THIAM said that he too thought it would be difficult to impose on the sending State the obligation to appoint a chargé d'affaires *ad interim*. It would be a mistake simply to try to assimilate permanent missions of member States to permanent observer missions and to subject non-member States to the same obligations as member States. It would therefore suffice if words such as "may act" or "may be appointed to act" were used.

32. Mr. ROSENNE said that Mr. Ushakov was correct in pointing out that an obligation did exist in article 19 of the Vienna Convention on Diplomatic Relations,⁸ but the case of permanent observer missions was entirely different and some explanation should be given in the commentary.

33. Concerning article 18, he maintained an open mind: it might be reconsidered but it would be going too far to say that it would probably need to be revised. The appointment of a chargé d'affaires *ad interim* was a faculty and not an obligation, but when that faculty was exercised and the appointment was made, there was an obligation to notify the organization.

34. Mr. CASTRÉN said that he still thought there was a very close analogy between article 57 *bis* and article 18, and that if the Commission amended the former, it should also amend the latter. Like Mr. Rosenne, he did not think that article 51 could be invoked as establishing an obligation in article 57 *bis*, since the two articles dealt with different situations.

35. With regard to Mr. Ago's suggestion, it was valid as far as the substance was concerned, but he was still reluctant to amend the wording of the article because it was what had always been used in conventions so far, and in some conventions there was a reference not only to the sending State but to the organs or authorities which could act on its behalf.

36. Mr. AGO said that there was no connexion between articles 57 *bis* and 18 and the so-called corresponding articles of the Vienna Conventions on Diplomatic and Consular Relations. When diplomatic relations were established, it was essential that some person should be instructed to act on behalf of the State; it was in fact

tantamount to an interruption in diplomatic relations if there was neither a head of mission nor a chargé d'affaires. It was therefore natural, in the case in point, that the appointment of a chargé d'affaires *ad interim* should be mandatory.

37. On the other hand, the establishment of permanent missions to an organization was not an obligation and many member States did not make use of the faculty. Consequently, it was not essential that there should be a permanent representative or, consequentially, a chargé d'affaires *ad interim*. It was even less essential in the case of permanent observer missions sent by non-member States, which might wish to leave their permanent observer missions without a titular head for a time if they lost interest in the organization's activities, without necessarily doing away with the mission altogether.

38. There was manifestly no connexion in that respect between diplomatic relations and permanent missions, whatever their nature. It was therefore necessary to stress the optional nature of the appointment of a chargé d'affaires *ad interim* and to state in the commentary that the Commission might consider revising article 18.

39. The wording of the second sentence was not always the same, contrary to what Mr. Castrén had said. For example, it differed in article 19 of the Vienna Convention on Diplomatic Relations. Nor could the permanent observer be assimilated to the competent authorities responsible for appointing or recalling him.

40. Mr. USHAKOV said that the situation was the same with diplomatic missions, permanent missions of member States and permanent observer missions when the head of the mission was absent or his post was vacant and there was no one to replace him. If the wording of article 57 *bis* were altered, there would be a risk of a conflict with the wording of conventions already in force.

41. Mr. EUSTATHIADES said he had been the first to draw attention to the point, at the 1062nd meeting. Neither practice nor logic indicated that the appointment of a chargé d'affaires *ad interim* was an obligation. States which wished to establish permanent observer missions thereby displayed their interest in an organization, but it could easily be envisaged that they might wish to take less interest in it, and they should therefore be given the faculty to do so.

42. As opposed to that idea, which was *de lege lata*, there could be another that clearly was universalist in trend, such as the Secretary-General's idea that the establishment of as many fully active permanent observer missions as possible was desirable in the interests of the universality and prestige of the organization. Consequently, if the Commission wished to encourage permanent observer missions to an organization to sustain their interest, it might very well draft a *de lege ferenda* text and indicate to non-member States that it was hoped that their interest would be maintained once they had manifested it. The Commission should decide whether that was really the attitude it wished to adopt.

43. Mr. RUDA said that article 15 of the Convention on Consular Relations used a different formula from

⁸ United Nations, *Treaty Series*, vol. 500, p. 106.

that contained in article 19 of the Convention on Diplomatic Relations. Paragraph 1 of article 15 of the Convention on Consular Relations stated: "If the head of a consular post is unable to carry out his functions or the position of head of consular post is vacant, an acting head of post may act provisionally as head of the consular post".⁹ Paragraph 1 of article 19 of the Vienna Convention on Diplomatic Relations, on the other hand, stated: "If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions, a chargé d'affaires *ad interim* shall act provisionally as head of the mission". However, that article also had an important second paragraph, which stated: "In cases where no member of the diplomatic staff of the mission is present in the receiving State, a member of the administrative and technical staff may, with the consent of the receiving State, be designated by the sending State to be in charge of the current administrative affairs of the mission". Article 18 of the Commission's present draft was taken from paragraph 1 of article 19 of the Convention on Diplomatic Relations, but the problem raised in paragraph 2 seemed to have been overlooked.

44. Sir Humphrey WALDOCK said that, in the case of an observer mission, it was impossible to make the appointment of a chargé d'affaires *ad interim* an obligation for the sending State, which could hardly be said to be bound to maintain a representative at the organization; it could only be a faculty. What might require consideration was the situation of the host State, which in his view was entitled to ask that there should be some member of the permanent observer mission who was identifiable as the person responsible for the conduct of its affairs.

45. The CHAIRMAN suggested that article 57 *bis* be referred back to the Drafting Committee for further consideration.

It was so agreed.

Organization of work

46. The CHAIRMAN welcomed the Legal Counsel, representative of the Secretary-General. The Commission would take advantage of his presence to examine, starting at the next meeting, agenda items 7 (Survey of topics suitable for codification) and 8 (Organization of future work). To assist the Commission, the Secretariat had prepared a working paper entitled "Review of the Commission's programme of work and of the topics recommended or suggested for inclusion in the programme" (A/CN.4/230).

47. At the same time, the Commission would discuss the question of the possible extension of its next session, or the holding of a special winter session, for the purpose of completing its work on the topic of relations between States and international organizations. Work on that particular topic was the Commission's first priority, since the General Assembly expected it to be completed by 1971.

48. So far as the remainder of the present session was concerned, the Commission would take up item 3 (a) (Succession of States and Governments: succession in respect of treaties) after it had examined items 7 and 8. It would then deal with the articles prepared by the Drafting Committee on relations between States and international organizations. Afterwards, the topic of State responsibility (item 4) would be considered. The Commission had already decided to allocate three days from 29 June to item 3 (b) (Succession of States and Governments; succession in respect of matters other than treaties).

49. Mr. AGO said he was rather uneasy about the optimism discernible in the proposed programme. At the outset, the main topic for the present session had looked to be an easy one. Part of it had seemed to be merely a question of adding an appendix to codification already completed. It was now clear, however, that the rules governing permanent diplomatic missions could not simply be made applicable to permanent missions to international organizations. It had then been found that the case of permanent missions did not exhaust the range of relationships between States and international organizations in the matter of representation, that permanent observer missions of non-member States need not necessarily be assimilated to the permanent missions of member States, and that conditions were not necessarily the same for representatives appointed to bodies on a permanent basis as for delegates appointed for a specific session of a body or for a conference. As a result, the time originally allowed for the consideration of the topic had proved insufficient.

50. The other topics on the agenda were of great importance and required careful consideration. Several weeks should be devoted to them in the course of several sessions. A discussion at four or five meetings would of course be useful, but if that procedure were followed at each session, the discussion would never get beyond preliminaries and would not touch the heart of the matter.

51. Consequently, in order to plan effectively for the rest of the present session, the next session and even the next five-year period of membership, the Commission would first have to complete its study of the draft on relations between States and international organizations. Each of the other topics would then constitute a stage to be completed before passing to the next stage. He would therefore even be prepared to agree to the study of State responsibility being deferred to a later date, although he was anxious to see some progress made on that topic, rather than let the Commission fall behind in its work on Mr. El-Erian's draft.

52. Moreover, if the Commission was going to do some useful work before the end of the term of office of its present members, it would need more time, in the form either of a special session—in the spring, not in the winter, since it would have to wait until it had received the comments of governments on Mr. El-Erian's draft—or of an extension to the regular session. A sufficient number of weeks should, in any case, be allowed for the completion of the draft relations between States and international organizations, before embarking on a

⁹ United Nations, *Treaty Series*, vol. 596, p. 274.

thorough study of State succession and State responsibility.

53. Mr. BARTOŠ said that every topic the Commission examined always involved more work than had been anticipated at the outset. Discussion revealed many hitherto unnoticed problems; that was indeed the justification of the Commission's deliberations.

54. The Commission should resume its consideration of relations between States and international organizations after studying the comments of governments, the opinions of writers and the views of the international organizations. The international organizations had been invited to express their opinion by the Legal Counsel and their replies would undoubtedly disclose fresh difficulties.

55. The Commission should begin its approach to the topics of State succession and State responsibility by defining the principles on which its work was to be based, in the light of the study of present differences in practice, since on many aspects there were no established rules of international law that were generally recognized. Moreover, many rules regarded as established should be reviewed, especially in the matter of State responsibility. The new system of sanctions instituted by the Charter, for example, gave food for thought. Again, the United Nations Charter and the Declaration on decolonization¹⁰ had changed the legal basis of the rules governing State succession.

56. The Commission had of course discussed those problems and the special rapporteurs had submitted to it the fruits of their knowledge and endeavours, but it had never had time to make effective use of that material. On that point he entirely agreed with Mr. Ago. It would still take some time to formulate the principles which should be followed today, since there was no consensus of opinion either in political or legal quarters, or in practice.

57. An extension of the present session or a special session was therefore necessary. He knew from experience how much time was wasted when consideration of a topic had to be resumed after a change in the membership of the Commission. He was therefore very much hoping that the Legal Counsel would help the Commission out of the critical situation in which it found itself with regard to the use of its time, which was very limited and ought to be increased.

58. Mr. USHAKOV said he agreed with the programme proposed by the Chairman for the work of the present session, and in particular that the Commission should complete its consideration of Mr. El-Erian's draft and should discuss the topics on which reports had been prepared by Mr. Bedjaoui, Sir Humphrey Waldock and Mr. Ago. The question of future work should be considered at a private meeting.

59. Mr. ROSENNE said he reserved his position with regard to the next session and also with regard to the longer-term programme of work.

60. He supported Mr. Ushakov's suggestion that the Commission should discuss its 1971 programme at a private meeting.

61. He found the Chairman's programme for the remainder of the present session somewhat ambitious. Three Special Rapporteurs had submitted reports with draft articles on topics which had already seen some discussion in the Commission. He submitted that it was necessary to choose one of those topics and start discussing the draft articles in the normal way. Experience had shown that the first two or three articles on any topic were particularly important because the decision on those articles set the tone for the project as a whole.

62. The CHAIRMAN might consult the Special Rapporteurs and decide on one report which the Commission could undertake to discuss in order to make some progress on the topic. If the Commission were able to show some progress on one of those topics, that would strengthen its position if it were to make a request to the Sixth Committee for the holding of a winter session.

63. Sir Humphrey WALDOCK said he found himself in agreement in principle with Mr. Ago and also largely with Mr. Rosenne. Experience had shown that the Commission was not likely to make much progress by dealing with topics in a piecemeal fashion. The Commission needed a few days' discussion on a topic before it began to get a real grip of it. He believed that the Commission should, in general, try to give itself the time necessary for a sustained discussion of any major report before it.

64. With regard to the topic of relations between States and international organizations, he asked the Chairman of the Drafting Committee whether some four days would be enough to complete work on that topic.

65. Mr. KEARNEY (Chairman of the Drafting Committee) said that it was still too early to reply to that question. The Drafting Committee was at present discussing the question of the different definitions for representatives to organs and representatives at conferences. It had still to receive from the Special Rapporteur the draft of the section on the privileges and immunities of those representatives. It was not unlikely that, when the Drafting Committee had completed its work on that section, the Commission itself would wish to debate it at length.

66. Mr. NAGENDRA SINGH said he agreed on the need for the Commission to concentrate on one subject, a method of work which was more systematic and more productive of results. However, since there were intervals when the Drafting Committee was engaged on the first priority topic and the Commission was awaiting the results of the Drafting Committee's work, it was desirable to have a second priority topic to fall back on. The present position was that the topic of relations between States and international organizations (item 2) had first priority; when there was a gap in the work on that topic, the Commission should fall back on its second priority topic, namely, succession of States and Governments in respect of treaties (item 3 (a)). Only when the Commission had completed its work on item 2 would

¹⁰ General Assembly resolution 1514 (XV).

item 3 (a) become the first priority item; it would then be appropriate to take up a third topic to fill in gaps in the work of item 3 (a).

67. Mr. STAVROPOULOS (Legal Counsel) thanked the Chairman for his kind words of welcome and said that it was both an honour and a pleasure for him to attend the meetings of the Commission.

68. He hoped that the Commission would be able to discuss its future programme of work and make a survey of the topics for codification during his stay at Geneva. A survey of such topics had been made in 1949¹¹ and had been adequate at the time, but it was now necessary to prepare a list of topics which would take into account the needs of the nineteen-seventies.

69. The working paper prepared by the Secretariat entitled "Review of the Commission's programme of work and of the topics recommended or suggested for inclusion in the programme" (A/CN.4/230) was only a preparatory survey. He was anxious to learn from the Commission what further preparatory work the Secretariat could do.

70. In considering the programme of work, the Commission should look upon the newly elected members as forming a new body, even though many of the present members were likely to be re-elected.

71. The Commission might now hold a preliminary discussion on its future programme of work, so that at its next session, in 1971, it could settle the final list of topics for inclusion in that programme.

The meeting rose at 5.55 p.m.

¹¹ See *Yearbook of the International Law Commission, 1949*, pp. 279-281.

1066th MEETING

Tuesday, 9 June 1970, at 10.55 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Organization of future work

(A/CN.4/230)

[Item 8 of the agenda]

1. The CHAIRMAN said that the officers of the Commission and all the Special Rapporteurs, except Mr. El-

Erian, had met that morning at 9.30 and, after a very detailed discussion, had come to the conclusion that the programme he had outlined at the previous meeting was the most acceptable. The Commission would take up Sir Humphrey Waldock's second and third reports on succession in respect of treaties (A/CN.4/214 and 224) from 10 June to 16 June. It would then spend about five days, from 17 to 23 June, on the adoption of Mr. El-Erian's draft articles as submitted by the Drafting Committee and go on to consider Mr. Ago's second report on State responsibility (A/CN.4/233) for five days, from 24 to 26 June and on 2 and 3 July. Mr. Bedjaoui's third report on succession of States in respect of matters other than treaties (A/CN.4/226) would be considered for three days as originally decided, from 29 June to 1 July, which would leave one week, from 6 to 10 July, for the adoption of the Commission's report.

2. The discussions of Sir Humphrey Waldock's and Mr. Ago's reports were not intended to lead to the adoption of articles which would be sent to the Drafting Committee; it was intended to discuss the articles in those reports on a broad basis so that the Special Rapporteur could ascertain the views of the members of the Commission on the general line they had adopted.

3. The officers of the Commission, in consultation with the Special Rapporteurs, had also decided that the most practical solution to the problem of extra time would be to extend the Commission's 1971 session by three to four weeks. It was not considered feasible to hold a winter or spring session, as had been suggested; and the recommendation most likely to be accepted by the General Assembly and the Sixth Committee was one which would not involve additional travel expenses.

4. Moreover, if the regular session were extended by three or four weeks, the Commission could be quite sure of completing its work on Mr. El-Erian's draft articles and would also have time to do some substantial work on the reports of Sir Humphrey Waldock and Mr. Ago. The officers hoped it would be possible for Mr. El-Erian to submit a report, taking all the comments of governments into account, by the beginning of the next session, so that the second reading could be based on that report. They also suggested that Mr. Ago's report should be taken first, early in the session, and that about four weeks should be devoted to it; Sir Humphrey Waldock's report would then be studied for a similar period, and after that the Commission could concentrate on Mr. El-Erian's final report until the second reading of his draft was completed.

5. The officers had seriously considered the possibility of starting with Mr. El-Erian's report at the beginning of the next session, but they feared there might be some delay, either on the part of governments in sending in their comments or, because of the need to take account of those comments, in preparing the final report. And the Secretariat would need time to make the necessary translations. Hence it would be better to begin with the reports of Mr. Ago and Sir Humphrey Waldock.

6. That was a rough outline of the programme the officers recommended to the Commission and he hoped that it would prove generally acceptable.

7. In conclusion, he had a word to say on the question raised by the Legal Counsel the previous day: that of the choice of topics for future consideration. The officers of the Commission had come to the conclusion that it would be best to ask the Secretariat to prepare a background paper for the use of the Commission, taking account of any general comments members might wish to make. The Legal Counsel had assured the Commission that the Secretariat could prepare such a paper, in the light of the recommendations of the General Assembly and in consultation with as many members of the Commission as possible, in time for consideration at the Commission's next session.

8. Mr. CASTAÑEDA said that, in view of the importance attached by the General Assembly to the topic for which Mr. Bedjaoui was Special Rapporteur, the Commission's failure to consider his report at all at its next session might be interpreted as showing a lack of interest in his work.

9. Mr. BARTOŠ agreed with Mr. Castañeda.

10. The CHAIRMAN said that the programme recommended by the officers of the Commission was only a tentative one; by the beginning of the next session, it might prove feasible to make certain readjustments and to discuss Mr. Bedjaoui's report as well.

11. Mr. YASSEEN asked the Chairman to impress on the General Assembly that the extra four weeks the Commission was requesting for its next session were not a favour, but a sacrifice which the members of the Commission, though pressed by other duties, had agreed to make because of the importance of the Commission's work, of which they were deeply conscious.

12. Mr. RUDA pointed out that, in its report on the work of its twenty-first session, the Commission had "confirmed its intention of bringing up to date in 1970 or 1971 its long-term programme of work, taking into account the General Assembly recommendations and the international community's current needs, and discarding those topics on the 1949 list which were no longer suitable for treatment". It had also "asked the Secretary-General to submit a preparatory working paper with a view to facilitating this task".¹

13. The Secretariat had submitted that working paper in document A/CN.4/230, and the representative of the Secretary-General had promised to prepare a supplementary working paper for the Commission's next session. He was somewhat concerned to note, therefore, that the programme of work suggested by the officers of the Commission did not allow even one day for consideration of the Commission's long-term programme of future work. At least four or five days during the next session should be devoted to that programme, in order to meet the needs of the new Commission which would take office in 1972.

14. The CHAIRMAN said that the question raised by Mr. Ruda was indeed of considerable importance and

that the two Secretariat working papers would be considered at the next session, together with a list of the priority topics recommended by the General Assembly.

15. Mr. RUDA said the Chairman had indicated that the four additional weeks of the next session would be devoted to Mr. El-Erian's report; but he thought at least one week would be required for consideration of the Commission's programme of future work.

16. The CHAIRMAN said that the Commission would take a final decision on the matter at the beginning of the next session, immediately after the election of officers.

17. Mr. STAVROPOULOS (Legal Counsel) suggested that in future, when the Commission adopted a new topic for codification and appointed a Special Rapporteur to deal with it, it should at the same time request the Secretariat to prepare the necessary background papers in consultation with the Special Rapporteur. In preparing that documentation, the Secretariat would confine itself to describing the state of international law at the time and would refrain from expressing any opinions of its own.

18. He also suggested that the Commission, as its own contribution to the twenty-fifth anniversary of the United Nations, should include in its report its firm decision to complete the work on Mr. El-Erian's report at its next session.

19. Mr. AGO said he was all in favour of the Secretariat's preparing papers to help the Special Rapporteurs in their work. Documents showing the state of a topic in regard to theory and jurisprudence were always very useful as working material, even if it was sometimes impossible for them to be complete. In the case of subjects dealt with extensively in the literature, a good bibliography could be very useful, particularly if it included works published in countries and languages not easily accessible to the Special Rapporteurs.

20. The Commission's contribution to the celebration of the twenty-fifth anniversary of the United Nations would mainly take the form of the four weeks' extra work proposed for completing the preparation of the draft articles on representatives of States to international organizations and for substantive consideration of the other important topics on the agenda, namely, State responsibility and State succession.

21. Sir Humphrey WALDOCK said he warmly supported the Legal Counsel's suggestion that the Commission should ask the Secretariat to prepare the necessary background material when it adopted a new topic. He fully agreed that the material should be entirely objective and should not contain any expressions of opinion, since they could only embarrass the Special Rapporteur if he chose to take some contrary view. As Mr. Ago had suggested, the material should include a bibliography and a resumé of practice, in particular, the practice of the United Nations.

22. The General Assembly, in operative paragraph 5 of its resolution 2501 (XXIV), had recommended "... that the International Law Commission should study, in consultation with the principal international organiza-

¹ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, para. 91.

tions, as it may consider appropriate in accordance with its practice, the question of treaties concluded between States and international organizations or between two or more international organizations, as an important question". In view of that recommendation, he suggested that the least the Commission could do at its present session would be to ask the Secretariat to collect the necessary information from various international organizations. It should also consider the choice of a suitable Special Rapporteur for the topic.

23. In the course of his work as Special Rapporteur for the Law of Treaties, he had been impressed by the enormous value of the practice of the United Nations as a depositary. That practice was difficult to ascertain without the collaboration of the Secretariat, because it was contained partly in circular letters from the United Nations to States, and did not all appear in official publications. But since there were other depositaries than the United Nations, and since uniformity was highly desirable, he hoped that the Secretariat would undertake to revise its documentation periodically and bring it up to date.

24. Mr. ROSENNE said he welcomed the general proposal advanced by the Legal Counsel, which was in line with action taken occasionally in the past. The papers produced by the Secretariat had proved extremely useful; indeed, many of them remained useful long after the completion of the Commission's work on a topic and its incorporation in a convention. In preparing such papers, the Secretariat should co-operate closely with the Special Rapporteur concerned, except when the Commission itself requested a paper on a well-defined subject.

25. With regard to the question of treaties between States and international organizations or between two or more international organizations, he saw nothing in General Assembly resolution 2501 (XXIV) which called for any immediate response by the Commission. The question had simply been described by the General Assembly as "an important question", without any suggestion of priority. It did, however, provide a very good illustration of the need for the Secretariat to work in very close association with the Special Rapporteur, who would certainly wish his views on the topic to be taken into account in the presentation of the material by the Secretariat.

26. He agreed with Sir Humphrey Waldock on the urgent need for the Secretariat to bring up to date its "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements";² it should issue the revised summary in some form other than a mimeographed document.

27. As to the information made available by the Secretariat to a Special Rapporteur, he thought the Commission itself should ultimately have access to all such information, though it was quite appropriate for it to be supplied to the Special Rapporteur first.

28. The question of the celebration of the twenty-fifth anniversary of the United Nations had been raised.

Operative paragraph 18 of General Assembly resolution 2499 A (XXIV) read: "Urges appropriate organs of the United Nations to complete as early as possible the consideration of important conventions still to be concluded." He accordingly suggested that the Commission might link three matters together: first, the overriding necessity of completing its work on the priority topic of relations between States and international organizations; second, its offer to meet for an extra four weeks at the next session in order to comply with the urgent request of the General Assembly to complete important work in hand; and third, its long-term programme of work, which would appear as the Commission's own contribution to the next twenty-five years of the United Nations, much as the 1949 list of topics had been its contribution to the first twenty-five years of the Organization.

29. Mr. USTOR said he too welcomed the Legal Counsel's suggestion.

30. On the topic of the most-favoured-nation clause, for which he was Special Rapporteur, the Secretariat had already collected abundant material from the international organizations concerned and he had made good use of it in the preparation of his report. He would shortly approach the Secretariat with a request for some further work to be carried out. In the tentative schedule of work for the present session no reference had been made to the topic of the most-favoured-nation clause and he hoped that, if time permitted, the possibility of a short discussion on it would not be excluded. He assumed that the topic would also appear on the agenda for the 1971 session.

31. The CHAIRMAN said that the topic of the most-favoured-nation clause would be on the agenda for the next session; if there were any possibility of taking it up before the end of the present session, the Commission would certainly do so.

32. Mr. CASTAÑEDA said he supported the Legal Counsel's suggestion regarding the celebration of the twenty-fifth anniversary of the United Nations, and also the further suggestions on the subject put forward by various members, in particular Mr. Rosenne. Perhaps the most appropriate contribution to that celebration would have been to review the present state of international law, as suggested by Mr. Ago, and find out what new topics could be studied to fill the existing gaps in the law. It was unfortunate that the Secretariat survey of topics would not be submitted in its final form until the next session.

33. Mr. RUDA said that the Commission's long-term programme of future work was one of the most important matters before it. The programme should be planned well ahead, and take particular account of the changes which had taken place in international law. The Commission should devote at least one week at its next session to the preparation of a long-term programme in concise terms. The Legal Counsel had put forward some valuable ideas for which all the members were grateful.

34. In 1967, the United Nations Office of Public Information had published a booklet entitled "The Work of

² ST/LEG/7.

the International Law Commission",³ under the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, established by General Assembly resolution 2099 (XX). But since 1967, the Commission's drafts on the law of treaties and special missions, which were reproduced in that booklet, had been superseded by the 1969 Vienna Convention on the Law of Treaties and the Convention on Special Missions adopted by the General Assembly by resolution 2530 (XXIV). The booklet should therefore be brought up to date and reissued. He would suggest a further improvement for the new edition, namely, that the bibliography on the International Law Commission should be expanded to include other than official publications. There was at least one precedent for such action: the volume in the United Nations Legislative Series entitled "Laws and Practices concerning the Conclusion of Treaties"⁴ listed in its bibliography not only official publications, but also relevant works of writers on international law.

35. Mr. KEARNEY, referring to the celebration of the twenty-fifth anniversary of the United Nations, said it was fitting that the Commission, in addition to completing its work on the topic of relations between States and international organizations, should take up the topic of treaties concluded between States and international organizations or between two or more international organizations, as requested both by the Vienna Conference on the Law of Treaties and by the Sixth Committee. The Commission would thus move on from the consideration of internal aspects of the United Nations to the area of substantive law. Its work on that new topic was bound to have a great effect on the law of international organizations, especially the United Nations.

36. He considered that the Commission should now appoint a Special Rapporteur for the new topic, who would work closely with the Secretariat in the production of any necessary documents.

37. Mr. AGO congratulated the Legal Counsel on having provoked a discussion from which some very promising ideas had emerged. The establishment of a new programme for the next twenty-five years was a task of the greatest importance, but it would be more difficult to carry out than in 1949, because the Commission had then been starting from nothing. It should now show how the situation had changed and in what respects the task of codification differed from what it had been then. It must indicate which parts of international law had been studied and what gaps remained. It should not confine itself to subjects which were regarded as topical; what was necessary was to codify the major themes of international law which had not yet been tackled.

38. Mr. CASTRÉN observed that several interesting proposals had been made along the same lines. It was an excellent idea to draw up a programme covering a long period such as twenty-five years, though much remained to be done under the programme established in 1949, as

a glance at the Commission's programme of work (A/CN.4/230) would show. Five topics still had to be completed, including the two very important ones of State responsibility and State succession. Those topics might take between five and ten years to complete, which was enough work for the next two terms of membership of the Commission.

39. A revision of the old list of topics would nevertheless be useful. The study of some topics might appear more urgent now than in 1949; for instance, unilateral acts, the examination of which had been proposed by Mr. Tammes (A/CN.4/230 para. 137), the law of space, and the utilization of international rivers. Some members of the Sixth Committee had taken the view that it would be premature to codify the last topic (A/CN.4/230, para. 124), but today it seemed more urgent and important than ever. A set of rules, including rules on pollution, had been adopted at Helsinki in 1966 at the Congress of the International Law Association. The Finnish Government had proposed that the subject should be placed on the agenda for the next General Assembly; it need not necessarily be given high priority, but the Finnish Government would certainly be glad if its proposal was favourably received, both by the Sixth Committee and by the International Law Commission.

40. Mr. EUSTATHIADES said that the document which the Secretariat was to draw up to help in preparing the programme for future years should omit several of the topics mentioned in the document prepared for the present session (A/CN.4/230). The problem must be tackled in a fresh spirit and with sufficient imagination to anticipate the needs which would arise during the next twenty-five years.

41. The Commission would certainly need a full week at its next session to draw up such a programme. It might even be advisable to work out some system whereby members could inform the Secretariat, while the document for the next session was being prepared, of their suggestions and arguments for the inclusion of certain topics and the omission of others. That would certainly help to shorten the discussion next year.

42. In any event, the idea of taking up the question of treaties between States and international organizations or between international organizations was very sound, for the Commission's work on the law of treaties and on relations between States and international organizations had already cleared some of the ground.

43. Mr. ALBÓNICO said he wished to thank the Legal Counsel for his suggestion and the Secretariat for all the valuable assistance it gave to Special Rapporteurs and to the Commission generally. He supported the various suggestions which had been made with regard to the Commission's programme of future work.

44. The best contribution the Commission could make to the celebration of the twenty-fifth anniversary of the United Nations would be to take measures to work still more effectively in carrying out its duties, and with that aim in view he had two suggestions to make, one of an internal character, the other relating to the Commission's future work.

³ United Nations publication, Sales No.: 67.V.4.

⁴ ST/LEG/SER.B/3 (United Nations publication, Sales No.: 1952.V.4).

45. His first suggestion was that the Commission should, at some stage, consider the adoption of internal rules of procedure. Experience had shown that it was absolutely essential to have, for instance, a rule on the closure of discussions. He was sure that rules of procedure would greatly contribute to the efficiency of the Commission's work.

46. Secondly, with regard to the future programme of work, he suggested the inclusion of a new topic which had attracted much attention from writers and was a matter of concern to governments, namely, the forcible diversion of aircraft. There was an international instrument already in existence on the subject—the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft⁵—but it had proved ineffective. The problem of the forcible diversion of aircraft had been a matter of concern in America for some time, and it was now arising in Europe. The Commission should consider that problem, since it was causing serious disturbance both in the domestic life of countries and in international affairs. The situation could only be remedied by the adoption of a universal convention and the Commission should therefore include the topic in its long-term programme of work.

47. Mr. CASTAÑEDA said that the Commission should devote a whole meeting to a thorough discussion of the interesting questions which had been raised during the present debate.

48. Mr. TABIBI said he supported that suggestion. He also supported Mr. Ruda's suggestion that the booklet "The Work of the International Law Commission" should be brought up to date and reissued. It should include not only the Vienna Convention on the Law of Treaties, but also the important resolutions and declarations adopted by the Conference on the Law of Treaties.

49. The idea of showing what parts of international law had been codified by the Commission and what gaps remained should be examined by a small committee of members of the Commission.

50. In connexion with the celebration of the twenty-fifth anniversary of the United Nations, he believed that the Commission should take into account the views of the whole membership of the United Nations and also those of regional bodies, which had taken a special interest in certain topics, such as that of international rivers.

51. The CHAIRMAN said he noted that there had been general acceptance of the suggestion for bringing up to date and reissuing the booklet "The Work of the International Law Commission". There had also been general acceptance of the suggestion put forward by the Legal Counsel and it had been agreed that the Secretariat should prepare a paper on topics for inclusion in the Commission's long-term programme of work.

52. The Commission would continue its discussion on the organization of future work at its 1069th meeting.

53. Mr. STAVROPOULOS (Legal Counsel) said that the question of reissuing the Secretariat "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" and republishing the booklet "The Work of the International Law Commission" had financial implications. Now that it had taken a decision on the matter, the Commission should therefore include an appropriate passage in its report.

54. With regard to the paper to be prepared by the Secretariat on the future programme of work, members would be receiving individual communications from the Secretariat inviting them to state their views.

The meeting rose at 1.15 p.m.

1067th MEETING

Wednesday, 10 June 1970, at 10.15 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States and governments in respect of treaties

(A/CN.4/149 and Add.1; A/CN.4/150, 151, 157, 200 and Add.1 and 2, 210, 214 and Add.1 and 2, 224 and Add.1, 225 and 232; ST/LEG/7; ST/LEG/SER.B/14)

[Item 3 (a) of the agenda]

1. The CHAIRMAN invited the Commission to examine the topic of succession of States and governments in respect of treaties (item 3 (a) of the agenda).

2. He explained that the discussion which would follow the Special Rapporteur's introduction of his second (A/CN.4/214 and Add.1 and 2) and third (A/CN.4/224 and Add.1) reports would not lead to the usual referral of draft articles to the Drafting Committee. Its purpose would simply be to show the Special Rapporteur the reaction of members to the articles in his two reports and to the problems raised by those articles. He expected the Special Rapporteur, in his opening statement, to focus attention on the essential principles and methods of approach on which he would like to have members' views. At the present stage the discussion need not go into points of detail or drafting.

3. Sir Humphrey WALDOCK (Special Rapporteur) said that the Commission had only a short time in which to discuss a large subject.

⁵ See *The American Journal of International Law*, 1964, vol. 58, p. 566.

4. He had so far produced three reports on succession in respect of treaties. The first (A/CN.4/202) had been of a preliminary character and had been discussed by the Commission in a preliminary way. In drafting his later reports, he had taken into account the points raised during that discussion.¹

5. His second (A/CN.4/214 and Add.1 and 2) and third (A/CN.4/224 and Add.1) reports, which he was now introducing, must be treated as a single report which took the Commission only a certain distance into the topic. They covered certain matters of fundamental significance and dealt fairly exhaustively with multilateral treaties. In his fourth report, which he would submit at the Commission's next session, he proposed to deal with bilateral treaties, with certain particular categories of treaty and with certain particular forms of succession.

6. The Commission had also before it a number of valuable Secretariat papers. Apart from those mentioned in his second report (A/CN.4/214, para. 12), he would draw attention to the more recent studies, such as that on the ITU practice (A/CN.4/225).

7. He had also found very useful the Secretariat "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" (ST/LEG/7). In using that document, however, he had noticed that entries needed further explanation if their implications in regard to succession were to be fully understood, and he had obtained helpful additional information direct from the Secretariat.

8. Not much information had so far been secured on bilateral treaties, but he hoped that more would become available before he submitted proposals on those treaties. A good deal of information on succession to bilateral treaties was contained in the well-known book by O'Connell² and in the volume published by the International Law Association.³ There was also some practice on succession in regard to bilateral treaties in the Secretariat publication "Materials on succession of States" (ST/LEG/SER.B/14). The Secretariat was at present engaged in studies on the practice relating to bilateral treaties; a study on extradition treaties had been completed and other studies, on such matters as transport services agreements, were in course of preparation.

9. It would be noted that there was no wealth of reference to legal literature in his reports. He had, of course, drawn inspiration from the great writers of the past but had felt that, with regard to the topic of succession in respect of treaties, it was his duty to look mainly to State practice, and particularly the modern State practice. The more one studied the subject the more one realized that legal writers started from a certain doctrinal hypothesis which was not always supported by the practice; for that reason, he had based his work essentially on the practice of States and on the very pertinent practice of depositaries in their dealings with States.

10. He had taken as the basis of his draft the thesis that in the context of the present topic succession was a particular problem in the framework of the general law of treaties. That approach was founded on a close examination of State practice, which provided no convincing evidence of a general doctrine of succession on the basis of which the various problems of succession relating to treaties should find their solution. What happened was that there were cases of succession in the form of changes of sovereignty, and the problem which arose was that of determining the impact of the occurrence of that succession of States in regard to existing treaties affecting the territory. The hypothesis in every case was that, at the date of succession, there existed a treaty—governed by the general law of treaties—which was then binding on the predecessor State with respect to its territory or in regard to which the predecessor State had in some degree expressed its consent on behalf of the territory.

11. The general law of treaties thus appeared as an integral part of the foundations of the law relating to succession in respect of treaties. In the past, there had been the difficulty that there was no well-accredited statement of the general law of treaties. For example, the rules on reservations had been far from settled, and since the question would also arise in the context of succession in respect of reservations to treaties, reliance on the rules accepted in the Vienna Convention on the Law of Treaties was really essential.

12. Since its adoption in 1969, however, the Vienna Convention did provide a general frame of reference in the matter, and his present draft therefore assumed that the general law of treaties was that expressed in the Vienna Convention. He recognized that some members might, on general grounds, prefer not to formulate the provisions of the present draft by cross-reference to those of another Convention. But in certain cases, for drafting purposes, he had found it convenient to refer to articles of the Vienna Convention when it was necessary to refer to the existing law of treaties. He suggested that that use of cross-reference as a drafting technique could be reviewed by the Commission at a later stage.

13. He had assumed that the scope of the work would, for the time being, be limited to inter-State treaties. The problem of succession could, of course, arise for treaties concluded between States and international organizations. For example, it had been a common occurrence for a country, on the eve of independence, to receive assistance from the International Bank for Reconstruction and Development, so that the problem of succession arose with regard to the relevant agreements with the Bank. For the purposes of the present work, however, it was convenient to concentrate on succession to inter-State agreements and leave succession to other types of agreement until a later stage of codification, after the general law of succession in respect of treaties had been determined.

14. It would also have to be assumed that whatever rules were drafted in the present context would be subject to any relevant rules in force in international organizations. That assumption would cover such special cases as the practice of succession with respect to international labour

¹ See *Yearbook of the International Law Commission*, 1968, vol. I, pp. 130-146.

² D. P. O'Connell, *State Succession in Municipal Law and International Law*, Cambridge, 1967.

³ *The Effect of Independence on Treaties*, London, 1965.

conventions which had emerged from the ILO practice regarding admission to membership of that Organization. In due course the necessary drafts would be prepared on both those points.

15. With regard to the general scheme of his draft, it would begin with a Part I containing general provisions. Those provisions would include the safeguard relating to the rules of international organizations and the rule on the scope of the draft. Later discussion might well reveal the need for some additional general provisions. For example, he had not yet any definite view on the question whether a general provision should be included on the criteria of the transmissibility of treaties. He had the impression that once the rules were laid down satisfactorily regarding the circumstances and the conditions under which a treaty could be continued by a successor State, the rules governing transmissibility would naturally emerge without any need for a separate provision on the subject.

16. Part II of the draft was entitled "New States". He had chosen that somewhat artificial term in order to show that the articles in that part did not deal with special cases of succession, such as federal States, unions of States and protected States. He thought it would be better for the Commission to agree first on a substantive rule applicable to the separation of a territory, including a colony, from a State in its purest form. Once that basic rule was settled, consideration could be given to any extra factors that might be introduced by particular forms of succession. It might be found that there was no substantial difference between some of those special cases and the case of new States.

17. The articles in Part II, in his third report, all dealt with multilateral treaties. In his fourth report, to be submitted at the Commission's next session, he would include a section on bilateral treaties which would cover the problem of real or dispositive treaties and the question of boundaries.

18. He would also include a Part III dealing with special forms of succession. One section would cover federal States and federal unions; others would deal with protected States, trusteeships and mandates. At the same time, he would consider the question whether colonies should be given separate treatment; and he noted in that connexion the recent declaration by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States that the territory of a colony had a status separate and distinct from the territory of the State administering it.⁴

19. In the same report he also proposed to examine some special problems. One would be that of treaties concluded very shortly before independence, and another would be that of treaties of a long-term nature which established special territorial rights or a special régime. In the light of that examination he would decide whether to propose special provisions on those problems or not.

20. Succession to bilateral treaties was a very important part of the present subject, and for purposes of codifica-

tion it suffered from one disadvantage in comparison with multilateral treaties. The absence of a depositary meant that the practice was less formal and looser, so that much depended on interpreting the attitudes of the States concerned. The machinery of the depositary, on the other hand, imposed a certain discipline and depositary practice provided valuable guidance for the identification of rules relating to succession to multilateral treaties. The position was different in the case of bilateral treaties, where it was more difficult to reduce the law relating to them to clear-cut rules.

21. Unless a fuller examination of the practice—based on the further evidence to be made available by the Secretariat—were to alter his present views, he expected to base the rules relating to bilateral treaties on mutual consent; that was to say, to treat the matter as one of novation and of express or tacit agreement to the continuance of the treaty.

22. The concept of succession which emerged from his work so far was characterized in the first place by the fact of the replacement of one State by another in the sovereignty over a territory or in the competence to conclude treaties; and secondly, by a distinction between the fact of a succession and the transmission of treaty rights and obligations on its occurrence. The transmission of rights and obligations was a question distinct from the fact of succession of States, and had to be decided in the light of the practice.

23. A further element in the concept was that a consent to be bound, or a signature, given by the predecessor State in relation to a territory established a certain legal nexus between that territory and the treaty. To that legal nexus, upon the occurrence of a succession, certain legal incidents attached. One such incident was that, subject to certain exceptions, in the case of multilateral treaties the legal nexus established a customary right for the successor State to notify its acceptance of the treaty and to consider itself a party to it. Practice, however, did not support the view that there existed any obligation in the matter, with certain exceptions such as dispositive treaties.

24. Many writers held the belief that customary law recognized certain categories of automatic transmission of obligations to successor States. He was satisfied, however, that the general rule was that there was no obligation. That conclusion could clearly be drawn from the practice relating to multilateral treaties.

25. As to bilateral treaties, the legal nexus implied, both for the successor State and for the third State concerned, a faculty to establish the continued application of the treaty bilaterally between those two States by mutual consent. The legal nexus created a legally recognized process for bringing about the novation of the treaty as between the successor State and the third State. The general rule in the matter was that of mutual consent.

26. It might indeed be argued that the position was the same in the case of multilateral treaties; in other words that the new State could bring about the continuance of the application of a multilateral treaty by notification to the depositary, who in turn notified the other parties, and only if no objection were then made would the notifi-

⁴ See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18*, p. 69.

cation establish succession. That approach would be based on the idea that there was no succession to a multilateral treaty without the consent of the other parties. He believed such an approach to be unrealistic, unduly conservative and unprogressive. There was no evidence from the practice of States and of depositaries to show that the consent of the other parties to the multilateral treaty was required. The right of a successor State to notify its succession and to have itself considered a party to the treaty as of right had never been questioned by the other parties.

27. His conclusion differed from that reached by the International Law Association in the course of its extensive study of the "Succession of New States to the Treaties and certain other Obligations of their Predecessors", to which he had referred in his second report (A/CN.4/214, paras. 13 to 18). In his draft, he had taken the position that there was no legal presumption of continuity. Continuity as a policy in treaty relations was desirable and, as a progressive policy, it should be encouraged; but there was no evidence in practice of the existence in law of any obligation of continuity or of any legal presumption in favour of continuity, and the principle of self-determination militated against such a presumption.

28. It was true that in one article of his draft—article 4 (A/CN.4/214/Add.2) entitled "Unilateral declaration by a successor State"—there was to be found an element of continuity. Such a unilateral declaration was designed to obtain a *provisional* application of the treaty in order to give time for reflexion. His proposed article 4, to that extent and in that context, took account of the desirability of continuity.

29. It was his impression that to speak of "continuity" begged the question. Writers who spoke of continuity as of an obligation did not make a sufficient distinction between the rights and the obligations of the successor State. There was a world of difference between being under an *obligation* to succeed to a treaty and having a certain *right* to notify succession to it, or to proceed to novate it by mutual consent.

30. If the Commission were to endorse his approach to succession in respect of treaties, that would not necessarily mean that the same approach ought to be adopted for the topic of succession in respect of matters other than treaties. Of course, if one were to start from a general doctrinal theory of succession, there would be a tendency to treat the two situations in the same manner. But if one approached the problem from the point of view of practice, it was clear that there was a material difference between succession in respect of treaties and succession in respect of other matters, such as public property.

31. In the case of succession in respect of treaties, there existed an instrument which affected a third State and which was the subject-matter of the succession. With regard to questions such as public debts and acquired rights, on the other hand, there might be a third State which was interested in so far as its nationals might be affected, but then the involvement of the third party was indirect. He himself had an open mind regarding succession in matters other than treaties, but he believed

it would be wrong to approach the whole subject of State succession on the assumption that there existed a fundamental notion which was the key to the whole problem.

32. In the discussion which was to follow his introduction, it would be most useful if he could be given some idea whether the general substance of his report was considered by members as a sound basis on which to proceed with the study of the topic. As the Chairman had pointed out, it would not be helpful at the present stage to go into drafting problems.

33. He would like to know, in particular, whether the following basic draft provisions seemed to members to be on the right lines: first, the definition of the notion of succession in paragraph 1 (a) of article 1 (Use of terms) (A/CN.4/214); second, the treatment of devolution agreements in article 3 (Agreements for the devolution of treaty obligations or rights upon a succession) (A/CN.4/214/Add.1); third, the handling of unilateral declarations in article 4 (Unilateral declaration by a successor State) (A/CN.4/214/Add.2); fourth, the general rule, which was made subject to possible exceptions, that there was no obligation of succession on the part of the successor State, in article 6 (General rule regarding a new State's obligations in respect of its predecessor's treaties) (A/CN.4/224); fifth, the right expressed in article 7 (Right of a new State to notify its succession in respect of multilateral treaties), which, he emphasized, related to multilateral treaties only; and sixth, the rule in article 8 (Multilateral treaties not yet in force), which also related only to multilateral treaties.

34. Mr. YASSEEN asked whether, in order to enable the discussion to proceed in the way the Special Rapporteur desired, the Secretariat could draw up a list of the points to be given special consideration.

35. Mr. CASTRÉN asked whether the Special Rapporteur had intentionally refrained from mentioning article 5 as one of the articles which he regarded as important and on which he wished discussion to take place.

36. He would also like to know whether each speaker should deal with general points and individual articles in the same intervention or whether the Commission would have a short general debate before examining the articles. He was not in favour of the first procedure, which might lead to confusion.

37. Sir Humphrey WALDOCK (Special Rapporteur) replied that he did not regard article 5 (Treaties providing for the participation of new States) as being of a fundamental character; its operation depended on the intention of the parties. He therefore suggested that article 5 be left aside for the time being.

38. With regard to the method to be followed in the present discussion, he thought it would be practically impossible to discuss the draft article by article. At the same time, members knew his aversion to general debates, which tended to be unproductive for a Special Rapporteur. He therefore suggested that the discussion should cover specific points on which members agreed

or disagreed with respect to the basic articles he had mentioned.

39. The CHAIRMAN suggested that the Secretariat prepare, in consultation with the Special Rapporteur, an informal paper setting out the basic issues. The Commission could then take up those issues one by one.

The meeting was suspended at 11.30 a.m. and resumed at 12.05 p.m.

40. The CHAIRMAN said that the five main points on which the Commission's comments were requested were, first, the use of the term "succession" (article 1); second, devolution agreements (article 3); third, unilateral declarations (article 4); fourth, the general rule that there was no obligation on the successor State to assume its predecessor's treaties (article 6); and fifth, the right to notify succession to multilateral treaties in general (articles 7 and 8).

41. Mr. EUSTATHIADES said that the Special Rapporteur had chosen the best possible method of presenting the topic. The Commission should bear in mind the indications he had given, in his brilliant statement, of the future course of his work, in particular on bilateral treaties and treaties relating to independence, so as to avoid premature discussion. For that reason, while he could say that he approved of the principle of article 2, he would not dwell on the exceptions it would be necessary to make in the case of treaties relating to the transferred territory.

42. The Special Rapporteur's preparatory work had been excellent and the systematic method he had proposed was the only one that would enable the Commission to see whether, and if so when, it could lay down guiding principles. The best proof of the excellence of the proposed method was the position given to article 6, which laid down the indisputable principle of non-continuity. There might have been a temptation to place that principle at the beginning of the draft articles, but it was in fact more appropriate to place it where it was for the time being. And conversely, the Special Rapporteur had rightly refrained from stating a contrary principle—that of continuity—which, however desirable it might be as a progressive solution, could not be taken as establishing a presumption that the successor State was bound by the treaties of its predecessor.

43. The method proposed by the Special Rapporteur had the advantage of being based strictly on the facts of international practice, including the most recent practice, so that the Commission could have the full range of possible solutions before it, and of dealing with different hypothetical cases as a basis for drafting concrete provisions.

44. In dealing with new States, faced with a practice that lacked uniformity, the Special Rapporteur had succeeded in bringing out those solutions which threw open wide for them the doors of international treaty law. He (Mr. Eustathiades) approved of the bases of articles 7 and 8, though some redrafting might be necessary later.

45. The definition of "succession" given in article 1 might give rise to some doubts at first sight, because it

extended to competence to conclude treaties with respect to territory, but it was quite clear that the purpose of the provision was to cover cases which were not cases of substitution of sovereignty. It was also clear that it was impossible not to make substitution of sovereignty the main criterion of the definition, because that was the starting point, whereas substitution in the competence to conclude treaties, independently of substitution of sovereignty, was the exception. Consequently, if all cases of succession were to be provided for, and if the purposes of the draft were to be met, that starting point must be retained, on the understanding that the definition could subsequently be supplemented or abridged according to the final content of the complete draft.

46. Article 3 was another example of the excellence of the method proposed by the Special Rapporteur; for in dealing with the question of devolution agreements, the crux of the problem, which was the position in regard to third States, had to be tackled at the outset.

47. He approved of the Special Rapporteur's method of work, which was not based on preconceived ideas and allowed full latitude for the subsequent statement of the general ideas and principles which would emerge from the debates and from examination of the specific provisions, but which it would be premature to consider at present.

48. Mr. CASTRÉN said he wished to congratulate the Special Rapporteur on the twelve excellent articles, with their detailed and persuasive commentaries, which he had submitted to the Commission in his second and third reports on succession in respect of treaties.

49. The two reports began with a clear and useful introduction which showed that the Special Rapporteur had rightly given special attention to the recent studies of the International Law Association on the same problems, while maintaining an independent attitude. He (Mr. Castrén) largely shared the opinions expressed by the Special Rapporteur in paragraphs 19, 20 and 21 of his second report with regard to decolonization and the position of new States.

50. On the question raised at the end of paragraph 23, namely, whether the traditional principle of self-determination should be retained as the underlying norm, in other words, whether the successor State had absolute discretion to regard itself as not being bound by the treaties of the predecessor State, or whether a certain presumption should be admitted in favour of the transmission of those treaties, as proposed by the International Law Association, his view was that everything depended on the nature of the treaty and other circumstances of the case, but that the presumption would be in favour of the absolute discretion of the successor State; that seemed to accord with the practice of several States and with the practice followed after the Second World War at the time of decolonization.

51. The most interesting part of the introduction to the third report was paragraph 5, where the Special Rapporteur developed the idea that the topic under study had to be oriented closely to that of the general law of treaties and that the present draft must be such that it

could be read together with the Vienna Convention on the Law of Treaties.

52. The Special Rapporteur had certainly had good reasons for basing his draft articles primarily on State practice, as he had indicated in his third report, and he (Mr. Castrén) had no doubt that the Special Rapporteur had also carefully studied the literature, including the works of certain authors, as the references in his report suggested.

53. Like the Special Rapporteur, he thought that the topic should for the time being be confined to treaties between States and that the question of international organizations should be left aside. He also shared the view that succession in respect of treaties was a special problem and that analogies derived, for example, from succession to public property should therefore be avoided. The plan of work which the Special Rapporteur had proposed to the Commission was carefully thought out and his programme was much more comprehensive than might be thought.

54. With regard to article 1, the Special Rapporteur had made several improvements to the wording proposed in his first report,⁵ probably as a result of the Commission's discussion of the subject in 1968. For instance, he had deleted paragraph 1 of his former text, which had referred to terms defined in article 2 of the draft articles on the law of treaties, had deleted the references to governments, and had amended the title of the report accordingly.

55. At the present stage of codification it would suffice to deal only with State succession. The terms "successor State" and "predecessor State" were simple and were adequately defined in sub-paragraphs (b) and (c) of the new article 1. The definition of the term "succession", in sub-paragraph (a), had been expanded and clarified; it was now stated that it meant the replacement of one State by another *in the sovereignty of territory* and in the competence to conclude treaties with respect to territory. He believed, like the Special Rapporteur, that it was preferable, for the reasons stated in paragraphs (2) and (3) of the commentary to article 1, at least for the time being, not to use the term "succession" in a wider sense and speak, by analogy with internal law, of a transfer to the successor State, by the operation of international law, of rights or obligations arising under the treaties of the predecessor State.

56. He welcomed the fact that, in his third report, the Special Rapporteur had added three definitions to article 1, and he approved of their wording. The Special Rapporteur had rightly taken the view that the expression "new State", defined in sub-paragraph (e), should be sufficiently wide to include all cases of secession of part of the territory of an existing State, and not only cases of accession of a colony to independence. Like the Special Rapporteur, he thought that the terms at present included in article 1 were sufficient for the time being and that the Commission could add others as its work progressed.

57. Mr. REUTER said that the qualities of the Special Rapporteur were familiar to all who had followed his work on the law of treaties. His approach to the problem of State succession seemed to have had two sources of inspiration, by which he had been guided equally, even if their consequences did not always coincide. The first was reliance on experience and facts and the avoidance of premature formulas and over-generalizations; the second was the voice of logic. He would confine his remarks to the concern for logic, for on the five questions submitted to the Commission, he agreed on the whole with the Special Rapporteur's point of view and with the general way in which he had defined his method and his subject.

58. The Special Rapporteur had approached his subject in the general context of the law of treaties and made special reference to the provisions of the Vienna Convention. It might well be asked, however, whether some of the formulations in that Convention ought not to be considered more closely, without, of course, going so far as to modify them.

59. The central idea behind the Special Rapporteur's work, so far as logic was concerned, was that treaties produced no effects with respect to third parties. The logic of that premise was that if the successor State was a new State, it became a third party; consequently, the provisions of the Vienna Convention would apply and everything followed from that.

60. Mindful of his other source of inspiration, however, the Special Rapporteur had recalled the formulas he had suggested to the Commission, when it had been studying the law of treaties, for limiting that absence of effect of treaties with respect to third parties where objective situations and real rights were concerned—formulas which the Commission had quickly rejected. But those formulas might perhaps have contained an element of truth, and that was no doubt why the Special Rapporteur was raising the same problems again by pointing out the difficulties involved in succession in respect of boundaries and dispositive treaties.

61. That being so, article 2 was perhaps less simple than it appeared. It was not necessarily the case that a treaty which altered the boundaries between two States was applicable as against third parties. The Special Rapporteur had put forward some explanations which certainly held good in practice, but they did not remove the difficulty regarding principles. Of course, to agree that such treaties were applicable as against third parties would mean entering a residual area, left aside at Vienna, in which treaties produced certain effects with respect to third parties.

62. In particular, when it came to dealing with the question of treaties and international organizations, many would disagree that an international organization, which could not participate in a treaty such as the one establishing it, was a third party where that kind of treaty was concerned. That definitely called in question one of the principles of the Vienna Convention, even though there was no question of rejecting that principle, but merely of going into it more deeply.

⁵ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 90.

63. Moreover, in taking up the question of multilateral treaties, the Special Rapporteur referred, quite logically, to the rather vague notion of open multilateral treaties, contemplated in the Vienna Convention. But the right of the successor State to accede to such treaties could have no connexion with the alleged right of succession. The successor State became a party to the open multilateral treaty because it was an open treaty. On that interpretation, it was not certain that article 8, for example, was essential.

64. It was also understandable that the Special Rapporteur had been far more cautious with regard to bilateral treaties, since in the case of open multilateral treaties it was clear that the problem of State succession could be got round by invoking the general principles of the law of treaties.

65. Of course, it would be possible to accept a less logical idea and say, not indeed that a notification of acceptance was unnecessary, but perhaps that, contrary to the ordinary rule, when the successor State notified its consent to succeed to an open multilateral treaty, the notification had the effect of making the acceptance retroactive from the actual date of independence. If all the objections connected with the problem of non-retroactivity were thus disposed of, a new element more specifically connected with the situation of the successor State would certainly be introduced. Those were extremely difficult questions which he was not able to answer at the present stage.

The meeting rose at 1 p.m.

1068th MEETING

Thursday, 11 June 1970, at 10.20 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldo, Mr. Yasseen.

Co-operation with other bodies

[Item 6 of the agenda]

STATEMENT BY A JUDGE OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRMAN said he had pleasure in welcoming Mr. André Gros, a former member of the Commission,

who, since 1964, had been a Judge of the International Court of Justice. He invited Mr. Gros to address the Commission.

2. Mr. GROS, speaking as a Judge of the International Court of Justice, said that the principle of contacts between the Court and the International Law Commission, unanimously accepted by the Court three years previously, was useful only if those contacts related to legal problems of common interest to the Judges of the Court and the members of the Commission. It was on that understanding that he wished to make a few remarks to the Commission on the state of international justice at a time when preparations were being made to celebrate the twenty-fifth anniversary of the United Nations, the twenty-fifth anniversary of the International Court of Justice and the fiftieth anniversary of the creation of the first permanent court of international justice. It was, indeed, particularly fitting to consider the realities of international life in those commemorative years. Like the other judges who had visited the Commission he would, of course, be expressing his own personal views.

3. The Institute of International Law, at its 1959 session, had adopted unanimously, on the basis of a report by Mr. Jenks, a resolution on the compulsory jurisdiction of international courts and tribunals,¹ in which it had noted that "the development of such jurisdiction lags seriously behind the needs of a satisfactory administration of international justice", affirmed that "recourse to the International Court of Justice or to another international court or arbitral tribunal can never be regarded as an unfriendly act" but "constitutes a normal method of settlement of legal disputes", and emphasized "the importance of confidence as a factor in the wider acceptance of international jurisdiction".

4. It was on the last point in particular that he wished to enlarge, for the members of the International Law Commission were well-informed persons who had an immense role to play in their respective countries and in their international activities for the development of international law, and the substance of the law and jurisdiction were two faces of the same coin.

5. He wondered whether the efforts of the international legal world might not have been partly nullified, as far as the problem of international justice was concerned, by the fact that, since the 1959 resolution, there had been no real collective research into the deep-seated causes of the uneasiness concerning the acceptance of international jurisdiction to which the Institute had drawn attention. He doubted whether the difficult problems that arose could best be solved by the discreet silence with which some jurists wished to cover the grave delay about which the Institute was concerned. It would be better to investigate the causes and see whether the lack of confidence related to the courts and their procedure, or to the present state of the law and its ability to keep pace with future needs.

¹ See *Annuaire de l'Institut de droit international*, 1959, vol. II, p. 380.

6. He was sure that the former was not the case. It must be recognized that, in the absence of an international government, judicial settlement would always remain one of the possible means, but not the only one, of peaceful settlement of disputes, and that the real reason for the lack of confidence in international tribunals, whether permanent or temporary, was the unorganized state of international society. That was proved by the fact that whenever a group of States really organized themselves and established a compulsory jurisdiction, as the European Economic Community had done, for example, there was no problem of confidence in the court, because the confidence had been there before the court was set up. On the other hand, when confidence among the members of an organization was insufficient, no compulsory jurisdiction, whether permanent or temporary, was ever established, because there was no adequate organic link between the States concerned, even when they belonged to the same region and applied the same legal system. Everyone could remember recent disputes between States having the same legal system and belonging to the same regional group, which had not been submitted to arbitration or even to a conciliation procedure.

7. As to the second possibility, the number of progressive jurists, that was to say those in favour of developing the law to keep pace with future needs and giving contemporary law a modern outlook, was substantial. Those who opposed the jurisdiction of the International Court or of arbitral tribunals because of the way international law would be applied by the judges, would only be justified in doing so if they sought and organized some form of justice acceptable according to their own conception of the law and administered by lawyers trained according their own views. Otherwise it was not the compulsory jurisdiction they were opposing, but the very idea of the application of law and hence its actual existence.

8. The reason for the slow progress of international justice was thus to be found neither in the composition of the courts, since *ex hypothesi* there was no shortage of good judges—the Statute of the Court permitted the formation of special chambers—nor in the state of the law, since both States whose legal system was based on conservative principles and those which believed in the need for other criteria had their judges. The reason was the relatively unorganized state of international society, of which the backwardness of justice was merely a consequence. That gave some ground for optimism, because it was possible to take an inventory of the deep-seated sociological reasons for the lack of organization. Thus it would have to be accepted as a basic idea, both in the work of the International Law Commission and in the duties of the Judges of the Court, that the problem of the substance of the law and the problem of its application would never be solved separately and that nothing would be achieved by laying down abstract rules which took no account of the realities of international life and of the society of States.

9. The CHAIRMAN thanked Mr. Gros on behalf of the Commission for his most interesting address.

Succession of States and governments in respect of treaties

(A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1)

[Item 3 (a) of the agenda]

(resumed from the previous meeting)

10. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's second and third reports on succession in respect of treaties (A/CN.4/214 and Add.1 and 2 and A/CN.4/224 and Add.1).

11. Mr. USHAKOV congratulated the Special Rapporteur on his reports and the statement he had made at the previous meeting. He shared most of the Special Rapporteur's ideas and, on the whole, approved of the articles he had submitted; nevertheless, he had a few general comments to make.

12. First of all, he thought the Special Rapporteur should remain faithful to the law of treaties, as he proposed, but that in certain cases he should go further. In matters of succession it was not sufficient, as it was in the law of treaties, simply to make a distinction between bilateral treaties and multilateral treaties, without taking their content into account.

13. Bilateral treaties generally bound the contracting States as such, but they could also bind a State with respect to only part of its territory: for example, a demilitarized zone or a region crossed by an international river subject to a treaty régime. The difference between those two kinds of bilateral treaty should be taken into consideration where succession was concerned. As to multilateral treaties, some were universal or "open", others were not. There again, the difference should be clearly brought out in the draft articles.

14. Nor did he think that in matters of succession it was possible to adhere strictly to the general notion of a treaty, since succession took different forms according to whether it involved the transfer of part of a territory, the creation of a new State as a result of decolonization, the creation of a State by union or merger, or the division of a State into two or more States. So far, the Special Rapporteur had dealt only with succession in cases of decolonization. He approved of that beginning, but provision had to be made for the other cases as well.

15. With regard to the articles themselves, the definition of "succession" given in sub-paragraph (a) of article 1 (A/CN.4/214) should be formulated differently; for although, as the Special Rapporteur stated in paragraph (2) of his commentary, succession denoted the *fact* of the replacement of one State by another in sovereignty, he (Mr. Ushakov) considered that it was that fact which led to succession proper, which was the transfer of the rights and obligations of one State to another when there was a simple substitution of sovereignty, creation of a new State, or cession of part of one State's territory to another.

16. In article 2, the idea expressed in sub-paragraph (b) was correct, but it would need to be expanded to take account of the exceptions, that was to say the special

cases in which the treaties of the predecessor State continued to apply: for example, treaties relating to immovable public property, which did not cease to have effects when the part of the territory in which the property was situated passed under the sovereignty of another State.

17. Again, in article 3 (A/CN.4/214/Add.1), the particular cases in which the provisions of the article were not applicable should be specified.

18. Article 4 (A/CN.4/214/Add.2) would be more appropriately placed in the part of the draft relating to succession as a result of decolonization; and although he approved of the idea the article expressed, he thought it should provide for the other cases of succession, such as the transfer of part of a territory.

19. Finally, it would have to be decided whether articles 7-12 (A/CN.4/224 and Add.1) dealt with universal or restricted multilateral treaties; in the latter event, the special cases would have to be provided for as well.

20. Mr. TAMMES, after expressing his admiration for the third report (A/CN.4/224 and Add.1), said that to his mind the Special Rapporteur had raised his most important point in paragraph 23 of the introduction to his second report (A/CN.4/214), where he had stated that "The question for the Commission will be whether to retain this principle" [the "clean slate" principle] "of the traditional law as the underlying norm or to follow the International Law Association and admit a certain presumption in favour of the transmission of the treaties of the predecessor sovereign to a new State". That presumption on the part of the International Law Association had been expressed in the first of eight resolutions adopted by it at its fifty-third conference, held at Buenos Aires in September 1968 (A/CN.4/214, section I, para. 15).

21. In his third report, the Special Rapporteur had decided against such a broad presumption and had based the underlying philosophy of his draft articles on the need for the explicit consent of the successor State to be bound by treaties concluded by its predecessor. The only presumption he had allowed was in article 4, paragraph 2 (c), concerning a unilateral declaration by a successor State at the expense of a third State (A/CN.4/214/Add.2).

22. As looked at by the International Law Association, the problem was one which essentially involved a choice between the two principles of continuity and consent. If continuity was to be assured, the consent of the original parties to the treaty ought not to be endangered by the accident of State succession; in other words, unless the predecessor State had included some express provision for a novation of the consent, the latter must be presumed.

23. The Special Rapporteur, on the other hand, seemed to have taken a quite different approach in article 6 (A/CN.4/224), which was closer to the strict rules of the Vienna Convention on the Law of Treaties, to the practice of new States themselves, and to the general idea of free will, freely arrived at without any pressure in the matter of time. He was in full agreement with the prin-

ciple of the "clean slate" embodied in that article, but that principle had been stripped of any categorical interpretation in paragraph (6) of the commentary, which stated that "a new State may have a clean slate in regard to any *obligation* to continue to be bound by its predecessor's treaties without its necessarily following that the new State is without any *right* to be considered as a party to them".

24. With respect to article 8 and the following articles, the legal nexus, which the Special Rapporteur had referred to as a requirement for the right of a successor State to consent to be bound by a multilateral treaty, seemed to have become thin, since that right was recognized, provided that the predecessor State had expressed its consent, even if the treaty had not been in force at the date when the succession occurred.

25. Since, however, in the modern law of State succession, all analogies with the private law governing inheritance were tending to disappear, he wondered whether that formal legal nexus was really necessary. Was it at all relevant what the former sovereign had decided? It seemed an unsatisfactory solution to make the exercise of the rights of the successor State depend on an act of will based on reasons which might become obsolete after a change of sovereignty. It might be objected that the requirement of a territorial nexus was confirmed by recent practice; but that practice, which had taken the "clean slate" rule as its point of departure, had been influenced by concern lest that section of international legislation be endangered by massive changes of sovereignty. The Special Rapporteur's untraditional interpretation of the "clean slate" rule, therefore, would appear to be aimed at the future extension of international legislation.

26. Mr. TABIBI thanked the Special Rapporteur for having taken into account, in formulating his second and third reports, the views of members of both the Commission and the Sixth Committee. He agreed with him that the topic of State succession in respect of treaties was one of the most complex areas of international law, because of the difficulty of establishing régimes which could be applied to all kinds of situations.

27. He also agreed that there was a marked difference between succession in respect of bilateral treaties and succession in respect of multilateral treaties. The former were concluded for a variety of different purposes pursued by the parties, whereas the latter were concluded on a universal basis and were subject to a certain uniform discipline. Care must be taken, therefore, to make the principles of succession apply to the various situations which might arise under bilateral treaties.

28. The Special Rapporteur had stated that he had based the formulation of his last two reports on the Vienna Convention on the Law of Treaties. He himself, however, thought there was a need for caution in adopting that approach, inasmuch as State succession was essentially a different branch of international law from the law of treaties. The latter dealt with certain known parties, while the former involved parties which had not been in existence at the time when the treaties had been concluded.

29. If it was agreed that the successor State had a fundamental right to accept or to refuse the rights and obligations of the predecessor State, it was also necessary to state the principle that if the successor State willingly accepted the rights and privileges conferred by a treaty, it must also accept the obligations arising from it. However, judging by the practice of States, both before and after the Second World War, it was obvious that many States were prepared to accept the rights and privileges but not the obligations, and it was difficult to find a formula which would apply to both situations under the same rules.

30. On the question of frontier treaties, his views remained the same as those he had expressed at the 965th meeting in 1968.² That was a most difficult and complex subject, as had been recognized in the Sixth Committee, and the present differences between great and small Powers throughout the world made it necessary to adopt a very cautious approach.

31. With regard to article 1, he had expressed doubts in 1968 as to whether the original version³ covered cases of double succession, such as those of India and Pakistan, for example, or Mali and Senegal.

32. As to article 2, he was afraid that if its basic purposes were not clarified, it might be interpreted as including frontier treaties. He would appreciate the Special Rapporteur's views on that point.

33. Mr. KEARNEY said he must pay a tribute to the high level of craftsmanship displayed by the Special Rapporteur in his set of reports.

34. With regard to article 1, on the use of terms, he agreed with the major theses of the definitions, but had some problems regarding the definition of "succession". It was couched in alternative form: "sovereignty of territory" appeared as an alternative to "competence to conclude treaties with respect to territory". That presentation gave rise to difficulties because of the extreme area of overlapping in the two expressions. It was not at all easy to differentiate between the underlying reasons for the two expressions.

35. He believed there were some indications in the commentary to article 1 that the intention had been to use the first expression to cover situations in which sovereignty appeared as one of the aspects, as in article 2, by contrast with the set of problems involved in the relatively small number of cases in which the issue of sovereignty was not involved. He understood that the Special Rapporteur was reserving the second category of cases for treatment later.

36. In article 2, he noted that the rule in subparagraph (b), that the treaties of the predecessor State "cease to be applicable in respect of that area from the same date", was laid down as a mandatory requirement. He did not think it was possible to be quite so categorical. He was thinking of cases in which an arrangement had been made by the predecessor State and the successor

State regarding a transitory period for the territory, such as an agreement in which either explicit or implicit provision had been made for matters such as air transit rights until permanent arrangements could be worked out.

37. Consideration should be given to the desirability of allowing some degree of tolerance in the cases he had mentioned. The same type of problem would probably arise regarding other provisions of the draft.

38. Mr. RAMANGASOAVINA observed that the Special Rapporteur's work on State succession had the same solidity and logic as he had shown in his work on the law of treaties.

39. The Special Rapporteur had not expressly opted for either of the extreme views, namely, the theory of automatic continuity and the voluntarist principle of self-determination. On the contrary he had achieved the *tour de force* of submitting articles which were both logical and cautious and likely to attract support from the advocates of all theories.

40. His position was all the more justified because, owing to the lack of uniform practice, it was impossible to base all the solutions on a single principle. States themselves did not always act rationally: some young States whose law was based on an empirical legal system acted in what could be called a logical manner and made a general declaration of succession at the outset, limited, nevertheless, as to time and subject-matter; others whose law was based on a rational legal system adopted the empirical solution of deciding each case on its merits after exhaustive consideration.

41. In any case, the Special Rapporteur had been right to refer to the law of treaties, even though the Vienna Convention was not yet in force, for that convention was the common denominator of present practice—a kind of customary international law.

42. The definition of State succession given by the Special Rapporteur in article 1 was extremely skilful, since it was compatible with all the theoretical conceptions.

43. On the other hand, article 2, though it seemed harmless enough, left aside a number of cases which might perhaps be marginal, but to which the principle stated in the article could not be applied. One example was the Concordat of 1801, which had never ceased to apply to Alsace-Lorraine despite the historical vicissitudes that territory had undergone. Moreover, the examples given at the end of paragraph (4) of the commentary to article 2 were cases rather of *debellatio*—the abolition of the sovereignty of a State and of the laws in force in it after conquest by another State—than of the transfer of an area of territory.

44. On the whole, however, he approved of the articles proposed by the Special Rapporteur, though he would have some points of detail to raise when the time came.

The meeting rose at 12.50 p.m.

² See *Yearbook of the International Law Commission, 1968*, vol. I, pp. 132 and 133, paras. 61-70.

³ *Op. cit.*, 1968, vol. II, p. 90.

1069th MEETING

Friday, 12 June 1970, at 10.15 a.m.

Chairman: Mr. Taslim O. ELIAS

later: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1 and 2)

[Item 2 of the agenda]

(resumed from the 1065th meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)**ARTICLE 57 bis (Chargé d'affaires ad interim)¹**

1. The CHAIRMAN invited the Commission to consider the text for article 57 bis adopted by the Drafting Committee on third reading.

2. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 57 bis:

*Article 57 bis**Chargé d'affaires ad interim*

If the post of permanent observer is vacant, or if the permanent observer is unable to perform his functions, a chargé d'affaires ad interim may act as head of the permanent observer mission. The name of the chargé d'affaires ad interim shall be notified to the Organization either by the permanent observer or, in case he is unable to do so, by the Minister for Foreign Affairs or by another competent minister if that is allowed by the practice followed in the Organization.

3. Two changes had been made to the text discussed by the Commission at its 1065th meeting. The first had been to make the rule in the first sentence permissive, by replacing the words "shall act" by "may act", in response to the comments of several members of the Commission. The provision embodied in the second sentence, however, remained mandatory. If the sending State appointed a chargé d'affaires ad interim, it was under an obligation to notify his name.

4. The second change had been to replace the concluding words of the second sentence, "by the sending State", by the words "by the Minister for Foreign Affairs or by another competent minister if that is allowed by the practice followed in the Organization". The provision had thus been brought into line with the corresponding

provision relating to permanent missions and the method of notification had been clarified.

5. Mr. YASSEEN said that he was grateful to the Drafting Committee for having taken into account the comment he had made.² As to the drafting, he wondered whether it would not be better, despite the precedents, to say "by another competent authority" instead of "by another competent minister".

6. Mr. USHAKOV said that although he had agreed to the present wording in the Drafting Committee, he preferred the former drafting of the first sentence. In any case, it should be understood that the new wording was without prejudice to the provisions of article 19 of the Vienna Convention on Diplomatic Relations.³

7. Mr. KEARNEY (Chairman of the Drafting Committee), replying to Mr. Yasseen's suggestion, said that the words "competent minister" were used in the corresponding article 12 in Part II. The same wording had been used in the interests of consistency.

8. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to adopt article 57 bis, subject to consideration on second reading of the comments made during the present discussion.

It was so agreed.

PART IV. Delegations of States to organs and to conferences

9. The CHAIRMAN invited the Commission to consider the Drafting Committee's text for articles 00, 61-B and 62.

ARTICLE 00 (Use of terms)⁴

10. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 00:

*Article 00**Use of terms*

For the purposes of the present part:

(a) An "organ" means a principal or subsidiary organ of an international organization and any commission, committee or sub-group thereof, in which States are members;

(b) A "conference" means a conference of States convened by or under the auspices of an international organization, other than a meeting of an organ;

(c) A "delegation to an organ" means the delegation designated by a State member of the organ to represent it therein;

(d) A "delegation to a conference" means the delegation sent by a participating State to represent it at the conference;

(e) A "representative" means any person designated by a State to represent it in an organ or at a conference;

² See 1062nd meeting, para. 86.

³ United Nations, *Treaty Series*, vol. 500, p. 106.

⁴ For previous discussion, see 1052nd meeting, paras. 29-47; 1053rd meeting, paras. 5-46; and 1054th meeting, paras. 3-47.

¹ For previous discussion, see 1065th meeting, paras. 12-45.

(f) The "members of the delegation" are the representatives and the members of the staff of the delegation to an organ or to a conference, as the case may be;

(g) The "members of the staff of the delegation" are the members of the diplomatic staff, the administrative and technical staff and the service staff of the delegation to an organ or to a conference, as the case may be;

(h) The "members of the diplomatic staff" are the members of the delegation including experts and advisers, who have been given diplomatic status by the sending State for the purposes of the delegation;

(i) The "members of the administrative and technical staff" are the members of the staff of the delegation to an organ or to a conference, as the case may be, employed in the administrative and technical service of the delegation;

(j) The "members of the service staff" are the members of the staff of the delegation to an organ or to a conference, as the case may be, employed by it as household workers or for similar tasks;

(k) The "private staff" are persons employed exclusively in the private service of the members of the delegation to an organ or to a conference, as the case may be;

(l) The "host State" is the State in whose territory the meeting of an organ or a conference is held.

11. In the Drafting Committee there had been a good deal of discussion on the definitions included in article 00 which, it should be stressed, were designed for application exclusively to Part IV.

12. The main difficulties had arisen over the definition of an "organ" and a "conference", and the distinction between persons who attended the meetings of an organ and persons who attended a conference. There had also been some difficulty regarding the definition of the term "representative".

13. The definition of an "organ" given in sub-paragraph (a) was identical in substance with that contained in article 1, sub-paragraph (m). The Drafting Committee had deemed it appropriate to introduce the words "in which States are members" in order to exclude, for convenience, bodies in which individual experts served in a personal capacity. It had been thought preferable for the time being to adopt a provision dealing with the major aspects of the question, in other words, concentrating on organs of which States were members. At a later stage, the Commission might wish to deal with other bodies.

14. He suggested that the Commission should consider the individual sub-paragraphs one by one.

Sub-paragraph (a)

15. Mr. ROSENNE said he disliked the use of the figures "00" to designate the article. The designation "article 0" was usually given to an article intended to be placed before article 1 of a draft. In the present instance, the article unsatisfactorily numbered "00" was really intended as an addition to article 1, on the use of terms.

16. With regard to sub-paragraph (a), the word "thereof" was ambiguous and, moreover, was not in line with the French version, which corresponded to that of article 1, sub-paragraph (m); better wording should be found. One solution would be simply to adopt the

language used in the English version of article 1, sub-paragraph (m).

17. The concluding phrase, "in which States are members", was not altogether clear either. It might be better to say "composed of representatives of States".

18. Mr. USHAKOV said that the Drafting Committee proposed that for the time being the Commission should confine the provision to organs whose members were States. Perhaps an attempt would be made later to draft an article covering organs composed of representatives who did not represent States, such as the Governing Body of the International Labour Office.

19. Mr. KEARNEY (Chairman of the Drafting Committee), replying to Mr. Rosenne, said that article 00 was intended to be placed before the first article in Part IV, the part to which the definitions in article 00 exclusively applied. There was no question of incorporating its provisions in article 1, which applied to the whole draft.

20. The word "thereof" had been used as a convenient means of referring to all the bodies mentioned before. It had been thought that the words "of any of those bodies", used in sub-paragraph (m) of article 1, would raise problems of interpretation.

21. The concluding phrase, "in which States are members", was intended to cover the unusual cases in which an organ consisting of States had certain members who did not represent any State.

22. Sir Humphrey WALDOCK said that he himself would be prepared to accept the use of the word "thereof" as reasonably clear. However, he could equally well accept a formula, closer to the French text, in which the word "thereof" was replaced by "of any such organ".

23. Mr. KEARNEY (Chairman of the Drafting Committee) said that such a change would be acceptable to him.

24. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to adopt sub-paragraph (a), with the change in the English version suggested by Sir Humphrey Waldoack.

It was so agreed.

Sub-paragraph (b)

25. Mr. THIAM said that although the definition of a "conference" was technically correct, it did not entirely fit the facts. In some African regional organizations, a conference was not something occasional, but an organ of an institution, as in the case of the Organization of African Unity and the Common Afro-Malagasy Organization; in those organizations, the meetings of Heads of State, which were periodical meetings, were called conferences. The States members of those organizations, when invited to comment on the draft articles, might perhaps object to the fact that, in a sense, they were being asked to amend the terms of the charters of those organizations.

26. Mr. KEARNEY (Chairman of the Drafting Committee) pointed out that the definition of a "conference" specifically excluded "a meeting of an organ".

27. Moreover, if the term "international organization" was to be taken in the context of article 2, paragraph 1, it meant only an organization of a universal character, so that for the purposes of the present articles regional organizations were excluded.

28. Article 3 was also relevant: if an organization had a rule according to which one of its organs was termed a "conference", then article 3 applied.

Sub-paragraph (b) was adopted.

29. Mr. ROSENNE said he wished to place on record his reservation in respect of both sub-paragraphs (a) and (b), which he did not consider necessary, though he would not oppose their adoption for the time being.

Sub-paragraph (c)

30. Mr. ROSENNE said that there was some discrepancy in the language used in sub-paragraphs (c), (d) and (e). Sub-paragraph (c) and (e) spoke of a delegation or a person "designated" by a State; sub-paragraph (d) referred to a delegation "sent" by a State.

31. Mr. USHAKOV said that the Drafting Committee's view was that the expression "delegation to an organ" referred to delegations as such—even if they consisted of only one person, provided there was representation. The term "representative" referred to a person forming part of a delegation in that capacity.

32. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to adopt sub-paragraph (c) subject to consideration, on second reading, of the points raised during the discussion.

It was so agreed.

Sub-paragraph (d)

33. Mr. ROSENNE said that the expression "participating State" was ambiguous. A State could participate in a conference as an observer. He enquired whether the intention was to refer to a State member of an organ or participating in a conference in any capacity, or only as a voting participant.

34. He suggested that the words "participating State" be replaced simply by the word "State".

35. Mr. KEARNEY (Chairman of the Drafting Committee) said that the term "participating State" had been used with the meaning assigned to it in article 9 of the 1969 Vienna Convention on the Law of Treaties.⁵

36. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to adopt sub-paragraph (d) subject to consideration, on second reading, of the points raised during the discussion.

It was so agreed.

⁵ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/27 (United Nations publication, Sales No.: E.70.V.5).*

Sub-paragraph (e)

Sub-paragraph (e) was adopted.

Sub-paragraph (f)

Sub-paragraph (f) was adopted.

Sub-paragraph (g)

Sub-paragraph (g) was adopted.

Sub-paragraph (h)

37. Mr. ROSENNE said he disliked the concluding words "for the purposes of the delegation". He suggested that they be replaced by the words "for the purposes of the meeting".

38. Mr. KEARNEY (Chairman of the Drafting Committee) said that the words "for the purposes of the delegation" had been used in order to stress that it would not be necessary for the sending State to give such titles as "ambassador" or "minister" to the various members of the delegation; it would be sufficient for the sending State to indicate that the persons concerned had diplomatic status for the purposes of the delegation.

39. Mr. RUDA, supported by Mr. ALBÓNICO and Mr. CASTAÑEDA, proposed that the Spanish version be reviewed by the Spanish-speaking members of the Commission.

40. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to adopt sub-paragraph (h) subject to revision of the Spanish version.

It was so agreed.

Sub-paragraph (i)

41. Mr. CASTAÑEDA said that although the provision in sub-paragraph (i) reflected well-established terminology, it was none the less tautological. It was unsatisfactory to say that the members of the administrative and technical staff were the members of the staff of a delegation "employed in the administrative and technical service of the delegation". It would be much better to define the members of the administrative and technical staff by exclusion, in other words, by indicating that they were the members of the delegation who were neither members of the diplomatic staff nor members of the service staff.

Sub-paragraph (i) was adopted.

Sub-paragraph (j)

Sub-paragraph (j) was adopted.

Sub-paragraph (k)

42. Mr. THIAM said he thought the term "private staff" was unsatisfactory, though perhaps it was an accepted expression.

43. Mr. TESLENKO (Deputy-Secretary to the Commission) said that the term had been used in the Con-

vention on Special Missions, in article 1 (k), in order to avoid the use of the term "servant".

Sub-paragraph (k) was adopted.

Sub-paragraph (l)

44. Mr. ALCÍVAR said that the term "*Estado huésped*" used in the Spanish version was not clear. Those words meant literally "guest State", not "host State".

45. Mr. RAMANGASOAVINA said that in the French version the words "*la réunion d'un organe ou une conférence*" were ambiguous, because the word "meeting" appeared to relate to both the nouns that followed it.

46. Mr. ROSENNE said that a similar problem arose with regard to the English version, where the words "or a conference" were ambiguous. He suggested that they be replaced by the words "or the conference".

47. The CHAIRMAN suggested that the terms be transposed, so that the passage would read: "a conference or a meeting of an organ".

It was so agreed.

Sub-paragraph (l), thus amended, was adopted.

Article 00 as a whole, as amended, was adopted.

ARTICLE 61-B (Derogation from the provisions of the present Part)

48. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 61-B

Derogation from the provisions of the present Part

International agreements between States and international organizations regarding the holding of a conference or the rules which may be adopted by a conference may derogate from the provisions of the present Part.

49. The article was in the nature of a saving clause, which was necessary because articles 3, 4 and 5 did not cover all the matters involved. Article 5 did not refer to future agreements relating to conferences; article 4 did not deal with the rules that might be adopted at a conference.

50. Mr. TAMMES said he was grateful to the Drafting Committee for taking account of his comment⁶ by adopting the second part of article 61-B. It was perhaps going too far to speak of the sovereignty of a conference, but it was necessary to safeguard the autonomous power of decision of the conference itself.

51. Mr. CASTAÑEDA said he was opposed to the formulation of the article, which differed from that of article 4, although their purpose was similar. The language of article 4 stressed the subsidiary character of the rules in the draft; the language of article 61-B appeared to present the provisions of Part IV as the

general rule, from which the rules adopted by a conference might "derogate".

52. Mr. USHAKOV suggested that, in the French version, the word "*règlement*" be replaced by the word "*règles*", which was a more accurate rendering of the English word "rules".

53. Mr. ROSENNE said that his own suggestion would have been to drop article 61-B altogether, as containing a self-evident proposition which followed for articles 3, 4 and 5 of Part I.

54. With regard to the drafting, he fully shared the doubts expressed by other speakers. The article appeared to suggest that it might be possible for the rules of a conference to derogate from other agreements. The real position was that the rules of a conference could derogate from the draft articles only in respect of the composition of a delegation, not with regard to such matters as privileges and immunities.

55. Mr. KEARNEY (Chairman of the Drafting Committee) said that article 61-B was necessary for purposes of clarification, because if it were omitted the provisions of general international law would apply. In particular, a question would be presented whether the provisions of article 41 of the Convention on the Law of Treaties would cover subsequent agreements between the host State and the organization.

56. With regard to the other points raised, he explained that the Drafting Committee had attempted to combine in article 61-B the meaning of the provisions embodied in articles 3, 4 and 5.

57. Mr. CASTRÉN said he thought the article was necessary, since articles 3, 4 and 5 dealt with rather different questions, which would be out of place in article 61-B. However, there was nothing to prevent the wording of the article from being brought into line with the formulas already adopted.

58. With regard to the word "*règlement*", Mr. Ushakov was probably right in considering it too vague: the intention had probably been to refer to the rules of procedure.

59. Mr. YASSEEN said he thought the first part of the article was unnecessary, since the idea it contained had already been expressed previously.

60. On the other hand, it might be useful to refer to the rules of a conference, which could not be described as an international agreement without distorting the meaning of the term. The problem then arose of the relationship between international agreements and the rules of procedure of a conference. That was the last point which needed to be made quite clear.

61. The CHAIRMAN suggested that article 61-B be referred back to the Drafting Committee.

62. Mr. ROSENNE said the Drafting Committee should note that it was not altogether correct to use the term "derogate" in that context. The intention was to refer to rules that might be different: it was a question of incompatibility, not of derogation.

⁶ See 1053rd meeting, paras. 32-35.

63. Moreover, the Commission's report would have to deal with the relationship between article 61-B and articles 3, 4 and 5.

64. Mr. REUTER said he thought the rules of a conference could only be its rules of procedure.

65. Mr. RAMANGASOAVINA said he considered the article necessary. As far as the drafting was concerned, he preferred the formula used in article 4.

66. Mr. EUSTATHIADES said he agreed with Mr. Ramangasoavina, especially as the formula proposed in article 61-B sounded like an encouragement to derogate from the provisions of the draft articles.

67. With regard to the word "rules", it was naturally the rules of procedure of the conference that were meant. However, the words "rules which may be adopted by a conference" could be understood in a wider sense. The wording should therefore be more precise.

68. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to refer article 61-B back to the Drafting Committee for reconsideration in the light of the discussion.

It was so agreed.⁷

ARTICLE 62 (Composition of the delegation)⁸

69. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 62:

Article 62
Composition of the delegation

A delegation to an organ or to a conference shall consist of one or more representatives of the sending State from among whom the sending State may appoint a head. It may also include diplomatic staff, administrative and technical staff and service staff.

70. The provisions of that article were a repetition of those of article 15 and of other previous articles on the composition of a delegation.

71. Mr. ROSENNE, supported by Mr. RUDA, suggested that the words "shall consist" be replaced by the words "may consist", so as to bring the text closer to that of article 15.

72. Mr. KEARNEY (Chairman of the Drafting Committee) said it was difficult to visualize a delegation without a representative of the sending State.

73. Mr. ROSENNE said that the matter should be left for the sending State to decide; that State might wish to send a delegation consisting only of a secretary.

74. Mr. USHAKOV pointed out that the form "shall" was used in the Convention on Special Missions.

75. Mr. ROSENNE said that the position was different from that of special missions, which operated by agreement between the two States concerned.

76. Mr. RAMANGASOAVINA said he approved of the drafting of the article. The words "shall consist of one or more representatives" did express the idea of a choice.

77. Mr. CASTAÑEDA said that the first sentence of the article was devoid of legal content. The only legal rule in the article was that embodied in the second sentence.

78. He proposed that the article be referred back to the Drafting Committee with the suggestion that the contents of the first sentence, which merely noted the fact that a delegation consisted of one or more representatives, be transferred to article 00 (Use of terms); the second sentence, suitably redrafted, would form article 62.

79. Mr. KEARNEY (Chairman of the Drafting Committee) said that there would be no point in referring the article back to the Drafting Committee without taking a decision on the suggestion made by Mr. Rosenne.

80. The CHAIRMAN said it seemed that the only solution was to take a vote. He accordingly invited members to express their preferences for the two alternative wordings, "shall consist" and "may consist".

There were 8 votes in favour of the words "shall consist", 5 in favour of the words "may consist", and 4 abstentions.

81. Mr. ROSENNE said that technically his suggestion had taken the form of an amendment to the proposal by the Drafting Committee. In view of the manner in which the question had been put to the vote, he took it that the Chairman had merely wished to take the sense of the meeting informally.

Article 62 was adopted.

Organization of future work

[Item 8 of the agenda]

(resumed from the 1066th meeting)

APPOINTMENT OF A SUB-COMMITTEE ON TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

82. The CHAIRMAN said that the officers of the Commission proposed that a sub-committee of ten members be set up to study the problem of treaties concluded between States and international organizations or between two or more international organizations. The ten members would be Mr. Reuter, who would act as Chairman, Mr. Alcívar, Mr. Sette Câmara, Mr. Casttrén, Mr. Ramangasoavina, Mr. Rosenne, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka and Mr. Ustor. The Sub-Committee would convene its own meetings and go about its business in the usual way, following the precedent established in 1963 in connexion with the topic of State responsibility. It would, he hoped, be able to submit a short report in 1971.

⁷ For resumption of the discussion, see 1073rd meeting.

⁸ For previous discussion, see 1052nd meeting, paras. 29-47; 1053rd meeting, paras. 5-46; and 1054th meeting, paras. 3-47.

83. Mr. YASSEEN said he fully approved of the proposed method of work and the choice of chairman for the sub-committee. As far as the members were concerned, he proposed that Sir Humphrey Waldock and Mr. El-Erian should also be included; as the Commission's Special Rapporteurs for the law of treaties and relations between States and international organizations respectively, they could make a valuable contribution to the sub-committee's work.

84. Mr. CASTRÉN supported Mr. Yasseen's proposal.

It was so agreed.

85. The CHAIRMAN said it was understood that there was no urgency about the Sub-Committee's report; the Commission would consider it when it was ready.

Mr. Kearney took the Chair.

Co-operation with other bodies

[Item 6 of the agenda]

86. The CHAIRMAN said that the Asian-African Legal Consultative Committee had sent the Secretariat a number of copies of the report on its ninth session, held in New Delhi in December 1967. Members who wished to read the report could borrow a copy from the Secretariat.

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

87. The CHAIRMAN welcomed Mr. Golsong, observer for the European Committee on Legal Co-operation, and invited him to address the Commission.

88. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) thanked the Commission for the opportunity of addressing it and said that he wished to be associated with the tributes paid to the memory of the late Mr. Gilberto Amado, who had been such a distinguished representative of the Latin American legal tradition.

89. To begin with, he wished to stress the ever-increasing interest which the European Committee on Legal Co-operation was taking in the work of the Commission. From time to time, it organized special meetings to consider parts of the Commission's work, which he hoped would stimulate the interest of the States participating in the work of the Committee and help to clear the way for the signature and ratification of treaties based on drafts prepared by the Commission.

90. The Committee was following with particular interest the Commission's discussion on Mr. El-Erian's report on relations between States and international organizations. The approach adopted by the governments of the member States of the Council of Europe to some of the problems dealt with in that report was, however, very different from that adopted by the Commission; the Council of Europe study approached the problem of the privileges and immunities of international organizations from a strictly functional standpoint. That study,

which accompanied Resolution (69) 29 of the Committee of Ministers of the Council of Europe, on the privileges and immunities of international organizations, had already been transmitted both to the United Nations and to the Commission; it contained among its concluding remarks the following statement: "It must be remembered that the granting of privileges and immunities to an international organization does not exhaust the question of the relations between States and international organizations, such privileges and immunities being conditioned by the general duties which apply both to States and to international organizations".

91. With regard to recent work on international law in which the Commission was particularly interested, the Consultative Assembly of the Council of Europe, alarmed by the high degree of water pollution, especially in the Rhine, had recently recommended, as part of its continuing campaign for the protection of nature, the drafting of an international treaty on the pollution of international fresh water. A draft of such a treaty had been annexed to Recommendation 555 of the Consultative Assembly. The draft had included, *inter alia*, the principle of almost unlimited international responsibility of States for pollution caused in their territory; that principle, with its far-reaching responsibility for lawful acts, had been rejected by the Committee of Ministers, which had given a new mandate to the Secretariat to prepare another draft on the same subject. In view of the Commission's interest in the subject of State responsibility and of the proposal made by the Government of Finland on the same matter for the next session of the United Nations General Assembly, he would keep the Commission informed about further developments in that field.

92. As long ago as 1949, the Commission had had on its list of items for consideration⁹ a topic entitled "Jurisdictional immunities of States and their property". It might therefore be interested to know that a European draft Convention on State Immunity had almost been completed. It was based on the system of a so-called negative list, enumerating those cases in which no immunity from jurisdiction was recognized, and contained provisions concerning the obligation of the defendant State to comply with a judgement given against it.

93. After referring to a general increase in the use of the machinery for the protection of human rights set up under the terms of the European Convention on Human Rights, he paid a special tribute to Professor Eustathiades, one of the draftsmen of the Convention, and to Sir Humphrey Waldock, Vice-President of the European Court of Human Rights, for their contribution to that development. It seemed likely, however, that the functioning of the European Convention and the future implementation of the United Nations Covenants on Human Rights would create certain problems concerning the coexistence of those two different systems. The most important objective was to reach identity of definition of the rights covered by the different instruments, in the

⁹ See *Yearbook of the International Law Commission, 1949*, p. 281.

sense that the European Convention should be aligned with the standards of the world-wide Covenants.

94. In the field of public international law, further progress had been made in a number of sectors. The Committee of Ministers had adopted Resolutions (69) 27 and (69) 28 on the uniform interpretation of European Treaties, and resolutions had also been adopted on the publication of a digest of State practice in the field of public international law. In addition, support had been given to a project of Cambridge University for the production of a unified collection of international treaties.

95. In the field of civil and commercial law, the Committee had established a close working relationship with the United Nations Commission for International Trade Law and a number of instruments had either been completed or were in their final stage. In particular, a Convention relating to stops on bearer securities in international circulation had been opened for signature by member States of the Council of Europe, on the occasion of the Sixth Conference of European Ministers of Justice, on 28 May 1970, at The Hague. In addition, a diplomatic conference was to be convened at Strasbourg in March 1971, to prepare a universal version of the European Convention on the international classification of patents.

96. Progress had also been made during the past year in the field of international criminal law, and at The Hague, on 28 May 1970, two Conventions had been opened for signature by member States of the Council of Europe: the European Convention on the International Validity of Criminal Judgements and the European Convention on the Repatriation of Minors. Further instruments were envisaged, on the settlement of conflicts of jurisdiction in criminal matters and the transfer of criminal proceedings.

97. A number of other matters were under consideration for future inclusion in the legal programme of the Council of Europe, including the problem of hijacking.

98. Another item for future consideration was the judicial settlement of international disputes. Whatever partial solutions might be found at the regional level, it was essential for the maintenance of peace to increase world-wide jurisdiction; he hoped, therefore, that the Commission would in due course consider what steps could be taken to strengthen the role of the International Court of Justice. Whatever progress was made in the codification of international law, the implementation of international instruments could not be efficiently carried out until there was a system in operation for the judicial settlement of disputes relating to the interpretation and application of such instruments.

99. He hoped that the Commission would continue to co-operate closely with his organization, particularly with regard to full exchange of information, and that it would, if possible, send an observer to the November session of the Committee on Legal Co-operation, at which it was planned to complete a draft convention on State immunity.

100. The CHAIRMAN thanked the observer for the European Committee on Legal Co-operation for his very interesting report.

101. Mr. YASSEEN said that co-operation with other bodies throughout the world which were concerned with the codification and progressive development of international law was one of the Commission's most valuable activities, since it kept the Commission in touch with the realities of international life and thus enabled it to perform its difficult and complex tasks more effectively. He had attended a session of the European Committee on Legal Co-operation as the representative of the International Law Commission, and could affirm that that Committee took the greatest interest in statements by the Commission's representatives. He wished to thank Mr. Golsong for the welcome he had received and to congratulate him on his Committee's efforts in the service of the codification and progressive development of international law.

102. Mr. AGO said that the reports and statements of the observer for the European Committee on Legal Co-operation were always of great interest. The Commission had a high regard for the Committee's work, and its valuable co-operation on the topics of relations between States and international organizations and State responsibility gave particular cause for satisfaction.

103. Among the points mentioned by Mr. Golsong, the protection of nature and the protection of the archaeological heritage were especially important.

104. In another sphere, the value of the Committee's work was shown by the fact that Italy, in the first two volumes of its practice in the field of public international law, covering the period 1861-1886, had been able to use the plan drawn up by the Council of Europe for unifying the publication of such digests of State practice. The standardization of the criteria adopted for publication of the digests would make it far easier for students of international law in all countries to consult them. He wished to convey his thanks and congratulations to the European Committee on Legal Co-operation and expressed the hope that the links between it and the Commission would become increasingly close.

105. Mr. RAMANGASOAVINA said he welcomed the close co-operation between the International Law Commission and the European Committee on Legal Co-operation. In the Committee's work, there were several points of interest not only to European States, but also to States in general, and young States in particular, especially the possible differences in the conception and application of law. Differing interpretations of the same notion, for instance, the notion of breach of trust, could be a very serious matter in relations between States, and in that connexion the Committee could play an extremely important role by giving wider publicity to its work on the harmonization of several groups of fundamental legal concepts. The Committee could also help young States by granting fellowships and encouraging work on topics falling within its competence.

106. In order to overcome the lack of confidence on the part of young States in international tribunals, to which Mr. André Gros, a Judge of the International Court of Justice, had referred at the previous meeting, the Committee might perhaps also co-operate more

closely with the Inter-American Juridical Committee and the Asian-African Legal Consultative Committee.

107. Mr. ROSENNE, thanking the observer for the European Committee on Legal Co-operation for his excellent written and oral reports, said they offered the Commission ample food for thought in connexion with both its present and its future programme of work.

108. He especially appreciated the work done by the Committee in co-ordinating the presentation of digests of State practice, which were extremely valuable and had been found useful even outside Europe. He also appreciated the support given by the Committee to the Consolidated Treaty Series now being prepared at Cambridge University, though he wished to draw attention to the fact that Europe was not the only part of the world in which treaty-making had been practised even as far back as 1648.

109. The Commission, which was the only organ with universal responsibility in the field of international law, should always be personally represented at the meetings of inter-governmental bodies with which it maintained relations. He hoped, therefore, that the Chairman of the Commission would be able to attend the next session of the Committee, or send a representative to it.

110. The CHAIRMAN said he too hoped that the Commission could be represented at the Committee's next session.

111. Mr. THIAM said he had listened with the greatest interest to the statement by the representative of the European Committee on Legal Co-operation. He was glad to note that regional organizations in different continents were dealing with the same topics.

112. Like Mr. Ramangasoavina, he hoped that the European Committee on Legal Co-operation would study the question of differences in the interpretation of legal norms and that some form of co-operation on that matter would be established between the secretariat of the Council of Europe and the secretariat of the Organization of African Unity. For although the development of concepts inherited from colonialism was logical and normal in some spheres, such as family law, it was difficult to accept when the differences in interpretation related to fundamental legal principles, particularly human rights, which in developing countries were still very often left to the discretion of governments.

113. Mr. USHAKOV said he warmly thanked the observer for the European Committee on Legal Co-operation for his statement; the whole Commission always greatly appreciated the Committee's work. He regretted that, for health reasons, he had been unable to represent the Commission at the Committee's last session, and hoped that a representative of the Commission would be able to attend its next session.

114. Mr. ALBÓNICO thanked the observer for the European Committee on Legal Co-operation for his report and paid a tribute to the outstanding work done by the Committee, particularly in connexion with the privileges and immunities of international organizations.

He noted with pleasure that the close juridical links between Europe and Latin America were being maintained.

The meeting rose at 1.15 p.m.

1070th MEETING

Monday, 15 June 1970, at 3.15 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States and governments in respect of treaties

(A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1)

[Item 3 (a) of the agenda]

(resumed from the 1068th meeting)

1. The CHAIRMAN invited the Commission to resume consideration of the Special Rapporteur's second and third reports on succession in respect of treaties (A/CN.4/214 and Add.1 and 2, and A/CN.4/224 and Add.1).
2. Mr. AGO said that the Special Rapporteur had submitted admirable reports; generally speaking, he was working on the right lines and should be encouraged to continue in the same way.
3. With regard to the considerations which the Special Rapporteur had set out as an introduction to his second report, he thought that the work of the International Law Association, though useful, left an impression of excessive complexity and a disappointing lack of clarity.
4. As to the relationship between decolonization and succession of States, though he had no wish to minimize the enormous political importance of decolonization, he must stress that decolonization was not a particular aspect of the problem of State succession; it was one of the causes of the birth of new States, but it was from that birth that the problem of succession derived, whether the State was born of decolonization or of some other phenomenon. He would not exclude *a priori* the idea that the creation of new States by decolonization could have special consequences, even in matters of succession, but the general principles were the same, whatever the origin of the new State. It was those principles which the Commission should state, after which it could see

whether there were any cases justifying exceptions to them.

5. Personally he saw hardly any difference, so far as questions of succession were concerned, between the formation of new States as a result of decolonization and their formation as a result of other circumstances, for example, those which had obtained at the birth of such States as Poland and Czechoslovakia or even of former British dominions such as Canada and Australia.

6. The Commission should not allow its vision to be clouded by immediate problems of the day; it should remember that it was working for the future and should therefore not confine itself to cases of formation of States through dismemberment, but also consider the emergence of new States as a result of association or merger, which might very well occur in a few years' time in the very continent where the number of States born of decolonization was greatest. The dominant concern should be to formulate rules applicable to all cases.

7. The Commission should also lay down rules applicable to cases in which succession did not result from the formation of a new entity, but from the transfer of a territory from one entity to another. The general rules would probably be the same, but perhaps separate special rules would have to be laid down.

8. With regard to the articles proposed by the Special Rapporteur, he had the following comments to make. In article 1, he was not sure that that part of the definition which described "succession" as "the replacement of one State by another . . . in the competence to conclude treaties with respect to territory" could be retained, since he questioned whether it was possible to conceive of a State which continued to exist as a subject of international law, but did not have competence to conclude treaties. At the same time, he wondered whether there might not be cases in which legal capacity to conclude treaties had subsisted but the physical capacity to apply them had disappeared: for example, in certain cases of occupation, even in peacetime. It would be premature to answer that question immediately, but it would be well to reflect on it.

9. He approved of article 2 unreservedly, but hoped that the Special Rapporteur would later explain in what cases there could be derogation from the general principle laid down, especially in regard to sub-paragraph (b). For there were exceptions, as was proved by the existence of the Free Zones of Upper Savoy and the district of Gex, and by cases in which the treaties in question dealt with territorial situations such as a right of passage.

10. With regard to the other articles proposed by the Special Rapporteur, generally speaking he approved of their substance and form, subject to a reservation on article 6.

11. Mr. RUDA said he would confine his remarks to the basic rules in the Special Rapporteur's reports, which were those in articles 6 and 7.

12. With regard to the expression "New States", which was used as the title of Part II (A/CN.4/224), in which articles 6 and 7 were placed, he could accept it with the meaning given to it in article 1 (e), on the understanding

that, in subsequent parts, the draft would deal with unions of States, federations of States, termination of protectorates and emancipation of trusteeship territories, and that the definition would later be expanded to cover those situations as well.

13. Articles 6 and 7, on which he would comment together, laid down two rules: the first was that a new State was not under an obligation to consider itself a party to the treaties concluded by its predecessor and in force in respect of its territory at the time of succession; the second was that the new State had the right to consider itself a party to multilateral treaties. In other words, there was no transmission of obligations under bilateral treaties, nor was there a transmission of the right to be a party. In the case of multilateral treaties, on the other hand, the new State had the right to notify its succession.

14. That approach, adopted by the Special Rapporteur, was much more realistic than that of the International Law Association (A/CN.4/214, section I.D); it conformed with State practice and with the general law of treaties. It was desirable that a new State should be given the faculty of choosing which instruments to apply to its international existence and which obligations to take over. There should be no question of any presumption against the new State based on failure to make a notification within a reasonable time, as suggested by the International Law Association.

15. He also agreed with the Special Rapporteur in rejecting the idea that new States must be considered automatically bound by multilateral "law-making" instruments. The contractual element was still the basis of the obligations arising under any treaty. There could therefore be no question of imposing on a State treaty obligations which it had not accepted.

16. He believed that the same argument applied to so-called "general" multilateral treaties with regard to which his reservations, expressed at the time when the Commission had dealt with the subject in connexion with the law of treaties, had been strengthened by the proceedings of the Vienna Conference on the Law of Treaties. General international treaties had rightly not been mentioned in the text of article 7. The right of a new State to notify its succession related to all multilateral treaties, whether "general" or not, with the exceptions mentioned in article 7 itself. That being so, it was perhaps unfortunate that a reference to general multilateral treaties had been included in the commentary, thereby introducing an element of confusion.

17. With regard to the foundation of the right of the new State to become a party independently of the consent of the other parties, the Special Rapporteur had adopted the same approach as the International Law Association. The right of the new State to be a party to a treaty was independent of the faculty of participation in accordance with the final clauses of the treaty. The legal nexus established between the treaty and the territory was sufficient and it was therefore not necessary that the notification of succession should be accepted by the other States concerned.

18. For those reasons, he supported the general rule contained in articles 6 and 7; he would comment on the other articles some other time. He was particularly interested in the treaties which constituted an exception to the rule stated in article 6: the category of dispositive treaties, which it was proposed to examine at a later stage.

19. That exception led him to offer a comment on the definition of "succession" in article 1. The Special Rapporteur had defined succession, in the commentary, as "the fact of the replacement of one State by another"; the cases of transmission of rights and obligations as a result of that succession were stated elsewhere, as exceptions to the general rule of non-transmissibility. It seemed strange that "succession", in the municipal law sense of the transmission of rights and obligations, should be an exception to "succession" as understood in international law.

20. Mr. SETTE CÂMARA said that the definitions in article 1 were a considerable improvement on those contained in the Special Rapporteur's first report.¹ The difficult concept of government succession had been dropped and transfer of sovereignty had become the basic notion for the definition of succession.

21. The broad and flexible terms in which the definition of "succession" was now couched had the advantage of covering the different circumstances in which succession took place and not concentrating solely on cases resulting from decolonization. The adoption of an empirical definition, which referred exclusively to the fact of the replacement of one State by another, kept away from the traditional conception of succession as the actual transfer of rights and obligations from predecessor to successor; and it was that conception which contained all the elements of doubt and controversy which the Commission was called upon to resolve.

22. The Special Rapporteur had acted wisely in placing succession squarely in the context of the general law of treaties, thereby excluding any obsolete analogy with problems of succession in municipal law. The municipal law of succession dealt solely with the devolution of rights and obligations by one person to another, independently of the will of the persons concerned and by the force of law alone. By choosing to be directed by the rules of the general law of treaties, the Special Rapporteur had discarded old ideas concerning automatic continuation of the binding force of treaties as a direct effect of succession.

23. Once it was accepted that succession of States with respect to treaties was part of the law of treaties, rights and obligations could not derive from any other source than the will of the contracting States. Without the unilateral declaration dealt with in article 4 of the draft, treaties signed by the predecessor State with third States did not retain their binding force, since they become *res inter alios acta* for the successor State. He fully supported the Special Rapporteur's approach. Decolonization had brought independence to some 55 nations and it would

be unthinkable to impose on them the automatic transference of rights and obligations on the analogy of succession in municipal law. No country would accept submission to commitments entered into by another country, or agree to accede to independent life with its hands tied by foreign commitments.

24. The practice of States and of depositaries clearly supported the "clean slate" principle. At the same time, new States should not be encouraged to make *tabula rasa* of all their obligations concerning international co-operation. Consideration should therefore be given to avoiding a text which might discourage the conclusion of devolution agreements once and for all. Some wording should be found which would encourage successor States not to discard their obligations under the so-called legislative treaties.

25. On the question of boundary treaties and dispositive treaties, he could not agree with Mr. Tabibi; if such treaties were to be purely and simply subject to the "clean slate" principle, the door would be opened to territorial chaos. The Special Rapporteur, however, had indicated that that important matter would be dealt with in due course.

26. With regard to article 3, the practice of States and of depositaries supported the conclusion that a devolution agreement could not be considered as creating by itself a legal nexus between the successor State and third States. A devolution agreement was little more than a solemn statement of intention concerning the future maintenance in force of pre-existing treaties concluded by the predecessor State. It could hardly be held that a legal presumption of continuity existed. It should be noted that the United Nations Secretariat, in its recent practice, had limited itself to inviting new States, following devolution agreements, to become parties to amending protocols to international conventions signed by their predecessors.

27. The negative rule in paragraph 1 of article 3 was in conformity with the general law of treaties, according to which treaty obligations and rights could not exist without the direct consent of the parties involved.

28. The theory of novation by tacit consent reflected a residual influence of concepts derived from the municipal law of succession. But if that theory were accepted, it would hardly be possible to ascertain the will of the parties, since the necessary steps of the treaty-making process, such as parliamentary authorization for ratification, and ratification itself, had no part in the frequently hasty exchange of statements by which devolution agreements were made. It would not be reasonable to recognize the validity of the automatic inheritance of a whole mass of treaty obligations and rights, when the law of treaties established very rigid rules for ascertaining the expression of the consent of the State to become a party to a treaty.

29. Although devolution agreements were mere statements of intention, they were still significant, because they served to bridge the gap which must otherwise occur at the moment of independence if all treaty links were automatically severed. The complexity of modern inter-

¹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 90.

national life and the closely knit fabric of inter-State obligations and rights would make it extremely difficult to reconstitute the net of normally binding treaties within which all new States had to live. Devolution agreements were therefore useful, since they offered new States an expedient and effective means of concluding the treaties indispensable for their everyday life.

30. Some authors maintained that a devolution agreement was necessary to indemnify the predecessor State with regard to treaty obligations, as from the date of independence of the new State. That argument was not convincing, since the general law of treaties would exempt the predecessor State from any obligation concerning the territory of the new State as from the date on which that State had emerged into international life.

31. The two paragraphs of article 3 had been carefully drafted to include only clear and indisputable aspects of devolution agreements, such as the fact that they created no legal nexus between the successor State and third parties and that obligations and rights regarding third States were governed by the provisions of the articles now being drafted. He supported the substance of article 3, but would suggest the introduction of wording that would not completely discourage the conclusion of devolution agreements. Though limited in their scope, those agreements constituted good evidence of the intentions of new States and helped to secure their recognition. He would deal with the other draft articles at a later stage.

32. Mr. ALBÓNICO said he supported the Special Rapporteur's method of treating the problem of succession in general and not simply from the point of view of decolonization.

33. The eight resolutions adopted at Buenos Aires by the International Law Association were based on premises which conflicted with those adopted by the Special Rapporteur; they also conflicted with State practice and occasionally even with the views of authors. The propositions embodied in those resolutions might be desirable as a matter of policy—as the Special Rapporteur had indicated (A/CN.4/214, section I, para. 22)—but not as a rule of law acceptable to the International Law Commission and to States.

34. With regard to the two alternatives presented by the Special Rapporteur in the last paragraph of the introduction to his second report, he believed that the decision should depend on the intrinsic character and purposes of each treaty.

35. He favoured the Special Rapporteur's conclusions based on the rules of the general law of treaties. Those conclusions were also in keeping with the draft declaration adopted, at its 1970 session at Geneva, by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States,² in particular the part relating to the principle of equal rights and self-determination; the Special Committee had recognized that a colony was a separate entity from its

metropolis—an element which had not been taken into consideration by the International Law Association.

36. With regard to individual articles, he supported the definition of "succession" contained in sub-paragraph (a) of article 1; he understood that term as referring only to the fact of the replacement of one State by another and not to the transmission of the contents of the treaty. The concept of succession was a specific and not a general concept; it was used for the sake of convenience and must not be confused with the concept of succession in municipal law.

37. The definition of a "new State" in sub-paragraph (e) of article 1 was in keeping with the plan of work adopted.

38. He agreed with the Special Rapporteur's decision not to include a definition of a "treaty" and to drop the reference to succession of governments. He also approved of the introduction of the concept of sovereignty, which did not appear in the Special Rapporteur's first report.

39. He noted that, for the time being, the draft did not refer to bilateral treaties and only covered multilateral treaties concluded between States.

40. Although the Special Rapporteur had not asked for comments on article 2, he wished to say that he fully agreed with the contents of that article, which conformed with the principle of "moving treaty frontiers", both in its positive and in its negative aspects.

41. With regard to article 3, he considered that devolution agreements were valid, but created obligations only between the predecessor State and the successor State; for third States they constituted *res inter alios acta*. The predecessor State was freed from liability by virtue of the principle embodied in article 2; the rights and obligations of the successor State resulted from general international law. A devolution agreement effected no more than a transfer of responsibilities and merely expressed the will of the successor State to maintain those treaties of the predecessor State which were applicable to the territory. The registration of a devolution agreement had no automatic effects; it was merely the fulfilment of the obligation created by Article 102 of the United Nations Charter.

42. He accepted the rule in paragraph 2 of article 4 and the exceptions stated in paragraph 3; he had some doubts, however, concerning the exception in sub-paragraph (d) of paragraph 3, because nothing was said about how the conduct of the States concerned would be judged.

43. The effects of a unilateral declaration were limited to the party which made it. The position was different from that contemplated in article 25 of the Vienna Convention on the Law of Treaties,³ in which the treaty was not in force; in the present case the treaty was in force, but only between the predecessor State and a third State.

44. The Special Rapporteur had not asked for comments on article 5. He noted, however, that paragraph 1 of that article was in keeping with article 36 of the Vienna

² See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18*, para. 83.

³ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/27* (United Nations publication, Sales No.: E.70.V.5).

Convention on the Law of Treaties and that paragraph 2 conformed with article 35 of that same Convention.

45. Article 6 contained the basic rule. A very clear distinction was drawn between the obligation of succession envisaged in that article and the right to succession contemplated in articles 7 and 8.

46. He noted the adoption by the Special Rapporteur of the *tabula rasa* doctrine, which was the only acceptable one. That doctrine had been applied in some bilateral treaties by Afghanistan, Argentina and Israel; it was also applicable to multilateral treaties, including those which were of a law-making character.

47. With regard to article 7, on the right to notify succession in respect of multilateral treaties, he accepted the rule stated in it only for multilateral treaties of a general character. The treaty must have been internationally in force for the territory in question at the time of the acquisition of independence. If there was no reference to territory, article 29 of the Vienna Convention on the Law of Treaties would apply. The legal nexus between the territory and the treaty must exist at the time of succession for notification to be possible. The right acquired by the successor State was that of notifying its will to commit itself as an independent party to the treaty.

48. Under article 8, on multilateral treaties not yet in force, the successor State could ratify a treaty which had only been signed by the predecessor State. The signature of a treaty gave rise to certain obligations, in accordance with article 18 of the Vienna Convention on the Law of Treaties. He accepted the proposition, in paragraph 2 of article 8, that a new State which established its consent to be bound under the provisions of paragraph 1 should be reckoned as a party for the application of provisions on entry into force.

49. Article 8, as formulated by the Special Rapporteur, differed from the solutions adopted by the International Law Association, which he did not find acceptable. The Association's approach conflicted with the declaration adopted by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, in particular with its statement of the principle of equal rights and self-determination of peoples, according to which the territory of a colony had a legal status separate and distinct from that of the metropolitan country.

50. Subject to those comments, he accepted and supported the six articles on which comments had been requested.

51. Mr. USTOR, after congratulating the Special Rapporteur on his brilliant report, said that in his view the Commission should base its work on article 73 of the Vienna Convention on the Law of Treaties, which stated that "The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States...". The Commission now had to answer the questions which might arise in regard to a treaty from a succession of States; it should, however, follow in the cautious path taken by the Vienna Convention and make all necessary reservations con-

cerning boundaries, hostilities, military occupation and the like.

52. The Commission would have to be very clear about what it believed State succession to be and what that term meant in article 73 of the Vienna Convention. That question appeared to have been answered in article 1 of the Special Rapporteur's draft articles and in his commentary thereto. The Special Rapporteur had been right to start from the assumption that it was necessary to consider State succession as a fact, or as several facts; he fully agreed with that interpretation and thought it would even be advisable to state explicitly in article 1 that succession was a fact, and possibly to expand the definition along the lines of that given in the *Dictionnaire de la terminologie du droit international*, quoted in paragraph (1) of the commentary.

53. With regard to articles 3 and 4 on devolution agreements and unilateral declarations, he noted that the commentaries to those articles referred exclusively to cases of "new States", as that term was used in the report (A/CN.4/224, section II). He wondered, therefore, if those articles should not be transferred to the part of the draft which dealt with new States. On the other hand, if the Special Rapporteur believed that such agreements and declarations might also be imaginable in connexion with other situations, that would also have to be explained in the commentary. In general, however, the idea expressed by the Special Rapporteur in article 3 seemed to be consonant with the *pacta tertiis* rule and was accordingly acceptable.

54. Article 4, concerning unilateral declaration by a successor State, provided in paragraph 2 (c) that third States had a certain right to object to the provisional participation of a successor State in treaties. That right of objection seemed to be doubtful in the case of multilateral treaties, where the third State had no right of objection, according to article 7, if the successor State declared itself not provisionally but definitely bound. He supported the provision of article 7 concerning the right of a new State to notify its succession in respect of multilateral treaties. In the latter case, a third State had no right to object to the participation of a new State, which could become a party to the treaty independently of the other parties. There, the Special Rapporteur had drawn a correct conclusion, which he thought should be stated clearly in article 7 itself.

55. In that connexion he would venture to go further than the Special Rapporteur. In his opinion, when a new State emerged, it had an inherent right to become a party to any general multilateral treaty, even if its predecessor State had not been a party thereto, since the case was not one of treaty-succession proper. The Vienna Conference had, unfortunately, refused to accept the idea that general multilateral treaties should be open to all States, and it was not accepted in United Nations practice either.

56. He presumed that article 8 was intended to be read together with article 7, which contained certain exceptions in sub-paragraphs (a), (b) and (c) that should also be included in article 8.

57. Lastly, he was in general agreement with the rule in article 6 that there was no obligation on the successor State to assume its predecessor's treaties, although there might be some exceptions, as suggested in paragraph (18) of the commentary. It should be made clear, however, that the rule stated in the article applied only to treaties in their formal sense and not necessarily to the substance of them. And it should also be made clear that, as stated in paragraph (9) of the commentary, the rules of the treaty would also bind new States if they were rules of generally accepted customary law.

58. Mr. ROSENNE, after associating himself with the tributes paid to the Special Rapporteur, said he was in general agreement with most of what was said in his reports, which provided a more realistic answer to contemporary needs than did the resolutions adopted by the International Law Association.

59. He would answer the Special Rapporteur's questions within the framework of his intervention at the 967th meeting,⁴ when he had agreed with the statement in paragraph 14 of the Special Rapporteur's first report that: "After all, on the emergence of a new State, the problems of succession which arise in respect of *treaties* are inevitably problems that involve old States no less than the newly emerged one. Succession in respect of a *treaty* is a question which by its very nature involves consensual relations with other existing States and, in the case of some multilateral treaties, a very large number of other States. Today, moreover, on the emergence of a new State the problems of succession will touch just as many recently emerged States as they will 'old' States. The Commission cannot fail to give particular importance to the case of 'new' States because it is both the commonest and the most perplexing form in which the issue of succession arises. But there is a risk that the perspective of the effort at codification might become distorted if succession in respect of treaties were to be approached too much from the viewpoint of the 'new' State alone."⁵

60. He had been unable to accept the view expressed by the Special Rapporteur and some members of the Commission, at its twentieth session, that "in the case of large multilateral treaties an extensive practice indicated that there might exist at least one basic rule: that a new State was entitled, by using one procedure or another, to continue the application of the treaty to its own territory as a party in its own right, independently of the actual provisions of the final clauses of the treaty concerning participation".⁶ He had unfortunately been absent when that paragraph of the report had been adopted at the 989th meeting; otherwise he would have expressed reservations concerning it. He would have preferred the idea expressed in paragraph 14 of the Special Rapporteur's first report to be retained.

61. With regard to the general delimitation of the subject-matter now before the Commission, he accepted the principle stated in paragraph 22 of the Special Rapporteur's second report that "the question with which the Commission has to concern itself is believed to be not so much whether decolonization may constitute a special new form of succession as what may be the implications of the principles of the Charter, including 'self-determination', in the modern law concerning succession in respect of treaties." He also agreed with the statement in paragraph 4 of the Special Rapporteur's third report, that the task of codifying the topic was "more one of determining the implications of cases of succession within the law of treaties than of integrating treaties into a general law of State succession." The Commission should, however, have a unitary concept of the element of the fact or facts which set in motion the rules of succession, however formulated.

62. He accepted paragraphs 8 and 9 of the Special Rapporteur's third report, concerning the temporary limitation of Part II of the draft articles to "new States" as defined in article 1 (e).

63. With regard to the nature and form of the work, he agreed with the Special Rapporteur that his study of succession in respect of treaties, regarded as a sequel or an addendum to the Vienna Convention, should be cast in the form of draft articles on the model of a convention, leaving open the ultimate form which they might take (A/CN.4/214, paragraph 7). In his opinion, the draft articles should be kept within the general framework characteristic of the Vienna Convention, bearing in mind four points. First, the determining place of the autonomy of the parties should not be impaired. Secondly, account should be taken of the general unwillingness of the Commission, as expressed on various occasions, and subsequently of the Vienna Conference to make any distinction of substance between bilateral and multilateral treaties. Thirdly, account should also be taken of the refusal of the Commission, and of the Vienna Conference, to accept any classification of treaties as a basis for codification; no distinction, therefore, should be made between a *traité-loi* and a *traité-contrat*. In his introductory statement, the Special Rapporteur had hinted that he might feel compelled to abandon those first three points, but he (Mr. Rosenne) felt strongly that they should be retained. Fourthly, it should be clearly recognized, as the Commission itself had decided many years ago, that the codification related to the instrument in which an obligation was embodied and not to the obligation itself.

64. Great care should be taken not to cast the articles or the commentaries in terms according to which depositaries would have wider powers and competence in the case of succession than those normally accorded to them under articles 76 and 77 of the Vienna Convention, in the sense that they might take decisions which would be binding on States independently of the terms of the treaty or the will of the contracting States. On that point he differed from the Special Rapporteur in that, in his opinion, any wider view of the functions of a depositary was not borne out as a matter of general principle, either

⁴ See *Yearbook of the International Law Commission, 1968*, vol. I, pp. 139-141, paras. 6-21.

⁵ *Op. cit.*, 1968, vol. II, p. 90.

⁶ *Ibid.*, p. 222, para. 88.

by the Secretariat memorandum of 1962⁷ or by the series of studies prepared by the Secretariat.⁸ The most that could be said was that in novel situations the Secretary-General and the other depositaries had produced workable solutions which had been consolidated by operation of the principle of tacit consent. In that connexion, the various circular letters issued by the Secretariat were more than mere notifications and amounted to a form of consultation recognized as such by their recipients, who, if they wished to make objections, were free to do so. It should be borne in mind, however, that there was more to depositary practice than might at first appear: in some cases, for example, it might be necessary to consult the United Nations Journal and Press releases, as well as to ascertain the date on which treaties were registered *ex officio* by the Secretary-General.

65. With regard to the introductory part of the draft articles, any difficulties he had with its arrangement were due to the general uncertainty about the fate of the articles in the first report. In his opinion, the Commission should take the Vienna Convention as a model and start with a positive statement as to the treaties and States to which the draft articles were intended to apply, and the exceptions to be made. That might be done by combining an idea similar to that expressed in article 1 of the Vienna Convention with articles 2 and 3 in the Special Rapporteur's first report suitably adapted.

66. With regard to article 1, as it appeared in the Special Rapporteur's second and third reports, he questioned whether sub-paragraphs (b), (c) and (f) were really necessary. Sub-paragraph (a), on the other hand, was intended to state in normative terms the actual fact of State succession. However, the two abstract nouns "sovereignty" and "competence" did not facilitate the understanding of that text, and the word "competence", in particular, might have a different meaning from that given it in article 46 of the Vienna Convention. The French version of the second report used the word "*capacité*"; and if that was a conceptual mistranslation it illustrated the difficulty. He suggested that it might be better to explain in the commentary how the Commission understood the concept of succession.

67. In article 3, he noted with appreciation that the title referred to "agreements" rather than to "treaties" for the devolution of treaty obligations. He doubted whether the article was really necessary, however, since it seemed to say that those agreements were to be treated mainly as statements of policy, and if what was involved was really the interpretation of such statements, the article was unnecessary. That form of agreement raised an issue of the mutual responsibility of the two States for the implementation of the treaties concerned, not merely as between the parties to the devolution agreement, but also as between them and the other parties to the treaties. In that connexion, the expression "third States" was one which, in the light of the relevant pro-

visions of the Vienna Convention, called for some reserve and might even be misleading. That notwithstanding, he agreed generally with what the Special Rapporteur had said in the commentary to article 3.

68. He noted that article 4 could refer to two types of unilateral declaration, one of which was couched in general terms, while the other mentioned specific treaties. The former were also statements of policy, but if accepted by the other parties to the treaties, either actively or passively, would lead to the provisional application of the treaty, whereas the second type involved the expression of a State's consent to be bound by a specific treaty. In that connexion too the important problem was that of responsibility for implementation of the treaty vis-à-vis its other parties.

69. With regard to article 6, he recalled that in 1968 he had stated that the concept of succession was inadmissible if it implied some automatic process independent of the consent of the parties.⁹ He therefore accepted the proposal.

70. In connexion with article 7, he did not think that in principle it was right to disregard any express terms of a treaty concerning the right of participation, and in that respect there was no difference in principle between bilateral and multilateral treaties as far as substantive law was concerned, though there obviously would be differences with respect to procedure. However, the Secretariat memorandum of 1962 did not appear to indicate to what extent participation clauses played a role, or to what extent the depositary accepted notifications of participation through succession from States which would not have been entitled to accede under the participation clauses, although that was a key issue. If the State concerned would have been entitled to accede, there was little real need for the depositary to consult with the other parties, and for that reason he (Mr. Rosenne) had doubts about paragraphs (2) to (4) of the commentary. He thought that the later Secretariat studies might bring that aspect out more clearly, as was illustrated by the passages relating to private law rights in industrial and intellectual property in Israel, quoted in the 1968 study.¹⁰ His conclusion was that the terms of the participation clause should normally be decisive as to the right to participate, but that its procedural provisions might be waived by tacit consent. That would correspond to article 11 of the Vienna Convention. He also believed that paragraph 139 of the Secretariat memorandum,¹¹ referred to in paragraph (8) of the commentary to article 7, related to one exceptional instance.

71. He thought that more information was needed on practice in the fringe area in which the new State was not, apparently, entitled to participate under the participation clause. Most of the precedents mentioned in the series of documents before the Commission dealt with

⁷ Op. cit., 1962, vol. II, pp. 106-151.

⁸ Documents A/CN.4/149 and 151 (1962), A/CN.4/157 (1963), A/CN.4/200 (1968) and A/CN.4/210 (1969), published in vol. II of *Yearbooks* for the years indicated.

⁹ See *Yearbook of the International Law Commission, 1968*, vol. I, p. 139, para. 8.

¹⁰ Op. cit., 1968, vol. II, p. 15, para. 34 *et seq.* and p. 63, para. 277 *et seq.*

¹¹ Op. cit., 1962, vol. II, p. 123.

cases in which there was a considerable overlap. In those cases the difference between succession and accession related essentially to the time from which the participation was effective, in the one case the date of independence of the successor State, in the other the date when the instrument of accession became operative.

72. He had certain reservations concerning article 2, since sub-paragraph (b) might not be sufficient to exonerate the predecessor State from further responsibility for the application of the treaty. It was important to keep the draft articles within the framework of the law of treaties as such, and not to glide over into other branches of international law.

73. Lastly, with regard to paragraph (6) of the commentary to article 7, he disagreed with the Special Rapporteur's view that the International Law Association's way of formulating the criterion appeared to be more exact than that used in the Secretary-General's letter, since the expression "internationally in force" referred to the validity of the treaty as between the parties. In his opinion, the approach adopted by the Secretary-General was more pragmatic.

The meeting rose at 6 p.m.

1071st MEETING

Tuesday, 16 June 1970, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiadis, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States and governments in respect of treaties

(A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1)

[Item 3 (a) of the agenda]
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's second and third reports on succession in respect of treaties (A/CN.4/214 and Add. 1 and 2, and A/CN.4/224 and Add. 1).

2. Mr. CASTAÑEDA said that there was a great wealth of precedent and legal opinion on succession in respect of treaties, but both were far from uniform, so that the whole subject was to some extent in a state of

anarchy. It had required a great effort on the part of the Special Rapporteur to analyse and systematize the available material so that he could deduce two or three basic principles from it and formulate—up to the present—some twelve legal rules.

3. He was in full agreement both with the Special Rapporteur's general approach and with the formulation of the articles, so that his remarks would be merely comments, not criticisms.

4. The nature of the Special Rapporteur's reports ensured that the draft would command the approval of the majority of States and would become an international treaty. If the term "progressive" had not been misused, he would describe the draft as progressive. Where two interpretations were possible in regard to a genuinely fundamental question, the Special Rapporteur had invariably adopted the one which responded best to the interests of the international community. The draft was thus progressive by comparison with the reactionary approach to the obligations of newly independent States adopted by the International Law Association.

5. The opinion held for some time by the Secretary-General of the United Nations, which exaggerated the effect produced by devolution agreements, could not be described as progressive. There had thus been no lack of alternative approaches, but the Special Rapporteur had fortunately adopted none of them.

6. He agreed that decolonization should not be dealt with separately as a specific type of succession. But he could not agree with Mr. Ago's view that the fundamental rules would prove to be the same in all cases of succession, whether originating from decolonization or from other causes. The Special Rapporteur's research had shown precisely the contrary.

7. The articles in Part II were, by their very nature, applicable only to new States. But the Special Rapporteur had gone even further and had proposed a new legal concept: that of the "new State" which was, precisely, a State emerging from decolonization. In his commentary to article 1 (additional provisions), he had described a "new State" as "a State which has arisen from a succession where a territory which previously formed part of an existing State has become an independent State" and had gone on to explain that his definition covered "a secession of part of the metropolitan territory of an existing State and the secession or emergence to independence of a colony" (A/CN.4/224). He had expressly excluded from the concept of a "new State" the cases of a union of States, a federation with an existing State and even the termination of certain colonial situations such as trusteeships and protectorates.

8. Again, in his commentary to article 6, the Special Rapporteur had cited, in support of the "clean slate" principle, a passage from McNair which referred to "newly established States which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor".¹ It was thus clear that "new States" were exclusively former colonies which had become independent States.

¹ McNair, *The Law of Treaties* (1961), p. 601.

9. With regard to the use of terms, he welcomed the distinction made by the Special Rapporteur between the actual fact of the replacement of one State by another and the transfer or devolution of the rights and obligations of one State to another. The Special Rapporteur had rightly made it clear in the text of article 1 itself that "succession" referred to the actual fact of replacement, so as to avoid the confusion that might result from the current meaning of the term "succession" in municipal law as the devolution *ipso jure* of rights and obligations on the occurrence of a certain event, a situation which did not obtain in international law.

10. He fully understood the Special Rapporteur's reasons for not formulating the definition of succession solely in terms of a change of sovereignty, because in such cases as the termination of a protectorate or a trusteeship there was no change of sovereignty, since the predecessor State did not exercise sovereignty; there was only a change in the legal competence to conclude treaties in respect of the territory. At the same time, he was not altogether happy about an approach which might have the effect of suggesting that protectorates and trusteeships were permanently legitimate institutions. The few remaining cases of protectorates and trusteeships could at best be regarded as temporarily legitimate.

11. He supported the rule in article 2 (A/CN.4/214) with regard to change of sovereignty; the provisions of that article were consistent with the "moving treaty frontiers" rule.

12. Mr. Ago's remarks on acts of war and occupation in regard to succession² were correct. In that connexion it was important to remember the rule of non-recognition of territorial conquests by force. That problem was outside the topic of succession in respect of treaties, however, and even outside the whole subject of the law of treaties. The best solution was that proposed by the Special Rapporteur himself, in paragraph (4) of his commentary to article 1: to formulate "a general article reserving the question of military occupations altogether from the draft, just as such special cases as 'aggression' and the 'outbreak of hostilities' have been reserved from the draft Convention on the law of treaties."

13. Article 3 contained the important rule that a devolution agreement did not by itself bind the successor State vis-à-vis third States. The Special Rapporteur had rightly discarded the idea put forward by the International Law Association that there should be a presumption that the new State was bound by treaties previously in force in respect of its territory, unless it notified its contrary intention within a reasonable period of time. There was no justification for placing the onus of notification upon the successor State. A newly independent State necessarily faced a period of initial disorganization, during which it was difficult for its Ministry of Foreign Affairs to obtain the views of other ministries regarding the advisability of continuing certain treaties in force. The inevitable delays resulting from that natural disorganization should not be allowed to

result in the injustice of imposing upon the new State an obligation which, after due consideration, it would not have wished to assume.

14. The Special Rapporteur had very properly adopted the opposite principle: the successor State must express its intention of remaining bound by the treaty. That rule was more in keeping with the general *tabula rasa* principle and was also more realistic and more in keeping with the principle of self-determination. In a working paper submitted to the Commission's 1963 Sub-Committee on Succession of States and Governments,³ Mr. Bartoš had pointed out the doubtful legal value of devolution agreements, which sometimes represented part of the price that had to be paid by a new State to the former metropolitan Power to obtain its independence. There was no need in the present draft, however, for a specific article on the validity of devolution agreements, because the position was safeguarded by the application of the rules in the Vienna Convention on the Law of Treaties.

15. The rule that a devolution agreement could not of itself operate the transmission to the successor State of rights and obligations resulting from a treaty concluded by the predecessor State had its basis in the *pacta tertiis* rule. As far as third States were concerned, the devolution agreement was *res inter alios acta*. It was, moreover, a general principle of the internal law of practically all countries that a transfer of obligations could not be effected without the consent of the beneficiary.

16. It was true that the law of many countries allowed the opposite operation, namely, the transfer or assignment of a credit, or more generally a right, without the consent of the debtor, as in the case of negotiable instruments. Situations of that type, however, had arisen from the need to facilitate trade transactions, and the possibility of assigning a credit without the consent of the debtor in certain cases must be regarded as a phenomenon peculiar to internal law. But that situation could not be imported into international law. For a State to owe something to a small country was very different from owing something to a great Power. It was unthinkable that an obligation should be assigned without the consent of the debtor party. It was only proper to require the successor State to express clearly its intention to remain bound by the treaties concluded by the predecessor State.

17. He supported the Special Rapporteur's thesis that devolution agreements must be regarded as a mere expression of intention. He also supported his interpretation of the significance and bearing of international practice in the matter and his reasons for not agreeing with the Secretary-General's former practice of considering that devolution agreements could have the effect of making a successor State a party to multilateral treaties signed by the predecessor State.

18. He agreed with Mr. Sette Câmara, however, on the usefulness of devolution agreements as evidence of the intention of successor States and on the need not to

² See previous meeting, para. 8.

³ See *Yearbook of the International Law Commission, 1963*, vol. II, pp. 293-297.

discourage the future conclusion of such agreements.⁴ At the same time, it would be a mistake to overlook the dangers to which Mr. Bartoš had drawn attention in his working paper in 1963, which had arisen from the historic conditions under which devolution agreements had been signed.

19. With regard to the definition of a "new State" in sub-paragraph (e) of article 1 (A/CN.4/224), he suggested that the rather inadequate wording "'New State' means a succession where a territory which previously formed part of an existing State has become an independent State" should be replaced by language similar to that used in paragraph (2) of the commentary, where a new State was described as "a State which has arisen from a succession where a territory which previously formed part of an existing State has become an independent State".

20. The essential rules were those contained in articles 6 and 7 (A/CN.4/224). Under article 6, the successor State was not bound by the treaties of the predecessor State, nor was it under an obligation to become a party to those treaties. The article thus expressed the "clean slate" rule, with which he agreed; he also agreed with the Special Rapporteur's interpretation of State practice and of the reasons for not considering multilateral treaties of a legislative character as an exception to the rule.

21. In connexion with the views put forward by Mr. Jenks,⁵ he noted the very subtle distinction made by the Special Rapporteur in paragraph (9) of his commentary to article 6 between "the law contained" in a multilateral treaty "in so far as it reflects customary rules", which was binding on the successor State as generally accepted customary law, and the erroneous suggestion that "because a multilateral treaty embodies custom, a new State must be considered as *contractually* bound by the treaty *as a treaty*".

22. He also found it acceptable that the only exception to the *tabula rasa* principle should be that of the so-called "dispositive" or "territorial" treaties which laid down boundaries or established encumbrances or servitudes—though legal opinion did not view with much favour the survival of the concept of servitudes in international law. In any case, those were exceptions and as such must be interpreted in a restrictive manner. There would be no justification for enlarging the scope of the exceptions by way of interpretation.

23. Hence, as the Special Rapporteur had pointed out in paragraph (17) of his commentary to article 6, there was no basis for regarding as dispositive or territorial treaties such instruments as Customs and transit agreements. Those agreements naturally related to a territory in the sense that any international instrument applied to a given territory, but it would be an abuse of language to describe them as "territorial" treaties.

24. Article 7 contained the fundamental rule which enabled the successor State to become, if it so wished, a

party to multilateral treaties concluded by the predecessor State, by notifying its intention of doing so. The excellent study of State practice by the Special Rapporteur made a very convincing case for the proposition that the rule in article 7 had become a rule of customary international law. It was a matter for surprise that other scholars—except Zemanek—should not have arrived at the same conclusion. Perhaps that situation could be attributed to the fact that the relevant State practice was very recent, so that the rule of customary law could be said to have only just been established.

25. It was important to note that, in the establishment of the right of the successor State to become a party to multilateral treaties, the will of third States parties to those treaties did not play any part. The position was well illustrated by the practice of the Secretary-General referred to in paragraph (2) of the commentary to article 7. Whenever a former dependency of a party to multilateral treaties of which he was the depositary emerged as an individual State, the Secretary-General wrote to that State inviting it to confirm whether it considered itself to be bound by the treaties in question. The Secretary-General did not consult the other parties before writing, nor did he ask the views of those parties or await their reactions when he notified them of an affirmative reply received from a new State. The Secretary-General acted on the assumption that the successor State was entitled to consider itself bound by the multilateral treaties in question in its own right. There was therefore no question of novation.

26. The question accordingly arose of determining the legal foundation of the rule in article 7. Its foundation was not the law of treaties, since, as Mr. Rosenne had observed, that law was firmly anchored in the principle of the autonomy of the will of the parties, whereas in the case under consideration the will of third States parties to a multilateral treaty did not play any part. There were, of course, considerations of justice and fairness which militated in favour of the proposed rule and it was, moreover, in the interests of the continuity of treaty relations. In any case, the practice of States was uniform in the matter.

27. The Special Rapporteur himself had put forward the concept of a legal nexus between the multilateral treaty and the territory of the new State. Personally, he found it difficult to understand the concept of such a nexus as the legal foundation of the rule in article 7. Every treaty, of course, applied to a specific territory but, except for treaties establishing rights *in rem*, there was no special connexion between a treaty and a territory.

28. There was no basis in the law of treaties for the rule in article 7, since it did not conform with the rules on the effects of treaties. That being so, the only foundation that could be assigned to it was a rule of customary international law deriving from the practice of States. But that practice had evolved in, and belonged to, the sphere of the law of succession more than that of the law of treaties.

29. In any case, as the Special Rapporteur had pointed out in paragraph (8) of his commentary to article 7, the question whether the right stated in article 7 derived from

⁴ See previous meeting, paras. 29-31.

⁵ See document A/CN.4/224, para. (8) of commentary to article 6.

a principle of the law of treaties or from a principle of "succession" was "primarily a doctrinal question". The different views on the answer to that doctrinal question did not in any way affect either the nature or the scope of the rule which had been proposed by the Special Rapporteur and with which he was in full agreement.

30. With regard to the formulation of article 7, he noted that its provisions were intended to acknowledge the right of the successor State to succeed to the multilateral treaties in question. That being so, the article should have been couched in terms of the statement of the right itself; as drafted, it merely said that the new State was "entitled to notify" that it considered itself a party to the treaty in its own right. That formulation had the disadvantage of placing the emphasis on the notification, which was only an instrument for the existence of the right.

31. He fully agreed with the three exceptions stated in sub-paragraphs (a), (b) and (c), but wished to draw attention to a particular modality of one of those exceptions, which he would illustrate by two examples.

32. The first was drawn from the Buenos Aires Protocol amending the Charter of the Organization of American States,⁶ which had recently come into force. The new article 8 laid down the rule that no final decision should be taken with respect to a request for admission to the OAS of a political entity whose territory was subject to a dispute with one or more member States. Perhaps that case might come within the scope of sub-paragraph (b), since it related to the "constituent instrument of an international organization", namely, the OAS Charter.

33. His second example was drawn from the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America,⁷ article 25 of which precluded the accession to that Treaty of a State whose territory was the subject of a dispute with one or more Latin American States.

34. Mr. CASTRÉN said that he had already made a number of general comments on the definitions in article 1⁸ and would now like to state his position on articles 3, 4, 6, 7 and 8. Next year he might deal with articles 2, 5 and 9-12.

35. The principle stated in paragraph 1 of article 3 was correct and should be included in the draft. Devolution agreements could, in fact, be binding only on the parties to them, namely, the predecessor State and the successor State. In paragraph (9) of his commentary to the article, the Special Rapporteur had rightly based that solution on the general rules of international law confirmed by the Vienna Convention on the Law of Treaties and in paragraph (25) he had pointed out that the practice of States with regard to such agreements was too diverse for them to be considered as creating, of themselves, a legal nexus between the successor State and the States linked to the predecessor State by treaties

applying to the territory affected by the change of sovereignty.

36. The Special Rapporteur had been right to devote a separate article containing detailed provisions to unilateral declarations by successor States. As he had shown in his commentary to article 4, in the process of decolonization which had followed the Second World War, such declarations had been made by several States which had achieved independence. They had the undoubted advantage of promoting the continuity of contractual relations in the international community of States, and that was generally in the interests of all parties. The practice of the new States had not been entirely uniform in the matter, but some common principles did emerge and it was therefore possible, on the basis of that practice, to frame rules for the guidance of States and for the interpretation of unilateral declarations, which were not always complete or clear. That was the task which the Special Rapporteur had set himself in presenting article 4 to the Commission and he seemed to have been very successful.

37. Of course, article 4 also contained some rules *de lege ferenda*, which were necessary if a complete and satisfactory mechanism was to be established. The new rules were by no means too radical, quite the contrary. Their purpose was merely to ensure that the treaties in question were applied on a provisional basis if no objection had been expressed within a specified time. After reviewing the treaties, the successor State would negotiate with the States which had concluded them with the predecessor State, in order to reach agreement on what should finally be done.

38. Several possibilities were then open to the States concerned: they could terminate the treaty or continue to apply it with or without agreed amendments. For practical reasons, the requirement that third States must communicate their decision within a fairly short time if they were opposed to even the provisional application of the treaties, was justified. If they omitted to do so inadvertently or for some other reason, they might still, under paragraph 3 (a), terminate the provisional application of the treaty by simple notification of the successor State. With the other cases of termination of the provisional application referred to in paragraph 3, a complete list of adequately described cases was provided. Sub-paragraph (d) might lend itself to divergent interpretations, but it should nevertheless be retained.

39. He also approved of the exceptions to the general rule of provisional application set out in paragraphs 2 (a) and (b). In paragraph (22) of his commentary, the Special Rapporteur had explained that he had drafted sub-paragraph (a) as a precaution, pending the Commission's conclusions as to whether any treaties were succeeded to automatically by a newly independent State. It was interesting that some new States had explained in their declarations that they regarded themselves as bound by certain unspecified treaties in virtue of the rules of customary international law. In his course at the Academy of International Law at The Hague in 1967, Professor Jennings, dealing with State succession and treaties, had expressed the view that there were some

⁶ Official Documents of the Organization of American States, document OEA/Ser.A/2/Add.

⁷ Official Records of the General Assembly, Twenty-second Session, Annexes, Agenda item 91, document A/C.1/946.

⁸ See 1067th meeting, paras. 54-56.

treaties—not only “law-making” treaties—such as multilateral conventions of a humanitarian, technical and administrative character, which could be regarded as subject to a régime of continuity and bound new States irrespective of their wishes.⁹ Article 4 was therefore fully acceptable.

40. The contents of article 6 should also be approved, both *de lege lata* and *de lege ferenda*. It appeared from the excellent commentary that most authors had accepted the main ideas advocated by the Special Rapporteur. On that point, too, the practice of States was not quite uniform, but should apparently be interpreted to mean that a new State was not bound to apply the treaties concluded by its predecessor or to become a party to such international instruments.

41. The Special Rapporteur had been right to make no difference between multilateral and bilateral treaties in that matter. In paragraph (9) of his commentary to article 6, he rightly pointed out that the solution adopted also applied in the case of multilateral law-making treaties. On the other hand, the right of a new State to succeed to multilateral treaties was in fact a separate problem, and was dealt with in the next article.

42. Although generally favourable to the new States' right of self-determination, he did not subscribe to the extreme applications of the *tabula rasa* theory. He therefore accepted the views expressed by the Special Rapporteur in paragraphs (4)-(7) of the commentary.

43. The description in paragraphs (10)-(14) of the practice followed by the depositaries of certain general conventions was very illuminating and the conclusions drawn on the question whether a new State was automatically bound by those conventions carried conviction.

44. Lastly, he approved of the initial reservation in article 6, because, for the time being, some categories of treaties designated under different names and referred to in paragraph (17) of the commentary had to be taken into account. In paragraphs (16) and (17) of the commentary, the Special Rapporteur noted the differences existing both in doctrine and in practice, particularly with regard to the categories of treaty to which the presumption of succession applied. The final text of article 6 would depend on the examination of that question.

45. Article 7 contained rules which had often been applied in the recent practice of States, as the Special Rapporteur had noted, particularly in paragraph (2) of his commentary. It might therefore be desirable to recognize in the draft the right of a new State to become a party, as such, to a general multilateral treaty by a notification of continuity or succession, although most authors did not expressly affirm such a right. It must be admitted that the legal foundation of that right might lie in the fact that the predecessor State had, by its acts, established a legal nexus between the treaty and the territory, as indicated in paragraph (6) of the commentary.

46. The three conditions laid down in article 7, subparagraphs (a), (b) and (c) were acceptable and even

necessary. With regard to sub-paragraph (b) the Special Rapporteur had, in paragraphs (10) and (11) of the commentary, faithfully described international practice with regard to the acquisition of the status of member of an organization. It was also true that a new State might become a party by succession, as well as by accession, to multilateral treaties adopted within an international organization when they were open to some or even to all non-member States, as indicated in paragraph (18) of the commentary.

47. Article 8, it had been said, should be read in conjunction with the preceding article. He had no hesitation in preferring the much more liberal rule for new States recommended by the Special Rapporteur to the rules drafted by the International Law Association. As was shown in paragraph (3) of the commentary, the rule in paragraph 1 (a) of article 8 was in conformity with the undisputed practice of the Secretary-General of the United Nations acting as depositary of multilateral treaties. In the absence of established practice in the matter, the rule in paragraph 1 (b) was rather *de lege ferenda* in nature. However, for the reasons given by the Special Rapporteur in paragraph (6) of the commentary, the Commission might adopt that rule of progressive development of international law. The provision in article 8, paragraph 2, was also acceptable, particularly as it was corroborated, at least to some extent, by the practice of the Secretary-General.

48. Some members of the Commission thought that article 8, paragraph 1, was unnecessary because, according to them, everything depended on the content of the treaty. All treaties, however, were not open to all States, and the fact that they were open to the predecessor State did not necessarily mean that the successor State would have the same right to become a party to them. For that reason, in addition to those already mentioned, paragraph 1 of article 8 should be retained.

49. Mr. YASSEEN said he would comment only on the points on which the Special Rapporteur had requested the Commission to give its views,¹⁰ but he wished first to express his admiration for the authority and skill which the Special Rapporteur had once more shown in successfully choosing, where the practice was not uniform, solutions which could be reconciled with the principles required by the interests of the international community.

50. The definition of succession in article 1 was excellent. It was not only a definition, but a real solution, for it avoided the enormous difficulties which would have arisen if the definition had been based on traditional considerations of private law. Instead of starting from the concept of devolution of obligations and rights, which would have given rise to controversies on the determination of cases of succession, the Special Rapporteur had simply taken as his starting point the neutral fact of the replacement of one State by another. It remained to determine and formulate the consequences of that fact. From the technical point of view, it was an extremely skilful solution.

⁹ See *Recueil des cours*, 1967, vol. II, p. 444.

¹⁰ See 1067th meeting, para. 40.

51. Article 3 reflected the most general international practice. There were, of course, other practices, but the rule stated in the article was favourable to new States. Without dwelling on the particular case of decolonization, which had been the subject of fairly full discussion at the previous session, it could be said, generally speaking, that a devolution agreement could not have the effect of transferring obligations and rights, first, for the technical reason that States bound to the predecessor State were third States in relation to the successor State, and secondly, because an agreement of that kind concluded between the predecessor State and the successor State was often hastily drafted and covered a great number of treaties without going into the difficulties peculiar to each of them. Hence a solution contrary to that proposed in article 3 could only harm new States. Leaving aside the details and exceptions to which there would be occasion to revert, he therefore approved of the principle stated in that article.

52. The unilateral declaration deserved to have an article to itself. It was the method to be encouraged, because the conclusion of a devolution agreement left doubts regarding the freedom of consent of the successor State, whereas a unilateral declaration was the free act of a sovereign State. The provision that treaties should continue to apply provisionally was not a real derogation from the general principles. The practical value of continuity in international relations was an argument in favour of presuming acceptance of that provision, which, moreover, was accompanied by all the necessary safeguards: the presumption was not irrefutable.

53. Article 6 was the key article of the draft. The rule it contained, which was borne out by practice, was required by the interests of new States and of the international community. A people could not be bound for ever. At the moment of succession, the new State should have a certain freedom as to the obligations contracted by the predecessor State. The rule gave concrete expression to the sovereignty of the new State. That did not, of course, mean that the new State had no links with the rest of the world; but the rule showed that reliance was placed on its judgement. Once it had become a subject of international law, the State itself decided which obligations should continue to have effect. He wished only that the article had a more prominent place in the draft.

54. Articles 7 and 8 were intended to facilitate access to multilateral treaties. They made no distinction as to the subject of the treaties, but they clearly referred to treaties involving the general interests of the international community; treaties concluded between only four or five States could hardly be called multilateral. The terms, which had a very precise meaning in the law of treaties, could therefore be maintained, and the practice of States could be relied on for the necessary distinctions. An increasingly wide participation in multilateral treaties was in the interests of the international community.

55. By the results of his work submitted to the Commission, the Special Rapporteur had proved that, despite

the exceptional difficulty of the subject, it would be possible to conclude a convention in the near future.

56. Mr. ALCÍVAR, after associating himself with the tributes paid to the Special Rapporteur, said that he had at first been inclined to support the view, frequently expressed in the Sixth Committee, that a separate chapter of the draft should be devoted to the problems of decolonization; but he now believed that the Special Rapporteur had adopted the right approach. Moreover, he agreed with the Special Rapporteur that there were no succession problems regarding the former Spanish and Portuguese colonies on the American continent. However, he would not venture to say the same about succession situations which had arisen after independence: for the former Central American Confederation had split up into five independent republics; Gran Colombia had been divided, first, into three States, and then, at the beginning of the present century, the Republic of Panama had been created by secession from Colombian territory.

57. With respect to the definition of "succession" in article 1, the Special Rapporteur had been right to distinguish between municipal and international law, since the transfer of rights and obligations under municipal law, especially in countries of Latin origin, was not governed by the same criteria as succession in international law.

58. He fully agreed with the Special Rapporteur's decision to deal with cases of State succession within the context of the Vienna Convention on the Law of Treaties, rather than to attempt to fit treaties into some general law of State succession.

59. He was prepared to accept the Special Rapporteur's definition of the term "new States" in article 1, sub-paragraph (e), but he agreed with Mr. Castañeda that it would be desirable to reflect in that definition the fact stated in paragraph (2) of the commentary, that new States could emerge as the result either of succession or of secession.

60. He fully supported the rule stated in article 3 on agreements for the devolution of treaty obligations or rights upon a succession, though he differed slightly from the Special Rapporteur in that he thought the rule should not be based on customary law alone, but rather on general international law, the sources of which, besides customary law, included treaties, general principles of law and the decisions of international bodies.

61. In article 4, on unilateral declarations, the Special Rapporteur had struck a cautious balance, which he considered absolutely acceptable.

62. Article 6 gave rise to certain questions of particular importance to new States, such as that of frontier treaties, which he hoped that the Special Rapporteur would consider at greater length in the future. He agreed with Mr. Yasseen's observation concerning the position of the article, which, as a rule of a general character, should be given more prominence.

63. He had certain reservations concerning paragraph 1 (b) of article 8, which permitted succession to

occur when the predecessor State had signed a treaty without ratifying it.

64. Lastly, he was in agreement with the general plan which the Special Rapporteur had proposed for the draft articles; in principle, that plan was concrete, clear and objective, but he reserved the right to reconsider his views in the light of later discussion.

65. Mr. THIAM thanked the Special Rapporteur for the valuable report he had submitted to the Commission, and congratulated him on his efforts to reconcile the requirements of scientific method with the realities of international life.

66. The difficulties on which the Commission was invited to give its views were of three kinds: first, the difficulties inherent in the very concept of the subject; secondly, difficulties of terminology; and, thirdly, difficulties relating to the principles to be enunciated.

67. With regard to the first kind of difficulties, the question arose whether the problem of succession in respect of treaties was sufficiently homogeneous for systematic study. The variety of concrete situations called for a variety of solutions, but inasmuch as the Special Rapporteur had defined succession as a transfer of sovereignty, power and competence, it was a concept which could be analysed and could lead to very similar solutions.

68. In the case of new States, however, it might be asked whether succession resulting from decolonization was of a sufficiently specific character to be treated separately or whether it should be studied within the general framework of succession in respect of treaties. In his opinion, that form of devolution could be studied within the general framework of succession in respect of treaties, provided that its specific aspects were emphasized in each case. And that was what the Special Rapporteur had done when he had established the difference between successor States and new States, it being possible for a State to be a successor State without being a new State. Another reason for stressing the special aspects of decolonization was that, although devolution agreements, which certain liberal theorists declined to recognize as valid, had in practice been the means of settling a number of succession problems amicably, and in any case could always be challenged, the fact remained that any State which wished to claim that they were void by reason of a defect in consent must be able to do so; hence the draft articles should deal with all the aspects of the matter which affected new States, if not necessarily all successor States.

69. With regard to difficulties of terminology, the Special Rapporteur had asked whether he could use the word "succession" to describe a situation very different from that covered by the term in municipal law. In his view, the essential point was to define the term within the framework of the draft articles in a way which made it quite clear that it only faintly echoed what succession meant in municipal law.

70. In the definition given in article 1, sub-paragraph (a) (A/CN.4/214), the word "sovereignty" was perhaps not appropriate; for as international life had

become more and more complex, there were, in current parlance, various degrees of sovereignty, and it was difficult to see whether, in using the word "or", the Special Rapporteur had wished to indicate an alternative or the use of synonymous expressions. If it was an alternative, the article could be understood to mean that certain States exercising their sovereignty over a territory were not competent to conclude treaties with respect to that territory or *vice versa*. The wording of the subparagraph should therefore be revised, despite the explanations which the Special Rapporteur had given in paragraph (4) of the commentary, where he had explained that he had used the term "sovereignty" in order to exclude situations such as military occupation.

71. With regard to the principles to be enunciated, the difficulty was to formulate a number of principles general enough to be applied to the great majority of cases. The basic principle, stated in article 6 (A/CN.4/224), was sound and in conformity with contemporary international law. It was very rare in practice for successor States to apply fully either the "clean slate" principle or the principle of continuity; they generally proceeded by stages, regarding as null and void treaties incompatible with their independence or their national interests, and maintaining those which had been concluded by the predecessor State in the interests of the successor State.

72. In article 6, therefore, it was more a question of affirming the principle of self-determination, in other words, the principle that a treaty could not be imposed on an independent State which was not a party to it. The Special Rapporteur had very rightly laid down that principle, but it would be advisable also to provide for exceptions and, before going any further, to examine the theory of "local contingencies".

73. On the whole, he approved of the Special Rapporteur's approach and, especially, of the spirit in which he had tackled the problems under study.

Organization of future work

(A/CN.4/L.154)

[Item 8 of the agenda]

(resumed from the 1066th meeting)

74. The CHAIRMAN invited the Commission to consider the Secretary-General's note on the estimated costs of a four-week extension of its 1971 session (A/CN.4/L.154).

75. Mr. USHAKOV said that the estimate appeared to be based on the assumption that the additional meetings would overlap with meetings of the Economic and Social Council. Perhaps the Secretariat could be asked to estimate the cost of an extension which would avoid such overlapping.

76. Mr. ROSENNE said that the Secretariat would have to bear in mind the Commission's long-established practice regarding the dates of its sessions, since it was those dates which might lead to a clash with other meetings in the event of a four-week extension.

77. The CHAIRMAN said that paragraph 2 of the Secretary-General's note included some costs which did not appear to be fully justified; the sum of \$98,000 for conference services for a four-week period in July, for example, was surely excessive, since there was usually an overlap of a week or ten days with the Economic and Social Council in July, in any case. He suggested that the Commission defer consideration of the matter.

It was so agreed.

The meeting rose at 12.55 p.m.

1072nd MEETING

Wednesday, 17 June, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States and governments in respect of treaties

(A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1)

[Item 3 (a) of the agenda]

(resumed from the previous meeting)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's second and third reports on succession in respect of treaties (A/CN.4/214 and Add.1 and 2, and A/CN.4/224 and Add.1).

2. Mr. BARTOŠ, congratulating the Special Rapporteur on the excellent work he had done on a subject rendered very difficult by the diversity of opinion and practice, said he wished to draw his attention to various points, so that he could take them into consideration in his further studies.

3. In article 1 (A/CN.4/214), the definitions in subparagraphs (a), (b) and (c) were correct, but called for certain comments. In subparagraph (a) he would limit the definition of "succession" to the replacement of one State by another in the sovereignty of territory, and add a reservation concerning general and partial replacement.

4. The second part of the definition, relating to the competence to conclude treaties with respect to territory, was less satisfactory, because that competence was not entirely in conformity with the Charter: for it was by virtue of territorial sovereignty that States possessed such

competence and under the Charter all States enjoyed equal sovereignty over their territory. True, the Special Rapporteur had explained in the commentary that he had used the phrase "competence to conclude treaties" because it was capable of covering such special cases as mandates, trusteeships and protected States; but that being so, the matter should be dealt with in a separate paragraph or sub-paragraph and not put on the same plane as sovereignty.

5. Sub-paragraph (c) raised the question of the distinction that should be made between a new State and a State which had become a successor State after having been part of another State's territory and denied that it was a "new State", claiming that it had formerly been a sovereign State and had merely freed itself from foreign occupation. He had no objection to the wording of subparagraph (c), but asked the Special Rapporteur to clarify that situation in his commentary.

6. Article 2 raised the question how the continuity of international life could be assured while at the same time taking into account the wishes of the successor State in regard to the obligations assumed by the predecessor State, for succession in respect of treaties affected not only the interests of the predecessor and the successor State, but also the interests of third States and of the general international public order. As he had pointed out in the working paper he had submitted to the Sub-Committee on Succession of States and Governments,¹ and again at the Commission's nineteenth session, when the topic had been divided between two Special Rapporteurs, it was not always a question of succession in respect of treaties, but sometimes of continuity of a status established with respect to a territory before the succession, which had become a rule apart, governing, for example, transit requirements, water supplies, the use of waterways, access to ports, and so on. On that point, the topic should be delimited more precisely between the two Special Rapporteurs.

7. The rules proposed by the Special Rapporteur in article 3 were in conformity with the practice followed until the end of the Second World War and even, quite frequently, after it. But in the case of certain States born of decolonization which did not regard themselves as new States, it was not easy to decide between the interests of the State which had surrendered its sovereignty, of the successor State, of third States parties to treaties with the predecessor State and of the international community, which required the continued application of certain treaties, such as those of a humanitarian character or those relating to the control of drugs or to the law of the sea. Where such treaties were concerned, acceptance of contractual obligations became an international duty for the successor State, which should, at least provisionally, adopt the principle that the general rules of international law which were in the common interest must continue to be applied.

8. With regard to decolonization, the question had been raised whether general rules should be laid down which successor States must apply, or whether the matter

¹ See *Yearbook of the International Law Commission, 1963*, vol. II, p. 293.

should be left to the discretion of States. But, as Mr. Thiam had pointed out, it was very rare in practice for successor States to apply fully either the *tabula rasa* principle or the principle of continuity.² In any case, the question of the devolution of obligations was not purely formal; it was subordinate to the interests and needs of the international community.

9. In the commentary to article 3, two points called for comment. The first was that the Special Rapporteur had quoted the 1947 Order settling the particular cases of India and Pakistan as an example of obligations assumed by governments before independence and taken over by the governments resulting from the arrangements, which had become something like an international treaty; but he had not examined the case of States which had been unable, before independence, to form a government having the capacity to assume contractual obligations, or the question whether there should not be a transition between the achievement of independence and the establishment of a government whose independence would be truly recognized at the international level.

10. The second point concerned the Special Rapporteur's very interesting approach to the *pacta tertiis* rule. It was unfortunate that he had based himself mainly on the practice of the United Kingdom and the Netherlands and on United Nations practice concerning the United Kingdom and the Commonwealth countries. For it was a question which had led to many disputes, not only between third States and successor States, but also between third States and predecessor States, which had been called upon to ensure that the successor State fulfilled the obligations arising from the old treaties. For the present, he thought that the question could only be settled on very general lines. Perhaps some indication could be given of what rules were desirable, but rules valid for all States could not be formulated.

11. It was doubtful whether the rule in article 4 could be applied in practice. Admittedly there were general rules in the matter, but the practice of new States varied widely. The Special Rapporteur had, however, very sensibly outlined the three possible solutions, namely, that the treaties should remain in force, that they should be applied provisionally, or that they should be terminated, and he had given many examples illustrating the evolution of the international rules governing succession in respect of treaties which could be derived from the practice of the new States. Thus the problem was one both of law and of historical evolution. It might, however, be asked whether the principle of the continuity of treaties did not go against the emancipation of the new States, since it maintained, *vis-à-vis* third parties, the régime in force before independence.

12. As to the corrigendum to article 1 (f) (A/CN.4/224/Add.1), the Special Rapporteur had been right to make a distinction between succession in general and succession in the case of new States; but it must again be emphasized that the expression "new States" would not always be well received by States born of decolonization which claimed that they had freed themselves from

foreign domination resulting from unlawful occupation of which they had been the victims. Those were cases of revival of a State, not of its liberation.

13. Article 6 was the key to the whole draft. It clearly stated the theory of the will of new States. He agreed with the Special Rapporteur, however, that the right of new States not to consider themselves bound by treaties concluded by the predecessor State did not apply to treaties containing rules of *jus cogens*. A separate subparagraph should therefore be drafted to cover such treaties.

14. He shared the Special Rapporteur's view concerning the right of a new State to notify its succession to multilateral treaties, which was the subject of article 7, but again, except in the case of treaties having the character of *jus cogens*.

15. He was also in favour of granting new States the right, set out in article 8, to establish their consent to be bound by a multilateral treaty which had not been in force at the date of the succession, but that right should be subject to the reservations stated in article 7. Those reservations should be set out in a separate paragraph.

16. Mr. TABIBI said he was in complete agreement with the Special Rapporteur's draft article 1, without which it would, indeed, be difficult to conceive of any model convention on State succession in respect of treaties.

17. He had certain reservations concerning article 2, however, and doubted whether it really belonged among the introductory articles. As at present framed, it might give rise to serious questions in the General Assembly, and on the part of governments, regarding the sovereignty and territorial integrity of small States.

18. In general, he supported article 3, although he questioned whether all devolution agreements should be accepted merely to safeguard the principle of continuity, since many agreements of that kind had been concluded only for political, economic and military purposes. In the past some agreements of that kind had been concluded without taking account of the principle of self-determination and without consulting the third States concerned. For example, the Indian Independence (International Arrangements) Order, 1947, had included a devolution agreement which was contrary to the text of the British-Afghan Treaty for the Establishment of Neighbourly Relations, signed at Kabul in 1921.³ That treaty, which itself was based on a large number of unjust wars waged during the nineteenth century, had provided that both Parties should consult each other concerning any transfer of territory in the so-called free tribal area, which included some four million inhabitants along the north-west frontier of India, but the United Kingdom had nevertheless unilaterally transferred the whole area to Pakistan.

19. He agreed in general with article 4, though he thought it tended to give too much importance to the unilateral declaration of the successor State and to ignore the need of third States. In particular, the period of three months mentioned in paragraph 2 (c) was much too

² See previous meeting, para. 71.

³ League of Nations, *Treaty Series*, vol. XIV, p. 67.

short to meet the requirements of the new Asian and African States: it should be increased to one or two years.

20. Article 5 embodied what he considered to be the cardinal principle of the draft and he supported it fully.

21. Lastly, he was prepared to support article 6. The "clean slate" principle seemed to be in accordance with general practice, although Mr. Bartoš had raised the interesting point that there were certain treaties having the character of *jus cogens* which new States should not attempt to evade. That problem was of particular relevance to his own country, for there were 8 million of its people living within the north-west frontier of Pakistan, for whom Afghanistan sought recognition of the right of self-determination. An additional article might be necessary to cover such cases.

22. The CHAIRMAN,* speaking as a member of the Commission, said he had certain doubts concerning the legal arguments advanced by the Special Rapporteur in support of article 3 (A/CN.4/214/Add.1). In paragraph (9) of his commentary to that article, the Special Rapporteur had correctly pointed out that articles 34-36 of the Vienna Convention on the Law of Treaties⁴ were of vital importance in connexion with the legal effects of devolution agreements. He had then gone on to consider the effects of the Vienna Convention from two general viewpoints: first, that of the actual terminology of the devolution agreement and, secondly, that of an assignment by the predecessor State, though he had concluded that neither was sufficient to bring article 34-36 into play.

23. However, some authority was to be found for the assignment theory in O'Connell's latest study of the question, chapter 20 of which opened with the following passage: "The consensual theory of treaty-making which has dominated modern international law inhibits the assignment of treaty rights and duties from one party to a non-contracting party. It must not be thought, however, that an attempted assignment of treaties must always be abortive, for international law takes a liberal attitude towards the creation of *vincula juris* through the processes of tacit consent or novation. Hence, if treaties which would normally lapse on change of sovereignty are assigned to successor States, they may be kept in force by tolerance on the part of the other contractors affected with notice."⁵ He would like to have that quotation placed on record to show that there was support for the assignment theory, although he felt that, as far as the Vienna Convention was concerned, that theory was only a red herring.

24. To his mind, the real point was whether any obligation arose for a third State under article 35 of the Vienna Convention and, what was more important, whether any right arose. The whole question turned on the problem of whether the parties to the devolution agreement had

intended to accord that right to a third State; it was not, therefore, a matter of assignment, but rather one of the intent of the parties, and in that respect the Special Rapporteur had relied on their intentions, as illustrated in their language, "to make provision *as between themselves for their own obligations and rights*" and "not to make provision for obligations or rights of third States within the meaning of articles 35 and 36 of the Vienna Convention". Yet while many devolution agreements might be couched in obscure language, there were a number which appeared to be fairly clear, especially those concluded by the French Government.

25. The Special Rapporteur had concluded paragraph 9 of his commentary by stating that devolution agreements, according to their terms, dealt "simply with the transfer of the treaty obligations and rights of the predecessor to the successor State"; if that statement was correct, however, those obligations and rights did not exist in a vacuum, but necessarily related to certain treaties, and accordingly, to those third States which had been the parties to the original treaties, as referred to in articles 35 and 36 of the Vienna Convention. That whole line of argument, therefore, led him to believe that some further development of the legal consequences of devolution agreements was necessary if the Vienna Convention was to be taken as a starting point.

26. With regard to article 4 (A/CN.4/214/Add.2), paragraph 1 could only be discussed in the context of the subsequent draft articles. Paragraph 2 raised a number of problems, especially with respect to the exception in subparagraph (a) that "the treaty comes into force automatically as between the States concerned under general international law independently of the declaration". He assumed that the contents of that subparagraph would be further developed in the course of the subsequent consideration of the draft articles as a whole, since it appeared to refer to dispositive and boundary treaties, which might involve elaborate provisions for implementation through boundary commissions and the like. Certain complications might also arise in connexion with subparagraph (c), especially concerning the application of multilateral treaties, though he assumed that that subparagraph was intended to have effects somewhat along the lines of the procedure concerning reservations referred to in article 20, paragraph 4 (c), of the Vienna Convention.

27. In article 6 (A/CN.4/224), the Special Rapporteur had adopted an acceptable working position, since obviously some flat rule was called for as a point of departure. The real scope of that article, of course, would be determined by the words "subject to the provisions of the present articles". In that connexion he could only refer to O'Connell's conclusion in chapter 8 of the volume from which he had already quoted: "No coherent doctrine on State succession can be formulated as a result solely of description of what the newly independent States have done, for they have acted in inconsistent fashion. The hypothesis of lapse of treaties, however, has been shown only to compound the diplomatic and administrative problems of the new States themselves, and of the other parties to treaties, and to introduce serious internal contradictions into the practices of government depart-

* Mr. Kearney.

⁴ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/27* (United Nations publication, Sales No.: E.70.V.5).

⁵ D. P. O'Connell, *State Succession in Municipal Law and International Law* (1967), vol. II, p. 352.

ments. The hypothesis of continuity, on the other hand, avoids these difficulties and, provided it allows for the possibility that some treaties lapse in virtue of inconsistency, places the successor State in no more disadvantageous position than does the hypothesis of lapse.⁶ He hoped that the Special Rapporteur would bear that quotation in mind when considering what exceptions to the "clean slate" doctrine were required.

28. Lastly, he had no objections to article 7, although it might be desirable to include an additional sub-paragraph to cover cases where multilateral treaties might have special requirements which were not at present covered by sub-paragraphs (a), (b) and (c).

29. Sir Humphrey WALDOCK (Special Rapporteur), summing up the discussion, said that, with the possible exception of Mr. Rosenne, members had been virtually unanimous in considering that his general approach reflected modern practice and provided a working basis for the Commission's further examination of the topic. There were, of course, points in the draft articles he had so far submitted which might call for modification and refinement in the light of the discussion that had taken place. At the same time, he interpreted the debate as indicating that he should complete the draft on the lines suggested in his reports.

30. At the present stage, none of the members were committed to a particular view, nor, indeed, did he regard himself as committed in any way. Members were clearly entitled to see the whole draft before taking up their final positions on the various articles, including those now being discussed.

31. In his next report, he would probably not present new texts of articles 1 to 12 revised in the light of the discussion. He still had much work to do in preparing further articles on the remaining questions, some of which were difficult and important. He would therefore probably leave the points made during the present discussion and recall them when he came to introduce the present group of articles one by one on the resumption of the Commission's consideration of the topic. For that reason, he did not think it would be useful for him now to comment in any detail on the various suggestions which had been made. Indeed, he needed time in which to reflect on those suggestions.

32. He would therefore confine himself to giving his reactions to certain points which had been raised during the debate. The first related to the use of the term "succession". It was difficult to avoid the use of that word, which appeared in the very title of the topic. Since it had to be used, he thought it must be defined, so as to avoid all confusion with the municipal law concept of succession.

33. Some speakers had expressed a certain regret that the term "succession" did not carry the notion of transmissible rights, but he felt certain that it would create confusion if the term "succession" were not limited to the fact of changes of sovereignty.

34. A number of suggestions of substance had been made regarding the definition of "succession". Members

had appreciated his reasons for referring, in that definition, to the competence to conclude treaties with respect to territory as well as to the replacement of one State by another in the sovereignty of territory. Clearly, there was a large overlap between the two notions, but both seemed necessary. In his first report, the definition of "succession" had referred simply to the replacement of one State by another in the possession of competence to conclude treaties.⁷ Following the debate on that report, he had decided to insert the reference to replacement in the sovereignty of territory, in order to give effect to views expressed by members of the Commission, although the phrase "competence to conclude treaties" had seemed to him to cover the matter.

35. It had been suggested by Mr. Castañeda, supported by one or two other members, that it was undesirable to take into account the case of protectorates, trusteeships and mandates, because international law was moving away from those concepts. Those members had suggested that, looking to the future, it was desirable to concentrate on changes of sovereignty *stricto sensu*. Although he had no decided views on the question, he thought it was not possible to escape an examination of those cases. Apart from the fact that some examples of protectorates still survived, there was the question of the future application of treaties concluded before or during the existence of a protectorate. With regard to mandates and trusteeships, careful examination would probably show that there was very little difference between the position of colonial territories for the purposes of succession. But he wished to look more closely at the treaty relations of trusteeships before forming a final opinion. In any event, it was his duty to submit to the Commission the relevant material in respect of protectorates, trusteeships and mandates, so that the Commission could take a decision with full knowledge of the matter.

36. Mr. Ago had raised the question whether the effects of occupation should also be dealt with in the context of State succession. His own suggestion was that the draft should include a very general reservation on that point, on the same lines as the reservations with regard to certain matters in the Vienna Convention on the Law of Treaties. The question belonged more properly to a study of occupation as such than to the present topic.

37. The definition of a "new State" was a provisional one, put forward for purposes of study. It would be helpful to clarify the law concerning new States in their pure form first. Other cases, such as that of federations, could then be considered, and the definition could be revised later, in the light of what the Commission decided concerning those other cases.

38. He had not requested comments on article 2, but certain members had referred to that article. He had placed it early in the draft for reasons of convenience of study. The order of the articles was at present very provisional. Ultimately, he expected that there would be a number of introductory articles setting forth general provisions.

⁶ *Ibid.*, p. 140.

⁷ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 90.

39. With regard to article 2, he differed fundamentally from Mr. Tabibi on the question whether the principle of “moving treaty frontiers” was inconsistent with the United Nations Charter and with modern international law. The Charter contained the principle of self-determination, and self-determination as well as other factors could result in the situations envisaged in article 2. It would not be reasonable to imagine that there would never be any changes in the political map in the future. The subject-matter of article 2 therefore had its place in any draft on State succession.

40. Many members had pointed out that the general reservation regarding the future study of dispositive or territorial treaties applied to article 2 as well. He fully accepted that point and observed that the question might indeed be of particular difficulty in situations falling under article 2.

41. He had been impressed by the fact that most members, representing every different approach to the law, had drawn attention to the point regarding territorial treaties. The question of so-called “objective régimes” had also been raised and some of the examples given by members in the present discussion fell into the category of such régimes. In the discussion of the law of treaties, there had perhaps been a slight majority in the Commission in favour of the notion of objective régimes, but the Commission had decided not to include any provision on them in the law of treaties. The Commission had limited itself to an article which underlined the potential effect of treaties as agents in the formation of customary international law. At the Vienna Conference on the Law of Treaties, there had been no disposition to resurrect the question of objective régimes. It did not follow, however, that the Commission must disregard that notion altogether in the present context.

42. The question of objective régimes might, he thought, present itself from a somewhat different aspect in the case of succession of States. At any rate, in the Åland Islands case⁸ the notion of the objective régime had been much stressed by writers—and also by the League of Nations Committee of Jurists—as being the explanation of the succession, which had been admitted in that case. The question required to be studied *de novo* in the context of succession and in his next report he hoped to present the relevant material. The Commission could then examine whether any special principle of continuity existed in the case of objective régimes.

43. A pertinent point had been raised by Mr. Bartoš concerning the delimitation of the two topics of succession in respect of treaties and succession in respect of matters other than treaties. Clearly, there was some overlap between the two topics in that the question arose of succession both in respect of a dispositive treaty as such and in respect of the situation that had resulted from the treaty. But he felt that he could not avoid dealing with the question of boundary and other dispositive treaties in connexion with succession in respect of treaties.

44. With regard to multilateral treaties, Mr. Ustor and others had expressed concern that the rule in article 6, that there was no obligation to become a party, should not affect the position of a new State in relation to the contents of the treaty where the contents embodied rules of customary international law or even rules of *jus cogens*. In that connexion, he pointed out that he had himself drawn a clear distinction between the contents of the treaty and the treaty itself, and had stressed the need not to confuse the obligation to perform the treaty as such with the obligation to conform to the law contained in the treaty.

45. A simple example was provided by the Geneva humanitarian conventions.⁹ Those conventions were open to denunciation at short notice, but such denunciation would not affect the validity of the rules of customary international law which they incorporated. Another example was provided by the Genocide Convention,¹⁰ which contained provisions of two distinct types: provisions of humanitarian law and consensual provisions which had been the subject of great controversy. Cases of that type showed the difference between accepting the law expressed in a treaty and accepting the contractual treaty as such.

46. The solution which he had in mind would be on the lines of article 43 of the Vienna Convention on the Law of Treaties, namely, a general reservation regarding “the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty”.

47. With regard to the right of the successor State to notify its will to consider itself a party to a multilateral treaty in its own right, he noted that the great majority of members endorsed the idea that modern treaty practice, notably that of depositaries, supported the view that there now existed a customary right to be a party to certain categories of multilateral treaty.

48. It had been suggested by Mr. Reuter that the right to notify succession was confined to “open” treaties, and by Mr. Rosenne that it was limited to treaties with a very wide participation clause. The practice of the Secretary-General, however, showed that the right of succession had been admitted without regard to the terms of the participation clauses; it seemed rather to be the fact that prior to the succession the territory had been under the treaty régime that generated the right—a right which was independent of the final clauses. Notification of succession thus appeared as an independent institution with its own incidents.

49. It was true that a multilateral treaty was often open to accession on a very broad basis. Even so, most treaties were not fully open, participation being limited to States Members of the United Nations, States members of the specialized agencies and States invited by the General Assembly. In the practice of the Secretary-General, a State had been permitted to notify its succession before it became a Member of the United Nations or of a relevant organization, so that it was not yet eligible for accession

⁸ See League of Nations *Official Journal*, 1920, Special Supplement No. 3.

⁹ United Nations, *Treaty Series*, vol. 75.

¹⁰ *Op. cit.*, vol. 78, p. 278.

under the final clauses of the treaty. The right thus attached to new States under customary international law and not under the final clauses.

50. On that point, considerable doubt had been expressed by Mr. Rosenne, who did not appear to accept the notion of any separate rules of succession and had suggested that he (the Special Rapporteur) was departing, in that case, from his initial statement that he regarded the Vienna Convention on the Law of Treaties as the basis for his work on the present topic. In Mr. Rosenne's view, the autonomy of the will of the parties was the essential principle of the Vienna Convention, which also exhibited a general tendency to avoid categories of treaty. Mr. Rosenne had further suggested that his (the Special Rapporteur's) proposals by implication attributed to depositaries broader powers than those assigned to them by the Vienna Convention.

51. He did not believe that those arguments were really valid. He had never suggested that the present work would simply consist of fitting cases of succession into the law of treaties. It really consisted of determining the impact of succession on treaties, which were, of course, governed by the law of treaties. He had never excluded the possibility that the fact of a succession might be recognized in international law as having some incidence on the law of treaties.

52. Thus, if the Commission arrived at the conclusion that territorial treaties passed automatically to the successor States in certain conditions, that conclusion would constitute a clear case of succession's having an impact on the law of treaties. Again, if practice showed that there existed in international law a right of a new State to notify its succession to certain categories of multilateral treaty, that, too, would be a case of succession's having an impact on the law of treaties.

53. He did not believe that the Secretary-General, in the practice to which he had referred, had in any way exceeded his powers, or that his own interpretation of the practice suggested that possibility. The depositary was only an administrator of the treaty; he had no powers of decision in the event of a dispute; and he necessarily administered the treaty in accordance with what he conceived to be applicable international law. If the depositary found that, as a development of practice, a certain right appeared to be recognized, he would act accordingly. The interaction of the practice of States and of depositaries could thus produce a rule of customary international law; and in the case now under discussion, a customary right appeared to have emerged from State and depositary practice in a quite unequivocal way. He saw no breach of the principle of autonomy of the will of the parties in that situation, because the consent of States had been given to the customary practice.

54. Members had in general accepted the idea of a customary right in the matter, but some had expressed doubts regarding the necessity of article 8. The Commission would, of course, consider the question of the retention of article 8 more closely at a later stage, but his own feeling was that its provisions were useful as favouring participation in multilateral treaties; those provisions also reflected the legal theory applied by the

Secretary-General. Article 8 was, of course, not as important as article 7, in that it dealt with special cases, but he thought that it was, on the whole, worth retaining. On the other hand, he agreed with the point made by Mr. Ustor that the three categories of treaty excepted from the rule in article 7 had also to be excepted from article 8; and a drafting amendment would be needed for that purpose.

55. With regard to articles 7 and 8, Mr. Castañeda had criticized the concept of a legal nexus between the treaty and the territory and had suggested that the reference should rather be to the application of the treaty in respect of the territory. Personally, he felt that the notion of application as the determining element was not very satisfactory and preferred the language used in the Vienna Convention on the Law of Treaties; he had therefore proposed that reference be made rather to the treaty being binding in respect of the territory.

56. In the case envisaged in article 8, the predecessor State had either established its consent to be bound or had given its signature to the treaty in relation to the territory. In short, prior to the succession specific action had been taken in relation to the treaty by the predecessor State in respect of the territory in question. It was that which made it appropriate to authorize the successor State either to notify its succession or, as the case might be, to proceed to ratification.

57. He had been very much enlightened by the views of members; their comments had been most helpful. The discussion gave him the feeling that the Commission was fully launched on a corporate work of codification. There was now a large measure of solidarity within the Commission on the manner of handling the topic and there was also a corporate desire to bring the work to a satisfactory conclusion.

58. Mr. ROSENNE said that, in order to avoid any possible misunderstanding, he must explain that he fully shared the view of all the other members that the two reports submitted by the Special Rapporteur constituted an exceedingly satisfactory basis for the Commission's work on the topic. Because of the lack of time, he had concentrated in his statement essentially on those points on which he differed from the Special Rapporteur; he had not been able to dwell on the very many points on which he agreed with him. Reduced to fundamentals, his difference with the Special Rapporteur related above all to a matter of philosophical approach to the contents of article 7, and to the proper construction to be placed on the practice of depositaries in general, not just of the Secretary-General.

59. Mr. AGO said that he was very grateful to the Special Rapporteur for his comments, which, on the whole, satisfied him completely.

60. With regard to occupation, however, he would not like to be credited with the idea that such a situation constituted a case of succession. What happened in cases of occupation was that certain situations arose, particularly in regard to territorial treaties, in which the rules of succession could be applied by analogy. That was why it might be useful to consider the question, but only from that standpoint.

61. What should be reconsidered was perhaps the reference to succession in the case of States that had lost the competence to conclude treaties, which appeared for the time being in article 1 of the draft. While it was true that the Commission could leave certain situations aside entirely, from the standpoint of competence to conclude treaties, because there was no longer any question of permitting that competence to be impaired, it must not, on the other hand, overlook cases in which a State had retained the competence, but lost the physical capability of implementing certain treaties.

62. Territorial treaties should be regarded as including all treaties which affected a territory in one way or another, not only treaties which established frontiers.

63. Lastly, with regard to the hypothesis of a rule of *jus cogens* inserted in a treaty, it must not be forgotten that such a rule, even if it was stated in a treaty, remained a rule of general international law which was valid independently of the treaty containing it. Moreover, that observation should not be confined to rules of *jus cogens*. Conventions codifying international law often laid down rules which were already in force as customary rules. Hence, even if it was possible to derogate from those rules by treaty, in other words, even if they were not rules of *jus cogens*, observance of such rules was not a question of succession to a treaty, but a simple obligation of every State to obey the general rules of international law, wherever they might be stated.

The meeting rose at 1.10 p.m.

1073rd MEETING

Friday, 19 June 1970, at 10.20 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Barotoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1 and 2)

[Item 2 of the agenda]

(resumed from the 1069th meeting)

1. The CHAIRMAN invited the Commission to resume consideration of item 2 of the agenda.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 61-B (Derogation from the present Part)¹

2. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that article 61 B had been referred back to the Drafting Committee, which now proposed the following text:

Article 61-B

Derogation from the present Part

1. Nothing in the provisions of the present Part shall preclude the conclusion of international agreements between States and international organizations having different provisions concerning conferences.

2. The rules of procedure adopted by a conference may differ from the provisions contained in articles...

3. Mr. ROSENNE said it was not possible to adopt article 61-B in its present form. Paragraph 1 departed far too much from article 5² and there was no clear reason for that departure; paragraph 2 should be cast in such a way as to establish what was loosely called "the sovereignty of the conference". He therefore suggested that the two paragraphs be reworded on the following lines:

1. Nothing in the present Part shall preclude the conclusion of other international agreements having different provisions concerning representatives of States in organs or at conferences.

2. The provisions of articles ... apply only to the extent that the rules of procedure of a conference do not provide otherwise.

4. Since the two paragraphs dealt with entirely different matters, they should become separate articles.

5. In paragraph 1 he had used the words "other international agreements" without the qualification "between States and international organizations", because there might well be other relevant agreements. He had not limited the scope of the provisions to conferences, but had included representatives to organs as well.

6. His wording for paragraph 2 took into account the fact that the rules of procedure of a conference might well be adopted after the conference had begun. He assumed that the intention was to refer, in the space left blank, only to the articles on the composition and organization of delegations and not to those dealing with privileges and immunities, which were governed by paragraph 1.

7. The question arose whether the scope of paragraph 2 should be limited to conferences. The explanation of the difficulty was perhaps to be found in the fact that, as far as representatives to organs were concerned, the matter was really covered by article 3.

8. He had serious misgivings about the very imperfect drafting techniques being used in Part IV. That part was to some extent self-contained and to some extent intended to be dovetailed with other parts. Some of the

¹ For previous discussion, see 1069th meeting, paras. 48-68.

² See *Yearbook of the International Law Commission, 1968*, vol. II, p. 198.

difficulties could be overcome by transferring the provisions of article 00³ from the beginning of Part IV to Part I, as an addition to article 1.

9. He wished to raise a much more serious problem, however. The provisions of article 61-B, and to some extent those of article 5, cast very serious doubt on the value of all the articles in Part IV, just as articles 3, 4 and 5, taken in the light of existing practice, cast doubt on all the articles in Part II.

10. A further question that arose was whether the Commission could submit the articles in Part III, especially those on privileges and immunities, to governments and to the General Assembly in their present form. It might be preferable to submit only those articles which were essential to the organization of permanent observer missions and to replace the others by an explanatory passage in the report. It could be explained that at the Commission's next session it was intended to adjust the articles adopted in 1969 so that they could apply equally to permanent missions and to permanent observer missions, subject to any special treatment that might be required for an article such as article 44.

11. A similar approach could be adopted with regard to the articles in Part IV dealing with delegations to organs and to conferences. The difficulties relating to that part were, however, much greater. The Commission really needed some indication of the views of governments and of the General Assembly.

12. The time had probably come for the Commission to take note of the terms of Article 105, paragraph 3, of the United Nations Charter, which read: "The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose".

13. Paragraph 2 of Article 105 dealt with the privileges and immunities of representatives of Members of the United Nations; the Commission should ascertain whether the General Assembly wished it to prepare a draft which would enable the Assembly to make a proposal under paragraph 3 of that Article.

14. Moreover, the real relationship was not clear between the articles now under consideration and the very large quantity of treaty arrangements made by international organizations. When that situation was taken into account it might well appear that the work the Commission was now engaged in was purely academic.

15. If his amendments to article 61-B were not accepted, he would request that its two paragraphs be put to the vote separately.

16. Mr. USHAKOV said that article 61-B was not very clear. The Drafting Committee had taken the view that articles 3 and 4 applied equally to delegations to organs and delegations to conferences. That was why, as now drafted, article 61-B appeared to be complementary only to article 5. But since that was not clear from the article, the Special Rapporteur should be asked to explain in

the commentary that articles 3 and 4 would be drafted in such a way as to apply to the whole of the draft, whereas article 5 concerned only the representatives of States to an international organization and had therefore to be supplemented by provisions relating to delegations to organs and to conferences.

17. Better wording should be found for paragraph 2.

18. Mr. EUSTATHIADES said that article 61-B raised a difficulty which might be overcome at a later stage in the Commission's work. It might therefore be better if the idea expressed in the article were developed only in the commentary. Since the Commission did not yet know the views of governments on variants A and B of article 69⁴ and some time had elapsed since the debate on articles 3 to 5, the question was too complex to be decided without a lengthy fresh discussion.

19. Sir Humphrey WALDOCK said he thought that, on the whole, some such provision as article 61-B was necessary within the general structure of the draft, but with regard to the drafting, some of the suggestions put forward by Mr. Rosenne would require consideration.

20. Most of the other questions raised by Mr. Rosenne had been discussed already and the Committee was largely committed to presenting drafts on the topics of permanent observer missions and delegations to organs and to conferences. It was, however, difficult to see what the general aspect of the whole draft would be, and it might therefore be useful if the Secretariat could circulate an informal paper showing all the articles which had so far been adopted. That would make it possible to visualize the structure of the draft as a whole.

21. The CHAIRMAN said that the Secretariat would prepare an informal paper, as suggested by Sir Humphrey Waldo.

22. Speaking as Chairman of the Drafting Committee, he said that the articles to be mentioned in paragraph 2 would be those relating to the composition and structure of delegations, and to notifications; they would not include the articles on privileges and immunities.

23. With regard to the relationship to article 3, Mr. Rosenne was right in assuming that organs had not been mentioned in paragraph 2 because delegations to organs were covered by the terms of article 3.

24. As to the over-all problem raised by Mr. Rosenne, it was because of the pressure of time and the fact that the next session would be the last for the present membership of the Commission that it had been necessary to go ahead with the work in rather difficult circumstances.

25. In order to enable the Drafting Committee to consider the drafting proposals which had just been made, he suggested that the Commission defer its decision on article 61-B until later in the meeting.

26. Mr. ROSENNE said he was quite satisfied with that suggestion.

27. With regard to the articles to be mentioned in paragraph 2, he thought the question of notifications was a borderline case: notifications could affect privileges and

³ See 1069th meeting, para. 10.

⁴ See 1059th meeting, para. 63.

immunities and were usually not dealt with in rules of procedure. Any decision taken at the present meeting would be subject to the filling of the blank in paragraph 2.

28. With regard to Article 105 of the Charter, it was true that the Commission had discussed the matter, but it had not mentioned the point he had raised in any of its reports to the General Assembly.

29. The CHAIRMAN said that, if there was no objection, he would assume that the Commission agreed to defer its decision on article 61-B until later in the meeting.

It was so agreed.

ARTICLE Z (Privileges and immunities in case of multiple functions)

30. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article Z:

Article Z

Privileges and immunities in case of multiple functions

When members of a permanent diplomatic mission, a consular post, a permanent mission or a permanent observer mission in the host State are included in a delegation to an organ or to a conference, their privileges and immunities as members of their diplomatic mission, consular post, permanent mission or permanent observer mission shall not be affected.

31. The language of article Z was similar to that of the corresponding provisions in other conventions. Its purpose was to avoid the loss of privileges and immunities through service on a delegation to an organ or conference.

32. The position of article Z had not yet been decided, but it would probably be placed after the articles on privileges and immunities.

33. Mr. SETTE CÂMARA said he doubted the usefulness of article Z. Persons who already enjoyed certain privileges and immunities would have a permanent status in the host State. That status was obtained through a formal procedure and the beneficiary usually held an identity card as evidence of his status. Unless the sending State notified the host State that his functions had been terminated, a member of a diplomatic mission, consular post, permanent mission or permanent observer mission would continue to enjoy his privileges and immunities as such; his appointment to a delegation to an organ or conference would not affect that situation in any way.

34. Mr. ROSENNE said that it was desirable to retain article Z, but he would suggest the deletion of the words "in the host State". It was not clear whether those words referred only to "a permanent observer mission" or to all the missions mentioned. Moreover, he was not at all certain that it was correct to include those words. A delegation to a meeting of an organ or to a conference often included persons drawn from posts in several countries. Some members of the delegation might therefore be diplomats accredited to States other than the host State. The question would then arise what privileges they

would be entitled to in the host State considered as a third State for the purposes of that application of article 40 of the Vienna Convention on Diplomatic Relations.⁵

35. Mr. USTOR said that basically Mr. Sette Câmara was right: strictly speaking, article Z was not necessary. However, since a provision of that type had been included both in the Vienna Convention on Consular Relations and in the Convention on Special Missions, failure to include a similar provision in the present draft might lead to difficulties of interpretation.

36. Mr. ALBÓNICO suggested that the Spanish version of article Z be reviewed by the Spanish-speaking members of the Commission.

37. The CHAIRMAN said the suggestion would be noted.

38. Sir Humphrey WALDOCK suggested that the drafting point raised by Mr. Rosenne should be met by the insertion of two commas, one after the words "permanent mission" and the other after "observer mission".

39. He was not in favour of dropping the words "in the host State", because that could lead to misunderstanding. One interpretation might be that a person accredited as a diplomat in a third State would be entitled to diplomatic privileges in the host State if he were included in a delegation to an organ or to a conference.

40. Mr. ROSENNE said that the clarifications which had been given were certainly useful, but he must point out that there was no corresponding article in Part II.

41. Mr. EUSTATHIADES proposed that in the French version the word "*modifiés*" should be replaced by the word "*affectés*" so as to bring it into line with the English version and make it more precise.

42. Mr. USHAKOV said he supported that proposal because the verb "*affecter*" had already been used in the French version of article 55.

43. Mr. RAMANGASOAVINA also supported the proposal.

44. In his opinion, article Z was necessary. He was opposed to the deletion of the words "in the host State", because members of a permanent diplomatic mission or a consular post performed their functions in the territory of a State with that State's consent and, consequently, did not enjoy the same privileges and immunities in other countries.

45. Mr. CASTAÑEDA said he saw no reason why the enumeration at the beginning of the article should be repeated at the end. It would be enough to say "as members of their respective missions".

46. Mr. USHAKOV said the reason was that article Z followed the wording of article 9 of the Convention on Special Missions⁶ and article 55 of the draft, relating to permanent observer missions.

⁵ United Nations, *Treaty Series*, vol. 500, pp. 118-120.

⁶ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 100.

47. The CHAIRMAN, speaking as a member of the Commission, said he favoured a simpler text on the lines suggested by Mr. Castañeda. The form would then be similar to that of article 55, paragraph 2.

48. Mr. ROSENNE, replying to Mr. Ushakov, said it should be noted that article 9 of the Convention on Special Missions was very different from the present article Z.

49. He supported Mr. Castañeda's suggestion for a simplified wording.

50. Mr. CASTRÉN pointed out that the enumeration included a consular post, to which the word "mission", if used alone at the end of the article, could not apply.

51. Mr. AGO suggested the wording "as members of their respective missions or posts".

52. He also supported the replacement of the word "modifiés" by the word "affectés" in the French version, but pointed out that more than a difference of expression was involved. To say that the privileges and immunities "shall not be affected" meant that the persons in question could not lose the privileges and immunities they already enjoyed; but they might possibly enjoy additional privileges and immunities. On the other hand, to say that the privileges and immunities "shall not be modified" meant that there could not be any change.

53. Mr. BARTOŠ said that the word "post" should always be preceded by the adjective "consular", because when used by itself it was vague and could apply to any function.

54. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to adopt article Z with the following changes: first, the insertion of commas after the words "permanent mission" and "observer mission"; secondly, the replacement of the words "of their diplomatic mission, consular post, permanent mission or permanent observer mission" by the words "of their respective missions or consular posts."

It was so agreed.

ARTICLE 63 (Principle of single representation)⁷

55. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 63:

Article 63

Principle of single representation

A delegation to an organ or to a conference may represent only one State.

56. The Drafting Committee believed that the rule thus expressed reflected the practice of international organizations, especially the United Nations.

57. It had considered whether a second paragraph should be included to provide that a member of a delegation might represent another State, but had decided that the situations envisaged were much too varied and that

it would be better to leave them to be governed by the rules of the organization concerned.

58. Mr. ROSENNE said he was not opposed to the principle embodied in article 63, but he was not at all certain that it should be laid down as a categorical rule. There was enough doubt to warrant caution in introducing the rule, for very much the same reasons for which the Drafting Committee had decided not to propose a second paragraph.

59. The CHAIRMAN said that the general principle laid down in article 63 would be subject to the limiting articles at the beginning of the draft; since article 63 thus contained only a residuary rule, there were no grounds for concern.

60. Mr. EUSTATHIADES said he could agree to the addition of a rule of the kind proposed, but at least the language should be less imperative. It was true that cases of a single delegation representing several States belonged to old-fashioned institutions such as confederations of States or personal unions; but the possibility of exceptions should be provided for, so that in exceptional cases one delegation could represent more than one State if that was necessary for some particular reason. That possibility should at least be mentioned in the commentary.

61. Mr. RAMANGASOAVINA said that he had strong reservations on the article, at least in the categorical form in which it was now worded. The rule it laid down might correspond to the situation in the major international organizations, but the draft was intended to apply to smaller organizations as well, including regional organizations. Such organizations would, of course, be free to adopt whatever rules they saw fit, but it would be better if the draft took account of the fact that some States, for reasons of convenience or economy, sometimes decided to be represented by another State.

62. Unless an adequate explanation were given in the commentary to the article, it might meet with some resistance on the part of States.

63. Mr. ALBÓNICO said that article 63, like all the other articles, would have its commentary.

64. In the case of a federation, there would be a single representation; in the case of a confederation, each member State retained its own competence and was entitled to separate representation. The provisions of article 63 were necessary in order to avoid all misunderstanding.

65. Mr. BARTOŠ said he had already expressed reservations concerning the rule in article 63 in the Drafting Committee. Since the first Vienna Conference⁸ the principle that a delegate or diplomat could represent only one State had been discarded, and, like previous speakers, he could not see governments accepting so categorical a rule against the representation of two or more States by the same person.

⁸ United Nations Conference on Diplomatic Intercourse and Immunities, 1961; see article 6 of the Vienna Convention on Diplomatic Relations, United Nations, *Treaty Series*, vol. 500, p. 100.

⁷ For previous discussion, see 1055th and 1056th meetings.

66. The commentary should therefore give a very clear and cautious explanation of the position. Indeed, it should go even further and say that several members of the Commission had expressed reservations on the article and that the Commission asked governments whether the text proposed by the Drafting Committee should be retained without change or whether, on the contrary, its scope should be limited.

67. The CHAIRMAN said that the discussion would be fully reflected in the commentary.

68. It would be possible to depart from the rule in article 63 by means of a suitable provision in the rules of procedure of an organ or conference.

69. If there were no further comments, he would assume that the Commission agreed to adopt article 63.

It was so agreed.

ARTICLE 64 (Appointment of the members of the delegation)⁹

70. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 64:

Article 64

Appointment of the members of the delegation

Subject to the provisions of articles 64 *bis* and 67, the sending State may freely appoint the members of its delegation to an organ or to a conference.

71. The reference to article 67 (A/CN.4/227/Add.2) in the first line was not final, since the Commission had not yet adopted an article concerning the size of the delegation. He suggested, therefore, that the figure "67" be deleted and the space left blank.

It was so agreed.

Article 64, as amended, was adopted.

ARTICLE 64 *bis* (Nationality of the members of the delegation)

72. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 64 *bis*:

Article 64 bis

Nationality of the members of the delegation

The representatives and members of the diplomatic staff of a delegation to an organ or to a conference should in principle be of the nationality of the sending State. They may not be appointed from among persons having the nationality of the host State, if that State objects, which it may do at any time.

73. The article was substantially the same as article 11,¹⁰ except for the last clause, which, in article 11, read: "except with the consent of that State which may be withdrawn at any time". The effect of the last clause in article 64 *bis* was to eliminate the requirement of the

prior consent of the host State and to permit the sending State to proceed to make the appointment; the host State could always object to it after receiving notification.

74. Mr. EUSTATHIADES said he feared that the second sentence left the host State free to withdraw its consent while the session of the organ or conference was actually in progress, which was not the Commission's intention. If that possibility was recognized, it would make the position of the representative insecure and be a threat to the stability of relations and to effective work by the organ or conference; it would be advisable to guard against such an eventuality.

75. Mr. ALBÓNICO said that the second sentence of the article provided that representatives could not be appointed from among persons having the nationality of the "host State", which in article 1, sub-paragraph (I), was defined as "the State in whose territory the Organization has its seat, or an office, at which permanent missions are established". In the case of conferences, he questioned whether it was advisable to permit the host State to oppose the appointment of one of its nationals, perhaps merely because his views differed from its own.

76. Mr. ROSENNE said he was not sure that there was any analogy between the delegations referred to in article 64 *bis* and permanent missions; but if there was, the text should be brought closer to that of article 11.

77. To his mind, the element of consent was more important than that of non-objection, and it would leave the way open for a gross abuse of good faith if the host State were permitted to object to an appointment "at any time". He feared that if the present wording of article 64 *bis* were retained, some States might object strongly and the Secretariat might have difficulties in organizing conferences away from Headquarters.

78. Mr. USHAKOV said that although, as a member of the Drafting Committee, he had helped to draft the second sentence, he wondered whether it would not be as well to revert to the wording of the second sentence of the corresponding article on permanent missions, namely, article 11, under which the prior consent of the host State was required. It was more difficult for the host State to object, after the event, to one of its nationals representing another State, and in any case it was more courteous for the two States to agree beforehand, which would also enable them to avoid the situation mentioned by Mr. Eustathiades.

79. Mr. USTOR said he agreed with Mr. Ushakov that the second sentence was not very logical, since any objection to a particular person should be made before his appointment. He therefore proposed that the last clause in the sentence be amended to follow the corresponding clause in article 11.

80. Mr. CASTRÉN, speaking as a member of the Drafting Committee, said that the Committee's intention had been to propose a more liberal régime for delegations to organs and conferences than that laid down for permanent missions. That was why prior consent was not required. In any event, even that consent could be withdrawn at any time.

⁹ For previous discussion, see 1056th meeting, paras. 31-45 and 1057th meeting, paras. 3-31.

¹⁰ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 203.

81. It was rare in practice for a State to employ nationals of the host State to represent it and for the latter to object, but in case of doubt, there was nothing to prevent the States concerned from reaching an understanding to ensure that the host State's consent would not be withdrawn.

82. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that there appeared to be no objection to the first sentence, but that some members would prefer to see the wording of article 11 adopted for the last clause of the second sentence.

83. It had also been suggested that, in view of the short duration of conferences, the work of delegations would be unduly disrupted if host States were allowed to withdraw their consent once it had been given. As a compromise, he suggested the following text: "They may not be appointed from among persons having the nationality of the host State except with the consent of that State, which may be withdrawn only if that withdrawal will not seriously inconvenience the delegation in carrying out its functions".

84. Mr. USHAKOV said that to deny the host State the possibility of withdrawing its consent would be an infringement of its sovereignty over its nationals. Any such formulation was therefore unacceptable.

85. Mr. THIAM said that he fully understood Mr. Ushakov's point of view, but besides the sovereignty of the host State it was necessary to consider the right of the chosen national to be able to express himself freely, without being in constant fear that the host State might withdraw its consent at any moment. Once the host State had given its consent, it should not be able to withdraw it except for grave and clearly defined reasons, which should be laid down.

86. Mr. ROSENNE said that Mr. Thiam had put his finger on the crux of the problem. The Chairman had attempted, in his compromise text, to strike a balance between the different points of view, but a shorter text would be better.

87. He still did not think there was any real analogy between article 64 *bis* and article 11; in fact, the differences between them should be mentioned in the commentary.

88. Mr. USHAKOV, replying to Mr. Thiam's remarks, said that the situation was the same in the case of permanent diplomatic missions and even of special missions. In the case of special missions, the relevant provisions were now included in a Convention.¹¹

89. Mr. CASTRÉN said he agreed with Mr. Ushakov that it would not be advisable to depart from precedents. Moreover, it would be very difficult to define what constituted a "grave reason".

90. Mr. AGO said that he, too, saw no reason for abandoning criteria which had always been followed. Besides, it was exceptional for a State to choose a nation-

al of the host State to represent it and the practice was not one to be encouraged.

91. He was in favour of reproducing literally the wording of article 11, which was clear, whereas the wording proposed by the Drafting Committee was rather ambiguous.

92. The CHAIRMAN suggested that the Commission vote on Mr. Ago's proposal that the last clause in article 64 *bis* be replaced by the last clause in article 11, which read: "except with the consent of that State which may be withdrawn at any time".

93. Mr. ROSENNE said that there was general agreement that the language of article 11 should be used; the only real dispute was about the words "which may be withdrawn at any time".

94. Mr. ALBÓNICO said he supported Mr. Ago's proposal.

95. Mr. EUSTATHIADES said that, if the Commission adopted Mr. Rosenne's approach, perhaps a passage could be included in the commentary expressing the two ideas formulated by the Chairman and Mr. Thiam, namely, that the host State could withdraw its consent, or refuse, only for grave reasons and only on condition that withdrawal did not cause difficulty to the sending State. The provision would thus be attenuated by the indication that it applied only in exceptional cases.

96. The CHAIRMAN said that there was a consensus of opinion in favour of adopting the language used in the last clause of article 11; but perhaps a vote should be taken on the words "which may be withdrawn at any time".

97. Mr. THIAM said he thought a vote might not be necessary, since members generally seemed to hold the view that the host State could withdraw its consent. That being so, the commentary should make it clear that the interests of sending States must also be safeguarded and that withdrawal of consent by the host State should at least be subject to a time-limit, so as to ensure that a sending State was not deprived of its representative, for example, just when a decision was to be taken.

98. The CHAIRMAN said he would suggest that the Commission adopt article 64 *bis*, subject to the replacement of the words "if that State objects, which it may do at any time" by the words "except with the consent of that State which may be withdrawn at any time." The Special Rapporteur would be asked to include a statement in his commentary to the effect that the host State should take such action only in the most serious circumstances and without disrupting the work of the delegation.

Article 64 bis, as amended, was adopted.

ARTICLE 65 (Credentials of representatives)¹²

99. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 65:

¹¹ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 100, article 10.

¹² For previous discussion, see 1057th meeting, paras. 33 to 63, 1058th and 1059th meetings.

*Article 65**Credentials of representatives*

1. The credentials of a representative to an organ shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent authority if that is allowed by the practice followed in the Organization, and shall be transmitted to the Organization.

2. The credentials of a representative in the delegation to a conference shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent authority if that is allowed in relation to the conference in question, and shall be transmitted to the conference.

100. Mr. ROSENNE said he had certain objections to the personification of the "conference" which seemed to have taken place in a number of articles. He suggested that article 65 be adopted and sent to the Special Rapporteur, but that the Commission reflect further on the problem of the word "conference".

101. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee would appreciate any suggestions concerning that problem.

Article 65 was adopted.

ARTICLE 61-B (Derogation from the present Part)¹³
(*resumed*)

102. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee now proposed that article 61-B be split into two articles, for which it proposed the following texts:

*Article 61-B**Derogation from the present Part*

Nothing in the present part shall preclude the conclusion of other international agreements having different provisions concerning delegations to an organ or a conference.

*Article 61-C**Conference rules of procedure*

The provisions contained in articles ... shall apply to the extent that the rules of procedure of a conference do not provide otherwise.

103. Mr. USHAKOV said he could accept that wording.

104. The CHAIRMAN suggested that article 61-B be adopted and that article 61-C be adopted provisionally, pending insertion in the blank space in the first line of the numbers of the articles to be referred to.

It was so agreed.

The meeting rose at 1 p.m.

1074th MEETING

Monday, 22 June 1970, at 3.30 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

State responsibility

(A/CN.4/233)

[Item 4 of the agenda]

1. The CHAIRMAN invited the Commission to consider the Special Rapporteur's second report on State responsibility (A/CN.4/233). A questionnaire prepared by the Special Rapporteur in connexion with his report had just been issued, which read:

I. Section I of chapter I:

(a) Does the Commission agree that, in defining the basic rule on responsibility, a composite formula should be adopted that would not prejudice the content of responsibility?

(b) Does the Commission agree that the formula adopted should allow for the existence both of responsibility for non-illicit acts and of responsibility arising from the acts of others?

(c) Does the Commission find the Special Rapporteur's terminology acceptable?

II. Section II of chapter I:

(a) Does the Commission agree that the international illicit act contains a subjective element and an objective element?

(b) Does the Commission agree that the subjective element may consist of an act or an omission imputable to the State?

(c) Does the Commission agree that imputation is a legal operation and that it is international law which imputes to the State—an international legal person—an internationally illicit act?

(d) Does the Commission agree that the objective element in an international illicit act consists of failure to fulfil an international legal obligation?

(e) Does the Commission agree that there is no need to pay special attention to the notion of abuse of rights?

(f) Does the Commission agree that a distinction should be made between illicit conduct and illicit events?

(g) Does the Commission agree that there is no need to consider a third constituent element of the international illicit act, namely, injury?

¹³ For previous discussion, see paras. 2-29 above.

III. Section III of chapter I:

(a) Does the Commission accept the idea of capacity to commit international illicit acts?

(b) Does the Commission agree that it is desirable to refer to the possibility of there being limits to the international delictual capacity of States?

IV. In general

Does the Commission accept the broad outline of the plan suggested by the Special Rapporteur and the method he has followed?

2. He invited the Special Rapporteur to introduce his report.

3. Mr. AGO (Special Rapporteur) said that at its twenty-first session the Commission had considered his first report on State responsibility,¹ the purpose of which had been to review previous work on that branch of international law in order to derive the maximum benefit from it for the purposes of the codification being undertaken, and at the same time to avoid committing once again the mistakes which, in the past, had prevented codification of the topic. At the end of the discussion on the first report, the Commission had decided to confine its study of international responsibility for the time being to questions relating to the responsibility of States without, however, excluding the responsibility of subjects of law other than States—a question which, for reasons of clarity, it proposed to study later.

4. He had followed those instructions, but wished to point out that the Commission might sometimes be led to take account of the possible effects of the acts of subjects of international law other than States—in particular international organizations—on the international responsibility of States. The Commission had also decided to start by considering only the responsibility of States for international illicit acts and to defer consideration of responsibility arising out of the performance of certain lawful activities—the so-called responsibility for risk. Certain members of the Commission had observed that the latter form of responsibility involved obligations established by primary rules of international law, whereas the obligations involved in the responsibility of States for international illicit acts arose, precisely, from the violation of obligations established by primary rules. It was to avoid any confusion between those two fields that the Commission had decided to confine its study to the responsibility of States for international illicit acts.

5. The Commission had also decided not to yield to the temptation to combine its codification of the consequences of the violation of obligations established by a primary rule with the definition of those international obligations themselves, in particular those belonging to the law of aliens. It had recognized, however, that the primary rules might have to be considered when it came to define the content of the responsibility and tried to

grade the various categories of illicit act according to the importance to the international community of the obligations violated.

6. The study of State responsibility should bear mainly on the origin or source of international responsibility, namely, the illicit act; then on the content of the responsibility, in other words on the consequences attached by international law to an internationally illicit act in different cases; and lastly on certain problems concerning what had been termed the “implementation” of the international responsibility of States.

7. He had concentrated on examining the subjective and objective conditions for the existence of an internationally illicit act. The second report, now before the Commission, only contained some basic general rules. First and foremost it stated the fundamental rule that every international illicit act was a source of international responsibility. There followed a concrete examination of the two elements of the conditions for the existence of the international illicit act: the subjective element, consisting of conduct attributable to a State as a subject of international law, and the objective element, consisting of the fact that the conduct imputed to the State constituted a failure to fulfil an international legal obligation.

8. Members of the Commission should not be surprised to find that the report contained some very lengthy expositions followed by a few articles, which might appear laconic. That was because the topic of responsibility rested on principles which, though relatively few in number, could not be defined until a whole series of problems had been solved, on which there was an abundance of practice, international jurisprudence and doctrine. He had therefore adopted the method of first outlining the problems and then, after examining them, proposing what seemed to him to be the best formulation, taking into account, in particular, the need to avoid prejudging in any way the questions that the Commission would have to settle later.

9. The abundance of works on international responsibility, and the wealth of practice and judicial decisions, explained why the report was loaded with numerous, but indispensable notes.

10. With regard to the problems he had discussed in the report, which dealt only with general rules, the jurisprudence, practice and writers all recognized that any internationally illicit conduct gave rise to State responsibility and that internationally illicit acts by States created new international legal relations. But unfortunately that was where agreement ended; there were three different main views on the consequences of illicit acts and, hence, on the content of responsibility.

11. According to the first view, which might be considered the classical one, an obligatory bilateral relationship was established between the State which had committed the illicit act and the injured State, in which the obligation of the former State to make reparation was set against the subjective right of the latter to claim reparation. Members would find applications of that view, taken mainly from judicial decisions and practice, in the footnotes to paragraphs 15 and 16 of the report.

¹ See *Yearbook of the International Law Commission, 1969*, vol. I, pp. 104-117.

12. The second, opposite, view, of which the most distinguished advocates were Kelsen and Guggenheim, started from the idea that the legal order was a coercive order, and saw an act of coercion as the only direct legal consequence of the illicit act. The obligation to make reparation was considered to be only a secondary duty interposed between the illicit act and the application of the measure of coercion, possibly by agreement between the guilty State and the injured State. It was not specified in that theory, however, whether the "sanction" referred to meant a real sanction having, as such, a repressive character, or a coercive measure intended to secure fulfilment of the obligation violated, and thus corresponding, in a way, to enforcement in municipal law.

13. Lastly, there was a third view, to which he himself adhered, which held that it was absurd to try to limit the direct consequences of an international illicit act solely to the sanction and the obligation to make reparation. An illicit act in international law, as in any other system of law, could give rise to a dual form of legal relations by virtue of which the injured party might, according to the case, acquire either the right to claim reparation or the faculty to impose a sanction on the author of the illicit act. Moreover, that faculty might be acquired by a subject other than the injured party. It was not easy to divide up illicit acts into clearly defined categories giving rise either to reparation only, or to reparation and sanction. All that could be said was that there was normally an order of priority between the two possible consequences, in that by offering adequate reparation the guilty State should be able to avoid the sanction. But that conclusion too was open to doubt in cases where the illicit act was of such gravity that it should be regarded as an international "crime". It might also be asked to what extent modern international law recognized the possibility of a sanction being imposed by subjects of international law other than the injured State, for example, by an international organization, and whether cases did not exist in which it might be said that an international illicit act affected all members of the international community, so that its author was responsible to all States. Those problems were of particular interest in as much as they revealed a trend towards incipient personification of the international community, and as an element making it possible to define a concept of "crime" in international law.

14. The Commission was not called upon to solve those problems at once. It would have to do so later, when it came to consider the content of international responsibility. The reason why he had thought it necessary to refer to them was that the Commission should be aware of those problems and bear them in mind, in order to formulate the basic rule on responsibility for internationally illicit acts without prejudging in any way the answers to questions it would have to settle when it came to define the content of responsibility.

15. He had also raised a question of terminology. In paragraph 26 of his report, he had referred to the many terms used in different languages to denote the act generating responsibility. In the interests of simplicity, he proposed that in French the expression "*fait illicite*"

should be adhered to, as the word *délit* suggested too many comparisons with municipal law. One might hesitate between the word *fait* and the word *acte*. But in the Latin languages, the term "*acte*" or "*acte juridique*" was used to designate an entirely lawful manifestation of the will, to which the law attached a legal result corresponding to the will manifested. It was clear, however, that the legal consequences of the illicit act or omission were not a result desired by its author: hence the term "*acte*" was inappropriate. Moreover, in international law, illicit conduct often took the form of an omission rather than an act, and the word *fait* could be better applied to both.

16. It might perhaps be more difficult to find an English equivalent of the term *fait illicite*. On that point, he relied heavily on the assistance of Sir Humphrey Waldock, Mr. Rosenne and all the other English-speaking members of the Commission. He would, however, point out that the word "act" should be translated into French by the word "*action*", rather than "*acte*", which had a strong legal connotation. Perhaps the expression "illicit act" could be retained in English, but he was waiting to hear the opinion of the English-speaking jurists.

17. Although the Commission had decided at its last session to leave aside, for the time being, the problem of responsibility for lawful acts or risk, it was necessary to avoid a formulation of the general rule which would, in effect, exclude that type of responsibility. The formula used, for example, in the *Dickson Car Wheel Company* Case, referred to in footnote 41 to paragraph 28 of his report, was just the type of formula to avoid, since it seemed to stipulate the existence of an "unlawful international act" as a prerequisite for international responsibility.

18. Imputation of the illicit act and imputation of responsibility were not synonymous. Even though the most usual case was that in which an illicit act generated international responsibility attaching to the State which had in fact committed it, the definition to be drafted should also allow for the case where responsibility was imputed to a State or subject other than the author of the illicit act.

19. It was in an attempt to satisfy all those requirements that he had drafted the brief article I which he was submitting to the Commission. He asked members of the Commission to be so good as to give their views on the three questions concerning the first section of chapter I.

20. The next question was when an illicit act could be said to exist in international law. That was the problem of the conditions for the existence of an international illicit act, which was discussed in paragraphs 31-55 of his report. Doctrine and jurisprudence were almost unanimous in distinguishing, for that purpose, a subjective element consisting of conduct—act or omission—imputable to a State, and an objective element, namely, the fact that the conduct in question constituted failure to fulfil an international obligation incumbent on that State. As could be seen from the writings and decisions quoted, that distinction was accepted by writers belonging to all the great legal systems of the world. But there again, unanimity did not go much beyond recognition

of the distinction. In his next report, he would deal extensively with the various problems posed more particularly by the question of imputability, such as the definition of organs of the State, the imputation to a State of acts committed by organs of the State in violation of its internal law, acts committed by public institutions which, under internal law, did not form part of the State, and the problem of acts of individuals.

21. A relevant general point was that the conduct to be imputed to the State might just as well be an omission as an act. That point was widely accepted in both doctrine and jurisprudence. He would refer members, in particular, to the judgement of the International Court of Justice in the *Corfu Channel Case*² and the quotations in footnote 53 to paragraph 36 of his report. However, the consequences of illicit acts and omissions were not necessarily identical, and it might therefore be necessary to take account of the possible differences in certain cases.

22. It must also be stressed that although the State was a legal person, it was an entity physically unable to act by itself. It always acted through the intermediary of natural persons who were its organs. To impute an illicit act to a State was to impute an act or omission physically committed by one person to another person. That was a juridical operation, and he did not think the concept of natural causality was applicable. In the same context, he stressed that the State to which an illicit act was said to be imputed was the State as a subject of law, not the State in the sense of a legal order. Moreover, the State was in that case regarded as a person under international law, not as a person under internal law, since the imputation of the international illicit act to the State was a juridical operation originating in international law. The difficulties which were sometimes raised on that point were due to a confusion between imputation and definition of the organs of the State, but it was the international order that attributed to the State, as a subject of international law, an act or omission by its organs as an internationally illicit act.

23. The definition of the objective element of the international illicit act as failure to fulfil an international obligation emphasized the subsidiary character of the rules of international responsibility in relation to the rules imposing on the State the obligations whose violation generated responsibility.

24. The concept of violation of an international obligation was well established in doctrine and jurisprudence. On that point reference might be made to paragraphs 42-44 of his report. As was explained in paragraph 45, the expression "breach of an international obligation" should be used in preference to "breach of a rule", since the subject of law failed to comply, not with a rule of objective law, but with the subjective obligation imposed upon it by that rule. Moreover, any obligation could be breached, no matter what its source, and in addition to the obligations imposed on States by "rules" of inter-

national law, there were obligations deriving from unilateral acts, judicial or arbitral decisions or particular conventions. Referring to a last problem of terminology, he pointed out that since every obligation had its counterpart in a subjective right of another subject of law the expression "impairment of a subjective right" was fully synonymous with "violation of an obligation".

25. As to the problem of abuse of rights, that was a matter on which judicial decisions had always been extremely guarded. It had even been possible to assert that they avoided referring expressly to that concept where they applied it in practice. In his view, there was no need for the Commission to become involved in the controversy on that subject. For either the concept was not known to international law, in which case there was obviously no need to deal with it in a study of responsibility; or it was known to international law, which would mean that States were under an international obligation not to exercise their rights beyond a certain limit. Since the objective element of the international illicit act was failure to fulfil an international obligation, abuse of rights would be nothing else but failure to comply with a positive rule of international law thus enunciated.

26. On the other hand, it was necessary to bear in mind the distinction between cases in which the illicit act consisted in conduct which in itself violated an international obligation and cases in which the illicit act was committed when the conduct was combined with some external event. Paragraph 50 of his report contained examples of the first type of case and paragraph 51 of the second. The example of an attack by private individuals on the premises of an embassy clearly illustrated the fact that an external element was sometimes necessary. For although the host State had an obligation to take the necessary measures to protect the embassy, the mere fact that it had not taken those measures was not a violation of that obligation; the external event of the attack was also necessary.

27. Lastly, the question had been considered whether, in addition to the conduct attributed to the State and the failure to fulfil an international obligation which that conduct constituted, a third element, namely injury, was necessary. That concept had sometimes been confused with the external event to which he had just referred. Sometimes, the injury caused by States to individuals had been considered, but that was confusing substantive rules with rules relating to responsibility. International obligations relating to the status of aliens were, indeed, obligations not to cause such injury to aliens. Hence, injury was part of the actual content of the rule. It was not a further element added to the violation of the obligation. On the other hand, the existence and extent of a material injury caused to another State was not, in his opinion, a condition that must be added to the fact that an international subjective right of that State had been infringed. Those were the principles on which the Special Rapporteur had based the article II he was submitting to the Commission. He would be grateful if members of the Commission would reply, in their statements, to his questions on section II of chapter I.

² *I.C.J. Reports*, 1949, p. 4.

Co-operation with other bodies

(A/CN.4/234)

[Item 6 of the agenda]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

28. The CHAIRMAN welcomed Mr. Adade, the Attorney-General and Minister of Justice of Ghana, who was also Chairman of the Asian-African Legal Consultative Committee, and invited him to address the Commission.

29. Mr. ADADE (Observer for the Asian-African Legal Consultative Committee) said that the Committee was glad to transmit to the International Law Commission its sincere greetings and good wishes, as well as those of its member countries. At its eleventh session, held in Accra in January 1970, the Committee had been privileged to act as host to Mr. Ushakov, the then Chairman of the Commission, whose presence at its deliberations had been a great source of inspiration and had contributed in no small measure to enhancing the Committee's prestige and standing in the eyes of the general public.

30. In anticipation of the Commission's discussions on the topic of State succession, the Committee had placed that topic on the agenda for preliminary discussion at its eleventh session, with a view to giving member countries an opportunity of defining their positions on it. Unfortunately, time had not permitted the Committee to deal with that item, although, for obvious reasons, it was of special interest to the new States; he assured the Commission, however, that the Committee would continue to follow its discussion of the topic with the keenest interest.

31. At its eleventh session, the Committee had discussed three main items, namely, the rights of refugees, the law of international rivers and the international sale of goods, though it had been unable, owing to lack of time, to discuss the topic of international shipping law.

32. An admirable report of the Committee's discussions on the above subjects had already been circulated by Mr. Ushakov in document A/CN.4/234. He wished to associate himself with Mr. Ushakov's remarks and would only add that every effort was being made to increase the number of the Committee's member States. Nigeria and Korea had already been formally admitted at the eleventh session. The Committee was particularly anxious to attract as many of the French-speaking African States as possible, as it did not yet have a single one of them among its members. That might be due, in part, to the fact that English was so far the only official language used at the Committee's meetings. However, as soon as it had a sufficient number of French-speaking States, the Committee intended to adopt French as an alternative language. Efforts were also being made to persuade some of the East African countries to join the Committee.

33. Although he had so far attended only one of the Commission's meetings, he had not failed to observe the meticulous care with which its affairs were conducted;

it was not surprising, therefore, that its proposals invariably commanded world-wide respect and acceptance. He assured the Commission that his Committee attached great value to the Commission's contribution to the development and codification of international law and would do everything possible to assist its endeavours for the good of the whole world.

34. Mr. NAGENDRA SINGH said he had been present as a member of the Asian-African Legal Consultative Committee at its eleventh session in Accra and wished to extend a cordial welcome to the distinguished Minister of Justice of Ghana, who had been Chairman. It was kind of him to find time to come to the Commission and thus show his spirit of co-operation with it. His statement had been illuminating. He (Mr. Nagendra Singh) also wished to express particular appreciation of Mr. Ushakov's excellent report and to thank Mr. Adade for the skill he had displayed as Chairman of the Committee in bringing its eleventh session to a successful conclusion. He hoped that the Commission would send an observer to all future sessions of the Asian-African Legal Consultative Committee; that was the least it could do to show its willingness to co-operate.

35. Mr. YASSEEN, after welcoming the observer for the Asian-African Legal Consultative Committee, pointed out that, under the Committee's statute, any question on the agenda of the International Law Commission was also on the Committee's agenda, a fact which created a very special link between the two bodies. The main task of the Commission was to prepare conventions acceptable to the international community as a whole. The efforts made by regional or intercontinental organizations could only facilitate the task of the Commission, which found their studies extremely useful.

36. He very much hoped that the Committee would, in particular, express specific and detailed views on the topics of State succession and State responsibility. It would be extremely useful to the Commission to have precise knowledge of the views of the many Asian and African States forming the Committee's membership.

37. It was true that not all African and Asian countries belonged to the Committee, but the number of member countries was sufficient to be representative of the different political trends and legal systems. In order to increase the number of members, however, it was necessary to admit the use of languages other than English and he personally had already had occasion to propose, in an article published in 1964,³ that the Committee should also admit Arabic and French as official languages.

38. In conclusion, he wished the Committee every success in its efforts to further the codification and progressive development of international law.

39. Mr. USHAKOV thanked Mr. Adade and congratulated him of his excellent statement. He also expressed his warm thanks to the Government of Ghana for the exceptional hospitality, so characteristic of that

³ See *Annuaire français de droit international*, 1964, vol. X, p. 669.

country, which had been accorded to him as observer for the International Law Commission.

40. At the opening meeting of the Committee's eleventh session, a message had been read out from the Chairman of the Presidential Commission of Ghana, emphasizing that the Asian and African countries had many problems in common and that the Committee could help to harmonize their views on important legal issues. Mr. Adade, who had been head of the Ghanaian delegation, had been elected Chairman of the Committee.

41. It was particularly gratifying to note that, as was evident from the whole course of its work at the eleventh session, the Asian-African Legal Consultative Committee attached very great importance to the maintenance and development of mutually advantageous relations with the International Law Commission. He had followed the work of the Committee with great interest. The African and Asian countries had many problems of their own and the Committee was preparing drafts that would be very useful for the development of mutual relations between those countries.

42. The Committee did not, however, restrict itself to problems peculiar to the African and Asian countries. It also concerned itself with problems which affected the world as a whole and, in particular, with the topics on the Commission's agenda. Members of the Commission had more than once had occasion to stress the decisive part played by members of the Committee in the success of the Conference on the Law of Treaties. Only lack of time had prevented the Committee from considering the topic of State succession at its eleventh session and it had been decided that that topic would be discussed at its next session.

43. In the report he had prepared on the eleventh session of the Committee, he had indicated the various decisions which had been taken by the Committee and had emphasized the importance they presented for the International Law Commission.

44. Mr. TABIBI said that he wished to join the preceding speakers in extending a warm welcome to the Chairman of the Asian-African Legal Consultative Committee and in congratulating him on his very interesting statement. It was unnecessary to stress the importance of the part played by the Asian and African countries in shaping contemporary international law; their work in that sphere, as exemplified by the Committee, was of benefit not only to the peoples of Asia and Africa, but also to the community of nations as a whole.

45. Mr. THIAM said that he, too, wished to welcome the observer for the Asian-African Legal Consultative Committee. He particularly appreciated the fact that useful relations had been established between the Committee and the Commission. That co-operation, which could only be beneficial, should be continued.

46. While the new African and Asian States were admittedly in need of rules of their own, they could also bring to the international community new ideas that would enrich international law. It would be particularly useful for the Commission to know the Committee's views on the topic of State succession. Similarly, with

regard to refugees, it would be useful for the African and Asian States to study the specific problems resulting from decolonization, while taking care not to depart too far from the general principles of law.

47. There was no doubt, moreover, that if the French-speaking States were allowed to use the language they knew best, that would open the way for their entry into the Committee. There was no other reason for their absence. The French-speaking African States did not constitute a monolithic bloc; there were neighbourly relations between the French-speaking and English-speaking States. It would be useful if the Committee could concern itself with the problems raised by those relations. He hoped that at the next session the observer for the Committee would be able to inform the Commission that a large number of French-speaking States had become members.

48. Mr. ROSENNE said that the work of the Asian-African Legal Consultative Committee had been of particular value to the Commission in connexion with its own work on the law of treaties and that he now looked forward to hearing the Committee's views on the law of State succession. Since he attached great importance to the maintenance of close liaison between the Commission and intergovernmental organs working in the same field, he hoped that the Chairman of the Commission would be able to attend the Committee's next session or else arrange to be represented by a member who could submit a full report on the Committee's activities. Lastly, he thanked Mr. Ushakov for his very interesting report on the Committee's eleventh session and suggested that the Commission should formally take note of that document in its own report.

49. Mr. BARTOŠ said that every year the work undertaken by the Asian-African Legal Consultative Committee was becoming wider in scope. The Committee had successfully overcome the difficulties it had encountered, in particular certain differences between African and Asian countries. It would soon settle the question of working languages which separated the States using English, French and Arabic as the usual languages for African jurists.

50. The Committee had two very different groups of tasks before it. First, it was called upon to strengthen, through the consultations brought about by its meetings, the role of the principles of international law recognized by the United Nations in relations between African and Asian countries, taking account of their specific situation, of which decolonization was one significant feature. Secondly, the Committee continued to make a close study of the work of the International Law Commission. It was to be regretted that the Commission did not make greater use of the results of the studies on topics on its agenda undertaken by the Committee. In his view, not only should the officers of the Commission seek practical means of improving the exchange of information, but the Commission and its Special Rapporteurs should take the opinions and advice of the Committee into consideration. He was convinced that the Committee wished to be heard not only during, but before, the General

Assembly, and not only through the comments of governments, but also through consultations initiated by the Commission. The reciprocal visits of the Chairman of the Committee and the Chairman of the Commission provided an opportunity for studying possible ways of extending the co-operation which had been established.

51. The CHAIRMAN, speaking on behalf of the Commission as a whole, thanked the observer for the Asian-African Legal Consultative Committee for his interesting statement. He himself had found the Committee's work on the subject of the international sale of goods particularly interesting. He shared the hope expressed by other speakers that the Commission would be represented at future sessions of the Committee.

The meeting rose at 6.10 p.m.

1075th MEETING

Tuesday, 23 June 1970, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

State responsibility

(A/CN.4/233)

[Item 4 of the agenda]

(resumed from the previous meeting)

1. The CHAIRMAN invited Mr. Ago to resume the introduction of his second report on State responsibility (A/CN.4/233).

2. Mr. AGO (Special Rapporteur) said that the third section of his report dealt with the capacity to commit international illicit acts, a concept particularly dear to German jurists.

3. First of all, the word "capacity" must not be understood in the sense of a faculty or power conferred by law: that had been the mistake made by certain German writers, who had regarded delictual capacity as a particular aspect of the broader concept of the capacity to act. It was, indeed, absurd to suppose that the law could confer the power to violate the rules which it laid down. The terms used—whether "delictual capacity" or "capacity to commit illicit acts"—could therefore be no more than a convenient way of expressing the idea that a State

which was materially able to exercise an activity in a given sector was also materially able to commit a breach of its international obligations in the exercise of that activity. It was practically certain that every State had that ability. The Commission, which for the time being was considering only the responsibility of States, need not concern itself with the question whether other subjects of law also had that ability. Moreover, the Commission should not allow itself to be drawn into formulating a rule on that point corresponding to article 6 of the Vienna Convention on the Law of Treaties,¹ which dealt with the capacity to conclude treaties, since the concept was entirely different. What was called "delictual capacity" really had nothing to do with the capacity to act or with any kind of legal power.

4. That being so, the only problem which might arise was that of possible limits to the capacity to commit international illicit acts. In that connexion, certain problems known under the name of vicarious responsibility or responsibility for the act of another must be left aside at once. There might be cases in which, because of a special situation, one State exercised control over the activities of another State and was answerable in its place for any international illicit act the other State might commit. In such cases, there were no limits to the capacity to commit international illicit acts; it was the responsibility which the law attached to such acts that was imputed to a subject other than the author of the delinquency.

5. Similarly, there appeared to be no need to refer to the situation of States members of a federal union, first, because it was evident that any State of that kind which had retained even limited capacity to make agreements with States outside the federation was usually *ipso facto* capable of keeping or violating the undertakings it had thus entered into, and, secondly, because federal States were generally opposed to any reference to a separate international personality of the States members of the federation.

6. The real limits to the capacity to commit international illicit acts must therefore be sought elsewhere. There was a whole series of situations in which the activity of one State might be superimposed on that of another State in its own territory. That happened in the case of protectorates, for example, which had not entirely disappeared; in the case of military occupation, not necessarily in time of war, but also following a state of war which had ceased to exist, or even in time of peace; and when the subject exercising the activity in place of the State was not another State, but an international organization. The occupier might replace certain administrative or judicial organs of the occupied State by elements of its own administration, and if the latter committed a breach of an international obligation of the occupied State it was obvious that the delinquency must be imputed to them. That was not a case of vicarious responsibility, but of original responsibility of the State

¹ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/27* (United Nations publication, Sales No.: E.70.V.5).

exercising the activity, and there was therefore a limit to the delictual capacity of the occupied State.

7. It might be asked whether it would not be better to refrain from mentioning those situations, as had been done in the case of the capacity to conclude treaties, because they were transitory. His answer was in the negative, because, first, some of those situations were not likely to disappear and, secondly, although it might be juridically correct and politically useful to say that, in certain cases, the capacity of a State to conclude treaties was not affected, that did not apply to illicit acts, for if the abnormality of the situation was ignored, there was a danger of imputing the illicit act to a State which could not possibly have committed it, and thus making a gift of impunity to the State which was really guilty. The Commission did not have to take a decision on that question immediately, but it would do well to reflect on it before adopting a final text. For the time being, he was submitting article III, which appeared in paragraph 64 of his report, and would refer the Commission to the two questions relating to section III of chapter I which he had asked in the questionnaire introduced at the previous meeting.

8. With regard to the continuation of the work, the report he would submit to the Commission at its next session would comprise the part relating to problems of imputation of responsibility. After defining the two basic elements constituting the international illicit act as a source of responsibility, the next step was to inquire in what cases an activity—an act or an omission—could be imputed to a State which was a subject of international law as an act giving rise to responsibility. The questions to be successively answered would be: What organs of the State could commit illicit acts? What attitude should be taken to acts committed by organs of the State in breach of its internal law or beyond the limits of their competence? What attitude should be taken to acts of organs of public institutions other than the State, acts of individuals acting for the State in specific sectors, and so on? Then it would be necessary to examine the objective element of responsibility, in other words to determine in what conditions an act imputed to a particular State could be defined as failure to fulfil an international obligation. That introduced the problem of fault (*culpa*), the question of the exhaustion of local remedies and other questions such as the relationship between conduct and events in international delinquencies. In that context there also arose the problem of the *tempus commissi delicti*. Lastly, to conclude the first part of the study of responsibility, would come an examination of the circumstances in which certain conduct was not of an illicit character and, hence, did not give rise to responsibility. In the light of those remarks, he asked members to answer the last question in his questionnaire, namely, whether the Commission accepted the broad outline of the plan he had suggested and the method he had followed.

9. Mr. RUDA said that the Commission was confronted with a very difficult problem; it had already defined what might be called the primary rules, but it now had to deal with the secondary rules—those which deter-

mined the consequences of the non-fulfilment of obligations established under the primary rules.

10. In considering the three important draft articles proposed by the Special Rapporteur, he wished to draw particular attention to the statement, in paragraph 10 of his report, that they were being put forward "with a view to the eventual conclusion of an international codification convention". In the same paragraph, the Special Rapporteur had said that the positions taken by international law writers would be mentioned, "having particular regard to the most recent trends in different countries". Then, in paragraph 24, he had gone on to say that the principle to be established from the outset was "the unitary principle of responsibility, which it should be possible to invoke in every case".

11. In his questionnaire the Special Rapporteur had invited the Commission's views on three fundamental problems, namely, the sources of State responsibility, the conditions in which the international illicit act existed and the capacity to commit such acts.

12. Article I aptly reflected the notion of the illicit act as a source of responsibility, and the fundamental rule that any conduct of a State regarded by international law as an illicit act involved international responsibility on the part of that State. The Special Rapporteur had correctly justified that rule by invoking the existence of an international juridical order and the obligations which that order imposed on States; he had made a most interesting analysis of the theories that could be applied to the various situations which might arise in that connexion.

13. The Special Rapporteur had then stated that an international illicit act could lead either to an obligation to make reparation or to some sanction or punishment. Although those ideas were theoretically separable, it was, he thought, rather difficult to distinguish between them.

14. The Special Rapporteur had gone on to say that the new trend in international law was to reject the Drago doctrine, especially where only minor acts of an economic character were concerned. In any case, it must be admitted that an international illicit act created a new relationship between the State committing the act and the State injured by it. He wished to reserve his own position concerning the Special Rapporteur's interpretation of that new trend.

15. New problems came to mind when one considered that the new legal relationship could extend not only to the guilty State, but also to other States and to international organizations. The State which committed an international illicit act could thus incur responsibility towards all States. In article I, the Special Rapporteur had adopted a clear and simple formula which was not open to criticism; he (Mr. Ruda) suggested, however, that in the commentary a clearer reference should be made to the scope of the concept of international responsibility referred to in paragraph 25. Such a broad definition of responsibility might lead to some rather complicated legal problems.

16. Article II dealt with the basic problem of the conditions in which an international act could be considered

illicit. The Special Rapporteur had correctly pointed out that the international conduct of a State could be either an act or an omission. He had also been correct in saying that imputation to a State, which was an abstract entity, was governed by international and not by municipal law.

17. It was better, he thought, to use the words “non-fulfilment” of an obligation than to speak of its “violation”. The illicit nature of an act existed in the non-fulfilment of a legal duty, which might come about as the result of a judicial decision.

18. With regard to article III, on the capacity to commit international illicit acts, he agreed with the substance of that article, but would prefer rather different wording in paragraph 1.

19. Lastly, with regard to the Special Rapporteur’s questionnaire, he could reply affirmatively to the questions under I and II, except II (e). He reserved his position on question III (a), but would reply affirmatively to question III (b) and to question IV.

20. Mr. TABIBI said he congratulated the Special Rapporteur on his outstanding report and noted with satisfaction that he had adopted a cautious approach to a complex subject which had caused much difficulty in the past. In his opinion, the Special Rapporteur had been right in deciding to consider only the responsibility of States and to leave other subjects of international law for the future.

21. He agreed that the three basic articles of the Special Rapporteur’s draft should be included in a convention, though he preferred to keep an open mind as to the final shape they might take.

22. There was no doubt that any conduct of a State which was in violation of international law must be considered an act generating responsibility on the part of that State. There were numerous examples of such violations in the practice of States and in judicial decisions, some of which had called for punitive sanctions. Lately, however, international law had undergone great changes as a result of the emergence of many new States and the coming into force of the United Nations Charter as a positive instrument of international law. Doctrine and practice should always be respected where they were in line with the fundamental principles of the Charter.

23. He could not agree, however, that the rules for establishing State responsibility and the rules for taking punitive action against violations of international law were necessarily part and parcel of each other. Under the Charter, for example, the failure of Members of the United Nations to meet their financial obligations called for the suspension of their right to vote, although in practice that sanction had never been applied. It was necessary to think in terms of the machinery actually in use in the United Nations and not to invoke that machinery as a means of pressure by the strong Powers against the weak. On the other hand, violations of basic principles of international law, such as those connected with human rights, the self-determination of peoples and nations, armed attacks, and slavery, were of a different character; they

directly affected the community of nations and therefore called for international action and sanctions.

24. With regard to the draft articles themselves, he agreed with the cardinal principle expressed in article I, though a specific reference should be added to acts which were prohibited by international law and by the United Nations Charter. He agreed with the substance of article II and was prepared to accept paragraph 1 of article III, but he thought that paragraph 2 tended to confuse the general rule and was therefore unnecessary.

25. Mr. SETTE CÂMARA said that past efforts to codify the rules of international law governing State responsibility had been largely confined to the question of responsibility for injury to the person or property of aliens in the territory of a State; he commended the Special Rapporteur for taking the subject out of those narrow limits and tackling the problem of State responsibility in general. As the three articles proposed were unlikely to meet with serious opposition in the Commission, he would confine his remarks to the text of the Special Rapporteur’s report.

26. He could accept the reasons given in paragraph 5 for confining the present study to the responsibility of States, provided that the importance of the responsibility of subjects of international law other than States was not underrated. Postponement of work on the question of responsibility arising out of lawful activities, such as those connected with space exploration and nuclear research, as was proposed in paragraph 6 on the grounds of the different nature of the responsibility involved, was also acceptable in the initial stage of the present study, but only as a practical expedient. The Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space was already considering drafts dealing with responsibility under such conditions.²

27. He also shared the view, expressed in paragraph 7 of the report, that a clear distinction should be maintained between the determination of principles governing the responsibility of States for internationally illicit acts, which the Commission had agreed to study, and any attempt to define the rules which placed obligations on States and whose violation could give rise to responsibility. That would help the Commission to avoid discussions on the nature of international law and its foundations.

28. The principle, stated in paragraph 12, that any conduct of a State regarded by international law as an illicit act engaged the responsibility of that State in international law was indisputable. International responsibility for illicit acts, as the Special Rapporteur pointed out, was a corollary to admission of the existence of a valid international legal order. However, to accept a connexion between the doctrine of State responsibility and the affirmation of an international legal order would be going beyond the premise adopted by the Special Rapporteur, and would open the way for the admission of penal

² See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 21, Annex III, Appendix II.*

responsibility, at least for acts resulting in an injury *erga omnes*.

29. The problem was whether the new relationship arising from the illicit act would entail only a subjective right of the injured State to obtain reparation and an obligation of the State which had committed the act to make reparation, or whether the legal order would impose additional sanctions for the breach of international obligations. With regard to the discussion in paragraphs 15 to 18 on the legal consequences of an illicit act in terms of sanctions as distinct from reparation, he agreed with the Special Rapporteur that the Commission should not now embark on a discussion of consequences other than the direct single relationship. But the Commission should state clearly that it did not intend thereby to deny the existence of consequences other than the mere obligation to make reparation for injury. The United Nations Charter made the international community appear to be organized, at least theoretically, on a coercive basis. Coercive measures were expressly provided for in Chapter VII of the Charter and had been applied on many occasions by the Security Council. Whether or not such sanctions were effective was another matter.

30. The Special Rapporteur's contention, in paragraph 21, that there was an order of priority between the two consequences of an internationally illicit act and that the claim for reparation must precede the application of sanctions when possible, seemed to be sound. He had doubts about the affirmation in paragraph 22 that, at least at the present stage in international relations, it seemed necessary to rule out the "idea that as a result of an international illicit act general international law can create a legal relationship between the guilty State and the international community as such, just as municipal law creates a relationship between the person committing an offence and the State itself". Although analogies with municipal law were always dangerous and sometimes fallacious, it could be said that acts such as the repeated rejection by Rhodesia and South Africa of indisputable obligations incumbent on all Members of the United Nations had justified and prompted the application of sanctions, and that the community of States, as legally organized by the United Nations Charter, had acted as a person injured by such acts.

31. He agreed with the suggestion in paragraph 25 that, in its commentary to the rule it adopted, the Commission should point out that the term "international responsibility" was used in a general sense and irrespective of whether it referred only to the guilty State's obligation to restore the rights of the injured State, or whether it also covered the faculty of the injured State itself, or of other subjects, of imposing sanctions for the illicit act. The wording proposed for article I would be acceptable on that understanding.

32. With regard to the suggested conditions for the existence of an international illicit act, he thought that the subjective element, consisting of conduct imputable not to the individual or group of individuals who were the actual authors, but to a State as a subject of international law, should not be taken to imply outright rejection

of individual responsibility for grave illicit acts, such as war crimes. State responsibility could then be engaged parallel with individual responsibility and be translated into either reparation or sanctions. That position had in fact been taken by the Commission in its earlier work.

33. He agreed with the condition that the State to which the conduct in question had been legally imputed must, by that conduct, have failed to fulfil an international obligation, and that the conflict between the State's actual conduct and the conduct required of it by law constituted the essence of the delinquency. The Special Rapporteur had rightly emphasized responsibility for illicit acts resulting from failure to fulfil international obligations. The suggestion in paragraph 49 of the report that the problem of abuse of rights need not be discussed for the time being, as it would involve examining the primary rules of international law which set the proper limits on the exercise of rights, was acceptable, although abuse of rights could become an important source of illicit acts and should be considered at an early stage in the Commission's future work.

34. The statement in paragraph 1 of article III was indisputable and the limitations in paragraph 2 were obviously necessary. However, the delictual capacity of States which were members of federations was a controversial problem and many speakers at the Conference on the Law of Treaties had categorically rejected the attribution of international personality to such States. He doubted whether article III was altogether necessary, since it seemed to state what was obvious in paragraph 1, while paragraph 2 limited the capacity to commit international illicit acts to States and it would be contradictory to adopt a rigid formula which excluded from that capacity subjects of law which had been expressly included in Mr. García Amador's bases of discussion,³ such as semi-sovereign entities, political subdivisions of States, individuals and international organizations.

35. He could give an affirmative answer to all the questions in the Special Rapporteur's questionnaire with the exception of question II (e). Regarding question II (f), he did not quite understand how events could give rise to State responsibility.

36. Mr. TAMMES said that in 1963 an initial distinction had been made between primary rules of international law, which had a direct bearing on the conduct of subjects of international law, and secondary rules, which were of a functional nature and were intended to ensure observance of the primary rules.⁴ The Special Rapporteur's second report was clearly concerned with secondary rules. Precisely what role the three proposed articles would play in the future draft was not yet known, but paragraph 91 of the Special Rapporteur's first report⁵ gave some indication of the practical consequences of the distinctions made in those three articles.

³ See *Yearbook of the International Law Commission, 1956*, vol. II, pp. 219-221.

⁴ See *Yearbook of the International Law Commission, 1963*, vol. II, p. 227 *et seq.*

⁵ *Op. cit.*, 1969, vol. II, Document A/CN.4/217.

37. Like the Special Rapporteur, he regarded article I as the fundamental rule containing the essential elements of State responsibility—an objective element of violation of a law, a subjective element of unlawful conduct in the form of an act or omission by a State, not by human beings not juridically identifiable with the State, and, lastly, the definition of State responsibility.

38. He was inclined to regard article II as a statement of doctrinal problems, and ample evidence of that was given in the report. Sub-paragraph (a) of the article made it clear that the term “conduct” covered passive as well as active conduct. The examples given in paragraphs 50 to 52 of the report gave the impression that the distinction made in sub-paragraph (b) concerned the formulation of primary rules of international law, rather than of secondary rules on State responsibility. That distinction was certainly not always easy to make in practice. For example, armed attack as such was illicit conduct, but under a general prohibition of aggression it only gave rise to international responsibility if it actually took place, as an external event.

39. With regard to the discussion, in paragraphs 44 to 46, of the relative merits of expressions such as “violation of international law”, “failure to carry out an international obligation” and “breach of an obligation”, he doubted whether it was wrong to speak of a violation of international law or of rules of international law on the grounds that a rule was law in the objective sense, whereas the subject of law could only fail to carry out its subjective duty or obligation. Article 6 of the United Nations Charter referred to violations of the Principles contained in the Charter. In a draft declaration⁶ it had prepared, the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States also referred to violations of international law. In many languages it was usual to speak of violations of the law, even if the obligation in question flowed from a personalized legal instrument, or from the decision of a court or international organization.

40. With regard to the Special Rapporteur’s conclusion in paragraphs 47 to 49 that the problem of abuse of rights did not belong to the topic of State responsibility, he must point out that in certain legal situations there was no clearly defined interaction of rights and obligations and the rights remained undivided in law. Disputes in such cases could only be decided on the basis of a reasonable balance between the interests of the parties. State responsibility did not then arise from the violation of a primary rule of international law, but was determined, in the absence of such a rule, by the parties themselves or by an impartial authority on the basis of general rules providing for the settlement of disputes with “due regard for” or “reasonable regard for” the mutual interests of the parties concerned. International instruments dealing with such matters as freedom of the seas, lunar exploration and activities which could threaten mankind or its environment were cases in point. Strict

rules would no doubt be worked out in time, but it would be a lengthy process. The problem of abuse of rights could only be finally solved by rules of State responsibility and the question should not, therefore, be left aside indefinitely because it was considered too difficult.

41. The text proposed for article III seemed to have been drafted more with the idea of inducing the Commission to express its views on a perplexing question than of the formulation of a precise rule. It would perhaps be wiser not to use the word “capacity” in the context of State responsibility. Of course, the term was used in the Convention on the Law of Treaties, but the capacity to conclude treaties was an entirely different concept from the capacity to commit international illicit acts, as the Special Rapporteur himself had pointed out. The term had been used by German writers particularly interested in the question of the possible responsibility of each State in a federation, as distinct from the responsibility of the federation as an international entity. It was a question that had also arisen in regard to the British Dominions. However, he was not sure that the question of the capacity of member States of a federation to conclude treaties was as theoretical and as obsolete as the Special Rapporteur claimed in paragraph 60. With the progressive organization and integration of States, a pre-federal stage would be reached, when it would no longer be clear who would bear the responsibility for failure to fulfil an international obligation.

42. Article III, paragraph 2, did not seem to provide for the situation in which a State was prevented from discharging its international obligations by the occupation of its territory. Only a State or organization whose organs had themselves acted could be held responsible. In the case of material impossibility or necessity, positive or negative illicit conduct was not imputable to the State which appeared to have acted or omitted to act, but to the State which had caused the act or omission. That did not involve a legal operation, but merely the establishment of a fact. One aspect not covered by paragraph 2 was the responsibility of the occupying State, especially with regard to the performance of the international obligations of a territorial State, as long as the occupied State was unable to act. That, however, was essentially a question of succession.

43. Mr. CASTRÉN said he associated himself with the congratulations which had been expressed to the Special Rapporteur on his excellent report. In the introduction and the detailed commentaries on the three general rules he was proposing, he had brought out clearly the principal characteristics and consequences of international illicit acts.

44. The plan and the method of work adopted by the Special Rapporteur and explained in the introduction seemed to be carefully weighed and satisfactory from every point of view. He agreed with the Special Rapporteur that the Commission should first consider the question of State responsibility for international illicit acts, leaving aside for the moment the problem of so-called responsibility for risk. The order in which the

⁶ See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18*, para. 83.

different questions were to be considered was given in detail in paragraphs 8 and 9. The programme of work was truly enormous and it would probably take several years to formulate all the rules. Some of the questions to be considered were very complex: the question of self-defence, for instance, and questions relating to the circumstances in which the conduct imputed to a State could not be regarded as wrongful.

45. The length of the previous codification drafts on State responsibility varied greatly and several of them were not complete. He noted that the Special Rapporteur took the view that responsibility comprised relatively few principles which could be formulated concisely, and therefore proposed to submit to the Commission a draft of twenty to thirty fairly succinct articles to cover all the points. On the other hand, on every point there were many complex questions which had to be examined and settled first, and that meant preparing lengthy commentaries.

46. He found the text of the three articles, which dealt with different aspects of international illicit acts, entirely satisfactory. The commentaries were very full, clear and convincing, and they showed that the Special Rapporteur's ideas were generally accepted by the majority of writers and in international jurisprudence and State practice.

47. The rule stated in article I was simple, undeniably just and drafted in general and flexible terms so as to cover all cases of responsibility. He agreed with the Special Rapporteur's statement in paragraph 20 that international law had not worked out a distinction between civil and penal offences comparable to that established in municipal law; in paragraph 22 that general international law could not, as a result of international illicit acts, create a legal relationship between the guilty State and the international community as such, in the same way as municipal law created a relationship between the person committing an offence and the State; in paragraph 27 that, in French, the expression "*fait illicite international*" was preferable to the other expressions used; in paragraph 28 that the formula stating that an international illicit act was a source of responsibility should be such that it did not lend itself to an interpretation which would automatically exclude the existence of another possible source of international responsibility; and in paragraph 29 that it was preferable to provide, in general, that every international illicit act gave rise to international responsibility, without specifying that such responsibility necessarily attached to the State which committed the illicit act.

48. The two sub-paragraphs of article II contained all the elements, with the possible alternatives, which had to be present for the existence of an international illicit act. In his commentary, the Special Rapporteur dealt very carefully—in the light of the literature, juridical decisions and established practice—with all the important problems connected with the rule stated in the article, and explained the reasons in favour of his text. It was correct, as he said in paragraph 31, that an international illicit act contained a subjective element—conduct attributable to the State—and an objective element—the failure of the

State to fulfil an international obligation incumbent on it—and, as he said in paragraph 35, that where a State had been held responsible for injury caused by individuals, it was really a case of responsibility of the State for omissions by its organs, which had failed to take appropriate measures to prevent or punish the individual's act. The Special Rapporteur made an important point in paragraph 40, when he said that an individual's conduct could be imputed to a State as an international illicit act only by international law. The observation that "The imputation of an act to the State as a subject of international law and the imputation of an act to the State as a person under municipal law are two entirely distinct operations which are necessarily governed by two different systems of law" was correct. The reasoning by which the Special Rapporteur arrived at the conclusion that the expression "breach of an obligation" was preferable to the expression "breach of a rule" was very convincing. He shared the Special Rapporteur's view, expressed in paragraph 46, that in international law the idea of the breach of an obligation was equivalent to that of the impairment of the subjective rights of others, and he accepted his exposition and conclusion in paragraphs 47 to 49 on the question of abuse of rights. Similarly, he agreed that, in order to accuse a State of failure to fulfil an international obligation, it was not always sufficient to show that the State had been negligent; it was sometimes necessary for some harmful external event to have taken place as a result of its failure to act. On the other hand, the Special Rapporteur had, on the whole, been right, in paragraphs 53 and 54, not to include the element of injury among the conditions for the existence of an international illicit act.

49. The Special Rapporteur was quite justified in proposing to include in the draft a provision on the capacity of States to commit international illicit acts, and he accepted the wording of article III which dealt with that point. Paragraph 1 of the article laid down an incontestable rule, subject to the exception stated in paragraph 2, which was the necessary complement to paragraph 1. The exceptional situations referred to in paragraph 2 could, unfortunately, still arise, as recent events had shown, and rules applicable to such regrettable situations as military occupation should be formulated in order to avoid injustices in the matter of responsibility. In paragraph 59, the Special Rapporteur rightly emphasized that the limits concerned were limits to the capacity to commit illicit acts, not limits to the responsibility which the law attached to such acts, and very properly added that, in the case of occupation, where the occupying State was guilty of international illicit acts in the occupied territory, those acts must be imputed to the occupier and entailed its direct responsibility. If the organs of a State were replaced, in its territory, in a broad specific sector of activity, by those of another State or of another subject of international law such as the United Nations, it was to the latter that the acts committed by its organs were imputable and it was the latter which must assume the entire responsibility for such acts.

50. It followed from what he had said that his answers to the twelve questions asked by the Special Rapporteur

in his questionnaire, on the three sections of chapter I, were in the affirmative, and that he accepted the broad outline of the plan suggested by the Special Rapporteur and the method he had followed.

The meeting rose at 1.10 p.m.

1076th MEETING

Wednesday, 24 June 1970, at 9.45 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

State responsibility

(A/CN.4/233)

[Item 4 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's second report on State responsibility (A/CN.4/233).

2. Mr. REUTER congratulated Mr. Ago on his excellent report, with which he was in general agreement, except for a few minor points he would mention later. The Special Rapporteur had been right to begin by seeking to establish the most fundamental principles and then to proceed from the general to the particular. Such a method presupposed, of course, that until the work was completed, it would always be possible to revert to the general principles in order to amplify and clarify them. He wished to point out, however, that whereas the first two articles were of a general character, article III was not quite on the same level. He did not dispute the usefulness of that article; at the most it might be asked, as the Special Rapporteur himself had done, whether it was necessary to express the idea stated in paragraph 1, since it followed from the general principles previously stated. Moreover, in his oral presentation of the report, the Special Rapporteur had referred, in connexion with article III, to the possibility of intervention by an international organization. He himself was not sure whether, in dealing with imputability, it would not be necessary to refer to plurality, or whether the problem of the relationship between imputation to a State and imputation to an international organization could be avoided.

3. The method adopted by the Special Rapporteur was not only an excellent one, it was the only one possible. For in all legal systems, apparently even in the common law countries, there was a general régime of responsibility and several special régimes. At any rate, that was the situation in international law, and it was with the general régime that the study of the subject must begin if insuperable difficulties were to be avoided. That was the principle which the Special Rapporteur had followed and the word "une", which preceded the words "responsabilité internationale" in the French text of article I, clearly suggested that there were several categories of responsibility.

4. But although it might be generally agreed that there was a general régime which should be studied first, there might perhaps be disagreement on whether a particular element came under the general régime or a special régime and whether a given special régime should have priority. The Special Rapporteur, in his capacity as such, had been exceedingly cautious. He himself would like to state his views at once on the problem of penal responsibility or, as it might also be called, the problem of sanctions. The term "sanctions" applied both to "enforcement" and to "punishment". As he saw it, all matters relating to enforcement lay outside the sphere of responsibility. The second aspect of penal responsibility came under a special régime and not under the general régime of responsibility. Punishment was a very serious matter; it was permissible only in special cases and subject to all kinds of safeguards. Admittedly, there was no lack of precedents, in particular very numerous arbitral awards concerning Latin America, in which the principles of a purely reparatory responsibility appeared to be outmoded. In some cases, insurance principles had served as a guide, while in others, decisions had a penal flavour. Remarkable though those precedents might be from the standpoint of international law, they might none the less explain the cautious attitude of some Latin American countries. That was why he believed that responsibility under the ordinary law should contain no penal element and that that was in keeping with the interests of the small and weak countries.

5. In the nineteenth century, sanctions had perhaps been applied for many acts which had not been serious and had not been applied for acts which deserved them. Today, reference was made to the judgement in the *Case concerning the Barcelona Traction, Light and Power Company, Limited*,¹ because of the possibility opened up by its paragraph 34. But in paragraph 91, the Court plainly stated that, even in matters of human rights, the problem of a sanction had been solved only on the regional level. The Court thus appeared to believe that a special responsibility was involved. Article 60 of the Vienna Convention on the Law of Treaties² was undoubtedly another example of special responsibility. It did not say that the violation of any treaty in the world, in other words violation of the *pacta sunt servanda* rule, gave

¹ *I.C.J. Reports 1970*, p. 3.

² *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/27* (United Nations publication, Sales No.: E.70.V.5).

all States a right to act. But certain rights of States parties to a broken treaty had been recognized, and had been strengthened in certain circumstances; it was especially notable that the fullest rights were conferred only on the party particularly affected.

6. The method of laying down the most general rules and treating penal responsibility as a special element was therefore justified not only from the intellectual standpoint, but also from the practical standpoint of the protection of small States. Only international organization might possibly give justice the backing of force required for punishment, but such a treatment of responsibility, which was perhaps necessary, constituted a special régime.

7. With regard to terminology, he found Mr. Ago's report extremely satisfactory. Most controversies were, indeed, due to the failure of communication resulting from the absence of a common language relating to responsibility. The expression *fait illicite* was open to discussion, but it might be satisfactory, and it should be noted that article 1382 of the French Civil Code, which dealt with civil liability, began with the words "*Tout fait quelconque de l'homme. . .*".

8. The expression "failure to fulfil an obligation", should be approved. He would add to what had already been said that every failure to comply with a rule did not constitute an illicit act and, conversely, although responsibility might be held to have a derived secondary character, a very large part of responsibility lay in failure to comply with what were called "standards" in English, which were perhaps not exactly rules, but certainly created obligations.

9. The Special Rapporteur contrasted illicit conduct with an illicit event. There was certainly an important distinction to be made between an obligation relating to conduct and an obligation relating to the result produced, but that was entirely different. The distinction made by the Special Rapporteur was open to criticism because it did not take sufficient account of the intention, and the example he gave would be difficult to accept.

10. Lastly, whereas in French it was perfectly satisfactory to qualify the two elements of the illicit act as "*subjectif*" and "*objectif*", difficulties might arise in English; moreover, if the term "objective" could be avoided when referring to responsibility, it would save many misunderstandings.

11. With regard to substance, the problem of the elements of responsibility called for some comment. First, in article II, the Special Rapporteur made a distinction between conduct imputed to a State and failure to fulfil an obligation. That distinction had been made in the interests of clarity, but as the Special Rapporteur himself explained in footnote 52 to paragraph 33 of the report, the two elements were closely connected, since the imputation was to the same State as had failed to fulfil the obligation. The two elements could not be treated separately.

12. The Special Rapporteur also raised the question whether injury was a condition for responsibility and replied in the negative, because injury was implied in the

violation of an obligation. That position presupposed, in reality, that the violation of an obligation always involved a moral injury.

13. But reference to the violation of an obligation immediately led to the question towards whom the obligation had been, or in other words, in regard to whom responsibility would be applied. Even if it was held that, under the general régime of responsibility, there was no need to require material injury as a separate element of responsibility, it would still be necessary to consider whether there were not special régimes under which moral injury was not sufficient and material injury was required.

14. That comment might suggest that the problem of injury was not so simple. In the light of the *Barcelona Traction* Case it might perhaps be said that some people believed that there were now illicit acts which called for reparation by themselves, independently of material injury, and that that was a manifestation of the current tendency to organize sanctions and allow all States to apply them; but that, conversely, there were less serious illicit acts relating particularly, though not exclusively, to economic assets; for those, there was no broad diplomatic protection. It had been said that property was perhaps not a human right. In the case of property offences material injury would therefore be required; without it, there would be no illicit act. For the present, he agreed that injury should not be made an element of responsibility, but he thought the Special Rapporteur might find it necessary to clarify his position on that point at a later stage.

15. Mr. USHAKOV associated himself with the congratulations addressed to the Special Rapporteur, whose clarity of thought and well-defined views were familiar to members of the Commission. Despite that clarity, however, certain points were still obscure, although they arose out of the positions adopted by the Special Rapporteur on the three draft articles; the reason was no doubt that he intended to develop them later.

16. The exposition preceding article I was excellent, and he shared the ideas it set out. Two preliminary questions arose, however, one theoretical and the other practical. Was responsibility a principle of existing international law or was it a presupposition of international law as of any other legal order? In his view, there could be no doubt that responsibility was implicit in any law, since without responsibility there could be no law. Hence that was true of contemporary international law.

17. Furthermore, a distinction could be drawn between international responsibility in general and absolute international responsibility or responsibility for risk. As he saw it, there was a clear difference between the two, both as to their origin, since the former derived from illicit acts while the latter resulted from injury caused, and as to their consequences, since the former was both political and material, whereas the latter was solely material. The report dealt only with international responsibility in general, since absolute international responsibility was a particular and entirely exceptional case of responsibility. He accepted that solution, but perhaps the

second kind of responsibility could be dealt with after the articles relating to the first had been completed.

18. As to terminology, the Special Rapporteur proposed the use of the expression "*fait illicite international*". That was perhaps the normal translation of the English term "international illicit act"; but the choice raised a point of substance, since a "*fait*" (fact) existed objectively, irrespective of the will of natural or legal persons, unlike an "*acte*" (act), which was the term he would prefer. It was true that there were facts in the ordinary sense and legal facts, and that only the latter brought legal rules into play, but all facts existed objectively.

19. It was perhaps surprising that, in article I, the Special Rapporteur should have referred to international responsibility without specifying with whom it lay. He (Mr. Ushakov) considered that international responsibility did not exist as such. The words "of that State" should therefore be added after the word "responsibility".

20. He found it difficult to accept the ideas set out in the introduction to articles II and III and given formal expression in the text of those articles. The two articles dealt with the problem of imputation and, in his view, such a legal operation did not exist.

21. What type of responsibility was in fact involved in international law? If it was responsibility for an offence, imputation would be necessary, because there would be a presumption of the innocence of the State. As he saw it, however, international responsibility was an objective responsibility and no question of culpability could arise. That was a fundamental point of the draft.

22. But then what did such imputation mean? The Special Rapporteur said that it was a legal operation. He (Mr. Ushakov) regarded it as a procedural matter. In internal law, it was the courts which made the imputation. In international law, the Special Rapporteur said that it was made by international law itself. In reality, international law could not impute an illicit act to anyone; what could be done was to impute the illicit act on the basis of international law. But in international law there was no organ which could establish the illicit act and impute it to a particular subject: hence there was no imputation. Behind the explanations given in paragraph 52 of the report there probably lay concealed the problem of culpability, and he understood that the Special Rapporteur had not wished to deal more explicitly with questions he intended to take up later in his work. But what was to be said later would follow from the position adopted at the present time.

23. Perhaps the Special Rapporteur had a different conception of imputation, however. In paragraph 37 of his report, he explained that the State was an abstract entity which was not physically capable of conduct, and that was why conduct which in fact was that of its organs had to be imputed to it. That idea seemed to be contrary to international reality. The State was a concrete political and material entity, consisting of three elements taken together—the population, the territory and the public authorities. The public authorities

had a very real, not an abstract existence. It was the system of State organs which exercised power, and that system comprised both central and local organs. In his view, if those public organs of the State acted, it was the State itself which acted, whereas, according to Mr. Ago, it was necessary to establish that a particular organ was an organ of the State and then to impute to the State the conduct of that organ. That operation was no more necessary than imputing to a person the conduct of his arm. Consequently, he could not approve of the reference to imputation in draft article II.

24. Article III was surprising. It seemed to him questionable to draft a rule which, as it were, established criminal capacity. In internal law, even though it was materially possible that some individuals might act in a manner prohibited by law, conduct was presumed to be lawful. To note the fact that unlawful conduct existed was one thing; to draft a legal rule was another.

25. Paragraph 2 of article III was explained by the fact that, according to the Special Rapporteur, the conduct of the organs of the occupying State must be imputed to that State. In fact, there was no problem of limitation of capacity to commit international illicit acts; in the case contemplated, it was the occupying State which acted through its organs and it was not the criminal capacity of the occupied State which was limited, since it was not the latter State which had acted.

26. Imputation did not and could not exist in the absence of criminal, civil or administrative procedures in international law; moreover, if such procedures existed, there would no longer be an international law based on the mutual consent of States, but a world law.

27. Sir Humphrey WALDOCK said that the ability and learning displayed in the report gave promise that the Special Rapporteur would provide the Commission with an excellent basis for its work. He agreed in general with the Special Rapporteur's approach to the subject of State responsibility and with his proposed method of work.

28. It was difficult to offer a balanced and useful criticism of the three draft articles without knowing the Special Rapporteur's intentions regarding the other articles of the draft. But some of the formulations adopted did not seem entirely satisfactory, at any rate in the English text. In article I, the term "international illicit act" was unacceptable. Many illicit acts, for example, a violation of human rights, could hardly be described as international acts, though they might have international implications. Again, the English word "act" did not correspond to the French word "*fait*"; moreover, while in article I the word "act" was clearly intended to include the case of omission, it was used in article II in a manner which suggested that it did not include the case of omission. Furthermore, article I referred specifically to illicit acts committed by a State, whereas article II introduced the idea of acts imputed to it. The concepts contained in articles I and II would have to be more satisfactorily expressed in the English text.

29. Some of the difficulty might arise from the fact that it was not yet clear what the Special Rapporteur meant

by the term "international responsibility"; for that term had the key role in the draft. The Special Rapporteur seemed to place undue emphasis on the material consequences of an illicit act and on the role of what he called an external event. That was perhaps the explanation of the surprising contention, in paragraph 51, that the deliberate bombing of a hospital or failure to provide effective protection for a foreign embassy would not constitute a breach of an international obligation unless the hospital was actually hit or the embassy attacked. In his own opinion, a State committing such an act would have failed in its obligations and must be considered responsible; responsibility meant that a State was answerable in law for failing to fulfil an international obligation. A mere declaration by a State would in some cases be sufficient to make it internationally responsible. The statements in paragraph 51 could not be accepted without considerable qualification.

30. A provision that every State possessed capacity to commit international illicit acts was unlikely to commend itself. If some rule embodying the concept of capacity were needed, paragraph 1 of article III might more appropriately consist of a statement to the effect that every State possessed capacity to engage its international responsibility. He also shared the doubts expressed by previous speakers, especially Mr. Tammes, concerning paragraph 2 of article III. There could indeed be situations in which liability would be negated, but they were more likely to be exceptions to the principle of liability than to that of capacity and should not, therefore, be dealt with in paragraph 2 of article III. In such cases the correct course seemed to be to negative liability because the act was not imputable to the State or because of *force majeure* or for some other reason.

31. He was ready to accept provisionally the Special Rapporteur's reasoning on the question of abuse of rights. No doubt it was, in principle, possible to treat cases of abuse of rights as cases of responsibility for breach of an obligation not to go beyond certain limits in the exercise of rights, which would in general be covered by article II. Special cases of responsibility could, however, arise in that connexion and a specific study of abuse of rights might be necessary in the final stages of drafting. Reference had also been made to cases of absolute liability, as they were called in English law, involving such matters as nuclear damage. Different theories had been advanced in municipal law concerning the basis of responsibility in such cases, and similar theories might be advanced in international law. The Commission might perhaps have to consider at a later stage whether specific provisions on the subject were necessary.

32. Mr. YASSEEN said he was full of admiration for the two reports the Special Rapporteur had so far submitted to the Commission, which augured well for the Commission's future work on the subject. Like Sir Humphrey Waldock, he thought it was difficult to comment on the three articles proposed in the second report without knowing the content of those that were to follow. While agreeing that rules on responsibility could only be of a general nature, he thought there should be more of them

than the Special Rapporteur envisaged, since, in legislating, a choice had to be made between the various solutions proposed in the literature. Explanations in the commentaries would not be sufficient.

33. In article I, the Special Rapporteur had succeeded in formulating a provision which did not prejudge the various solutions to be found in doctrine and jurisprudence, thus leaving the Commission free to take up later the issues requiring its attention. Article I could therefore be accepted, in principle, as a starting point.

34. With regard to the legal relationship between the guilty State and the international community as a whole, he believed that international law was now sufficiently mature for recognition of responsibility of a State towards the international community, which in any case followed from the Charter.

35. As to the use of the words "*fait*" and "*acte*" in the French text, the word "*fait*" had a more general meaning and it would therefore be preferable to use the word "*acte*", provided that it was clearly shown to cover both the idea of action and that of omission.

36. He agreed that there was a subjective element and an objective element in an international illicit act. He found the terms used acceptable, except for the word "conduct", which appeared in article II, whereas in article I the term "illicit act" was used to express the same ideas of action and omission. The two articles needed to be brought into line with one another.

37. The rule concerning capacity to commit international illicit acts, stated in article III, obviously did not refer to capacity to act; the idea it was intended to convey was that every State could be held responsible for an act it had committed. The statement was, of course, correct, but he was afraid that its inclusion in an article might have adverse psychological effects. The examples given in support of the exception stated in paragraph 2 were not all convincing, because they seemed to involve, especially in the case of occupation, not a limitation of capacity, but rather a problem of imputation of responsibility.

38. Mr. EUSTATHIADES warmly commended the Special Rapporteur on his report, which could be considered as a contribution to the theory of international responsibility, and thanked him for having mentioned his own work on that topic. It was natural that there should be differences of opinion among members of the International Law Commission on such a complex branch of international law, but it should be remembered that their comments at that stage were of a preliminary nature and could serve to guide the Special Rapporteur in his later work, especially with regard to a number of special cases, closer consideration of which might be thought premature at present. The reason why the articles proposed by the Special Rapporteur gave rise to discussion was that, in drafting them, he had tried to take into account the differences of opinion expressed at the twenty-first session. He would do better to proceed as he thought best, in conformity with general international law, and perhaps see later how specific, agreed solutions could be incorporated.

39. With regard to terminology, he thought it would be more appropriate to refer to the “generation” and “consequences” of international responsibility than to its “origin” and “content”.

40. As he had emphasized at the twenty-first session, a special place should be reserved, at least in the introduction, for the subject of the third part of the report, which would be the application of responsibility.³ The importance of application was twofold: first, in legal training, it should always be taught at the same time as the rules governing responsibility, which it complemented; and secondly, many observations would be found unnecessary, and there would then be fewer differences of opinion in the Commission, if the members kept the aspects of application in mind. He agreed that the Commission should begin by studying the sources and consequences of responsibility, but it was necessary to consider from the outset towards whom responsibility was engaged, in other words who could invoke it—an aspect which hinged on the question of application. There could be State responsibility towards an individual or towards an international organization as a whole, in the interests of international intercourse and of the international community. Examples of the latter case were violations of the Charter and crimes under international law. But he wished to point out that, from the legal standpoint, no distinction could be made between grave violations and minor violations such as violations of a right of a private person. Referring to paragraphs 19 to 23 of the report and to the statements of certain members of the Commission, he also pointed out that both in general international law and in cases of political sanctions or collective guarantees there were the beginnings of public action. To allow for such cases, it would be sufficient, at the present stage, either to mention them in the commentary, or to ensure that the general articles were drafted in such a way as to cover them. But in the last analysis it was the question of application of responsibility which came into play.

41. From the point of view of drafting, it would be more correct to use the phrase “internationally illicit act” than “international illicit act” in article I. As to substance, the article was too general, as it tried to cover too many different doctrinal aspects. Unlike the Special Rapporteur, who had preferred a neutral formula to cover cases of responsibility, including vicarious responsibility, he believed that the article should be made to specify which State incurred the responsibility, by inserting the word “its” before the words “international responsibility”. Otherwise, the idea expressed would be too general. The special case of responsibility for acts of others would be covered by a separate article and the general rule stated in article I should therefore be completely unambiguous. Moreover, it should not be possible to interpret it as covering cases in which an internationally illicit act gave rise to double responsibility—of the State and of an individual—with which the Commission was not concerned, since it had been agreed that it would

deal only with State responsibility. The commentary should make that clear by stating that the topic of individual responsibility warranted inclusion in the programme of future codification work. At the present stage, when only the responsibility of States was being considered and a draft convention should be the object in view, since the subject-matter was sufficiently ripe having regard to general international law and any other text would be of only limited value, article I, which would be the frontispiece of the convention, should be conceived for practical application and be capable of being invoked either independently or in conjunction with other articles; and that was a further reason for saying “its international responsibility”.

42. In the case of article II, the Commission should perhaps try to find a term other than “imputation”, but if there was no alternative, it must be understood that what was meant was only imputation under international law, in other words, that the problem of responsibility could not be solved by referring back from international law to internal law. For example, responsibility for acts committed by organs exceeding their authority was imputed to the State not by virtue of the internal order, but in the interests of safeguarding international relations. In addition, the words “Conduct consisting of an act”, in sub-paragraph (a), should be replaced by “An act” and the words “Such conduct”, in sub-paragraph (b), should be replaced by “Such act or omission”. In the French text, the word “*représente*” in sub-paragraph (b) should be replaced by “*constitue*”.

43. With regard to the substance, it would be better to delete the phrase “in itself or as a direct or indirect cause of an external event”, which raised the question whether injury, material or moral, should be mentioned as a constituent element of an international illicit act. He thought it might perhaps be better not to touch on that problem in the text of the article, for apart from possible doubts about accepting paragraphs 51 and 53 of the report, the discussion might be complicated by terminological questions: for example, the question whether the concept of moral injury covered the case of non-fulfilment of an international obligation by a State which in itself infringed the right of another State—the corollary of the responsibility—to have that obligation fulfilled. Moreover, the question of injury seemed to be indirectly linked with the problem of abuse of rights which, in the last analysis, was a violation of an obligation which caused injury. *Qui jure suo utitur, neminem lædit*; but where there was abuse of a right there was injury. From another point of view, there was responsibility in the case of legislative acts or orders, independently of their application. For those and other reasons, a discussion on the subject would take the Commission too far, without serving any useful purpose at the present stage. Hence, it would be best not to refer to the “external event” or to the question of injury in the text of article II, and either to deal with them in the commentary or to reserve them until a later stage in the work.

44. In article III, the Special Rapporteur had clearly intended to highlight the exceptions, but the examples cited in paragraphs 61 and 62 did not seem to be true

³ See *Yearbook of the International Law Commission, 1969*, vol. I, p. 114, para. 10 *et seq.*

exceptions; for the acts were not committed by the organs of the State, but by organs of another State, and it would therefore be more appropriate, either to deal with those cases in a separate provision, or to mention them in the commentary. Moreover, the word "capacity", although often used in the textbooks, was infelicitous and it would be better to say, in paragraph 1, "Every State can incur international responsibility". It was also necessary to consider whether it would be advisable to define, either in the article or in the commentary, what was meant by a "State" for the purposes of international responsibility, for the words "every State" were too general. When the work was further advanced, and if paragraph 2 was not retained, the Commission might consider deleting article III in the light of the final text of article II.

The meeting rose at 1.10 p.m.

1077th MEETING

Thursday, 25 June 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1 and 2)

[Item 2 of the agenda]

(resumed from the 1073rd meeting)

1. The CHAIRMAN invited the Commission to resume consideration of item 2 of the agenda.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 62 bis (Size of the delegation)¹

2. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 62 bis:

Article 62 bis
Size of the delegation

The size of a delegation to an organ or to a conference shall not exceed what is reasonable or normal, having regard to the

functions of the organ or, as the case may be, the tasks of the conference, as well as the needs of the delegation and the circumstances and conditions in the host State.

3. The text was similar to that of previous articles on the subject of the size of missions, except that it now referred to the "tasks" of the conference. It had been considered that "tasks" was a more appropriate term than "functions" when speaking of conferences.

4. Mr. ROSENNE suggested that the word "particular" be inserted before the word "delegation" in the phrase "the needs of the delegation" in order to bring the text into line with that of articles 16 and 56. It was desirable to avoid unnecessary differences with previous texts and, if a change was thought to be necessary, an explanation should be given in the commentary.

5. Sir Humphrey WALDOCK said he supported that suggestion.

6. Mr. KEARNEY (Chairman of the Drafting Committee) said he agreed that it was important to maintain uniformity.

7. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission agreed to adopt article 62 bis with the change suggested by Mr. Rosenne.

It was so agreed.

ARTICLE 64 ter (Acting head of the delegation)

8. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 64 ter:

Article 64 ter
Acting head of the delegation

1. If the head of a delegation to an organ or to a conference is absent or unable to perform his functions, an acting head may be designated from among the other representatives in the delegation by the head of the delegation or, in case he is unable to do so, by a competent authority of the sending State. The name of the acting head shall be notified to the Organization or to the conference.

2. If a delegation does not have another representative available to serve as acting head, another person may be designated as in paragraph 1 of this article. In such case credentials must be issued and transmitted in accordance with article 65.

9. To a certain extent the wording followed that of previous articles on the *chargé d'affaires ad interim*, such as article 18.² That expression, however, had been replaced by "acting head of the delegation" because it had been thought that "*chargé d'affaires ad interim*" was rather too heavy a title in the case of a delegation.

10. It would be noticed that, by comparison with article 18, a change had been made in the procedure in order to accelerate the making of notifications. The wording now adopted permitted any form of notification, either by the sending State or by the delegation itself, whichever was more convenient in the circumstances.

¹ For previous discussion, see 1059th meeting, paras. 10-62 (article 67).

² See *Yearbook of the International Law Commission, 1968*, vol. II, p. 211.

11. In the first sentence of paragraph 1, reference was made to "a competent authority" of the sending State. It had been considered that such informality was justified because of the pressure of time.

12. Paragraph 2 dealt with the case where the delegation had only one representative. The first sentence contained the broad provision that "another person" could be designated if the single representative were not available. However, since credentials would be needed in order to establish the right of that person to speak and vote, a second sentence had been added, requiring such credentials to be issued and transmitted in accordance with article 65.

13. Mr. CASTRÉN said that the notification provided for in article 64 *ter* had to be made "to the Organization or to the conference", whereas according to the text adopted by the Drafting Committee for article 82, the end of the functions of a member of a delegation had to be notified "to the organ or the conference". A choice must be made between "organ" and "Organization", but in any event the same term should be used in both articles.

14. Mr. KEARNEY (Chairman of the Drafting Committee) said that the term "organ" was perhaps better than "Organization". It was quite common for an organ to meet elsewhere than at the seat of the organization concerned.

15. Mr. ROSENNE said that he could accept paragraph 2 in principle, but had considerable difficulties with paragraph 1, which did not conform to existing practice.

16. To begin with, it was quite common for credentials to designate a vice-chairman of the delegation, in which case there might be no difficulty. But if they did not, he did not think a State really could be bound, in the event of the inability of the head of its delegation to act, to the simple course of appointing another representative even as acting head of the delegation. It would be going too far to say that, if the credentials were silent on the point, nobody but one of the other representatives could be appointed.

17. Another difficulty was the form of words used, which, as in article 65, amounted to a personification of the conference as a body to which communications were made. The definition of "conference" in article 00 brought in the element of the international organization concerned. In practice, such communications were received by the Executive Secretary of the conference, who represented the Secretary-General, or by the Director-General of the organization concerned.

18. In the second sentence of paragraph 1, he would prefer to see the reference to notification to the "Organization" retained; the term "Organization" would have the meaning attached to it in article 1. As for the term "conference", it was already connected with "Organization" in article 00, and if that article were made a continuation of article 1, the position would become much clearer and certain controversial aspects would be removed.

19. Mr. USHAKOV said there was an error of translation in the French version of the article. In paragraph 1, the expression "the other representatives in the delegation" had been translated as "*les autres représentants de la délégation*", whereas it should read "*dans la délégation*".

20. Mr. NAGENDRA SINGH said that he preferred the term "organ" to the term "Organization" because the provisions of the last sentence of paragraph 1 related to a delegation to an organ rather than to a permanent mission accredited to the organization as such.

21. Mr. ROSENNE said he wished to place on record his formal objection to the whole of paragraph 1.

22. From the point of view of drafting, he could not accept the replacement of the term "Organization" by "organ". When an organ of the United Nations met at Geneva, the practice was for the permanent mission of the sending State in New York to notify the Secretary-General of the names of the representatives to the organ in question.

23. The CHAIRMAN said that Mr. Rosenne's objection would be noted. If there were no further comments, he would consider that the Commission agreed to adopt article 64 *ter* subject to the replacement of the word "Organization" by the word "organ" in the second sentence of paragraph 1.³

It was so agreed.

ARTICLE 66 (Full powers to represent the State in the conclusion of treaties)⁴

24. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 66:

Article 66

*Full powers to represent the State
in the conclusion of treaties*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs, in virtue of their functions and without having to produce full powers, are considered as representing their State for the purpose of performing all acts relating to the conclusion of a treaty in a conference or in an organ.

2. A representative to an organ or in a delegation to a conference, in virtue of his functions and without having to produce full powers, is considered as representing his State for the purpose of adopting the text of a treaty in that organ or conference.

3. A representative to an organ or in a delegation to a conference is not considered in virtue of his functions as representing his State for the purpose of signing a treaty (whether in full or *ad referendum*) concluded in that organ or conference unless it appears from the circumstances that the intention of the Parties was to dispense with full powers.

³ This decision was later reversed. See below, para. 39.

⁴ For previous discussion, see 1057th meeting, paras. 32-63, 1058th meeting, paras. 1-56, 1059th meeting, paras. 1-9, and 1061st meeting, paras. 3-7.

25. The article substantially reproduced the provisions of article 14,⁵ itself based on article 7 of the 1969 Vienna Convention on the Law of Treaties.⁶ The Drafting Committee had adopted an abridged wording which in its view would be sufficient to deal with the normal problems arising in connexion with full powers of delegations to represent their States in the conclusion of treaties.

26. Mr. ROSENNE said that he had no objection to paragraphs 1 and 2, subject to his remarks concerning articles 14 and 54 *ter*.⁷

27. Paragraph 3, however, was not a copy of any previous provision and he suggested that it be dropped, since it added very little to the law. His main objection was to the use of the term "Parties" in the particular context. He would be glad to hear the views of Sir Humphrey Waldock on that point.

28. Sir Humphrey WALDOCK said that paragraph 3, as he understood it, was designed simply to protect the position of the State concerned by making it clear that a representative to an organ did not have the power to sign, as distinct from adopt, a treaty simply by virtue of his functions.

29. Mr. USTOR said that Mr. Rosenne was right in his view that paragraph 3 was redundant. Since paragraph 2 stated that the representative could only represent the State for the purpose of adopting the text of the treaty, it naturally followed that he did not have the power to sign the treaty. However, since a provision on the lines of paragraph 3 already existed in article 14, it would be better to retain it in article 66 for the time being. On second reading the Commission could consider eliminating the provision from both articles.

30. Mr. KEARNEY (Chairman of the Drafting Committee) said he could agree to that course. The retention of paragraph 3 would enable the Commission to obtain the comments of governments on that point.

31. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to adopt article 66 as proposed by the Drafting Committee, on the understanding that the commentary would contain an explanation of the difficulties that had arisen in connexion with paragraph 3.

It was so agreed.

ARTICLE 67 (Notifications)⁸

32. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 67:

⁵ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 206.

⁶ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/27* (United Nations publication, Sales No.: E.70.V.5).

⁷ See 1062nd meeting, para. 31.

⁸ For previous discussion, see 1057th meeting, paras. 32-63, 1058th meeting, paras. 1-56, and 1059th meeting, paras. 1-9 (article 65).

Article 67

Notifications

1. The sending State, with regard to its delegation to an organ or to a conference, shall notify the Organization or, as the case may be, the conference, of:

(a) The appointment, position, title and order of precedence of the members of the delegation, their arrival and final departure or the termination of their functions with the delegation;

(b) The arrival and final departure of a person belonging to the family of a member of the delegation and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the delegation;

(c) The arrival and final departure of persons employed on the private staff of members of the delegation and the fact that they are leaving that employment;

(d) The engagement and discharge of persons resident in the host State as members of the delegation or persons employed on the private staff entitled to privileges and immunities;

(e) The location of the premises occupied by the delegation and of the private accommodation enjoying inviolability under articles . . . , as well as any other information that may be necessary to identify such premises and accommodation.

2. Whenever possible, prior notification of arrival and final departure shall also be given.

3. The Organization or, as the case may be, the conference, shall transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

4. The sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

33. The wording substantially reproduced that of article 17,⁹ with the necessary changes. The main difference was the insertion of the new sub-paragraph (e), the provisions of which were all the more necessary since members of delegations were often accommodated in different hotels.

34. He suggested that article 67 be adopted on the understanding that on second reading consideration would be given to the inclusion of sub-paragraph (e) in article 17 as well.

35. Mr. USHAKOV said that in paragraph 1 and 3, the word "Organization" should be replaced by the word "organ", as had been done in article 64 *ter*.

36. Mr. ROSENNE said that the reference in article 67 could only be to the Organization because that article clearly referred to the Secretariat.

37. Mr. ALCÍVAR said he supported Mr. Rosenne's view. For example, notifications were made to the United Nations in the case of delegations to the General Assembly, which was an organ of the Organization. The position was different in the case of a conference, which enjoyed a certain autonomy.

38. Mr. CASTRÉN said that if the Commission were now to decide to revert to the term "Organization" in article 64 *ter*, it should bear in mind the need to bring article 82 into line as well.

39. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to

⁹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 209.

reverse its decision in respect of article 64 *ter* and to revert to the term "Organization".

It was so agreed.

Article 67 was adopted on the understanding expressed by the Chairman of the Drafting Committee.

ARTICLE 67 bis (Precedence)¹⁰

40. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 67 bis:

Article 67 bis
Precedence

Precedence among delegations to an organ or to a conference shall be determined by the alphabetical order used in the host State.

41. The provision was merely a residuary rule to cover the case where an organization had not adopted any rule or practice on the question of precedence.

42. Mr. THIAM said he disliked the use of the word "precedence", since it seemed to imply that certain delegations were superior in rank to others, which was impossible among delegations of sovereign States. Either another expression should be found, or it should at least be explained in the commentary that it was only a question of determining, for example, the order in which delegations were seated in a conference room.

43. Mr. ALCÍVAR said that he had the same doubts as Mr. Thiam. The text did not refer to precedence but simply to the order of seating.

44. Mr. KEARNEY (Chairman of the Drafting Committee) said that he sympathized with the remarks by the previous speakers, but the word "precedence" had been used in previous texts to describe the order in which delegations were dealt with.

45. Mr. ROSENNE said that he agreed in principle with Mr. Thiam. The present text differed in one respect from the text originally proposed by the Special Rapporteur in that it referred to "precedence among delegations" instead of to "precedence among heads of delegations."

46. That being said, he agreed with the Chairman of the Drafting Committee that the term "precedence" had acquired a special connotation in the United Nations.

47. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to adopt article 67 bis on the understanding that an explanation would be included in the commentary on the point which had been raised during the discussion.

It was so agreed.

ARTICLE 68 (Status of the Head of State and persons of high rank)

48. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 68:

Article 68

Status of the Head of State and persons of high rank

1. The Head of the sending State, when he leads a delegation to an organ or to a conference, shall enjoy in the host State or in a third State the facilities, privileges and immunities accorded by international law to Heads of State on an official visit.

2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a delegation of the sending State to an organ or to a conference, shall enjoy in the host State or in a third State in addition to what is granted by the present Part, the facilities, privileges and immunities accorded by international law.

49. The text was based on article 21 of the Convention on Special Missions.¹¹ It had been thought desirable to include it in the present draft because it was quite common for a delegation to an organ to include persons of high rank.

Article 68 was adopted.

ARTICLE 69 (Privileges, immunities and obligations in general)¹²

50. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 69:

Article 69

Privileges, immunities and obligations in general

The provisions of articles 22, 24, 27, 35, 37, 39, 41, 46 and 48 shall apply also in the case of a delegation to an organ or to a conference.

51. The article had been drafted on the lines of the corresponding provision, article 60-B, in Part III on permanent observer missions.¹³

52. The Drafting Committee sought the approval in principle of article 69, on the understanding that its final drafting might be changed. When all the articles of the draft had been approved, it might be necessary to split article 69 into two or more articles covering the various sections.

53. Mr. USHAKOV asked why the words "obligations in general" had been introduced into the title.

54. Mr. KEARNEY (Chairman of the Drafting Committee) said it was because the text referred to such articles as article 46, which dealt with an obligation and not with a privilege or an immunity. The title was provisional and if the article were later to be broken up into two or more articles, separate titles would of course be adopted for each.

¹¹ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 101.

¹² For previous discussion, see 1059th meeting, paras. 63-80, 1060th meeting, paras. 1-51, and 1061st meeting, paras. 8-54.

¹³ See 1064th meeting, para. 21.

¹⁰ For previous discussion, see 1059th meeting, paras. 10-62 (article 68).

55. Mr. REUTER suggested that it might be preferable to entitle the article "Privileges, immunities and miscellaneous obligations". The reference was not to obligations in general, but to certain obligations only.

56. The CHAIRMAN said that the difficulty might be overcome by dropping the words "in general".

57. Mr. ROSENNE suggested that the Drafting Committee be asked to prepare a separate article containing the reference to the articles of section 3, namely article 45 *et seq.*, and place it at the end of the draft.

58. Mr. BARTOŠ said he did not understand what was meant by "approval in principle" of the article. The Commission should either adopt the article or send it back to the Drafting Committee, and should communicate to governments only articles which it had adopted definitively. He disliked the new practice of communicating to them articles which it had only half adopted.

59. Mr. KEARNEY (Chairman of the Drafting Committee) said that the intention was that the article should be approved in substance. When all the articles had been approved and numbered, the actual wording might be changed.

60. Mr. ALCÍVAR said that the intention was probably to adopt article 69 provisionally.

61. Sir Humphrey WALDOCK said that the Commission would be approving article 69 in substance. The intention was that the article would go back to the Drafting Committee for further consideration as to its most appropriate form.

62. Mr. NAGENDRA SINGH suggested that article 69 be approved for the time being, on the understanding that it would be reviewed at a later stage.

63. Mr. ROSENNE said that it was his understanding that, when the Commission came to consider its draft report, it would have before it all the articles in their final order and would be able to adopt them formally.

64. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission agreed to adopt article 69 in substance, on the understanding that the Drafting Committee would reconsider the drafting. In addition, the words "in general" would be dropped from the title.

It was so agreed.

ARTICLE 70 (Premises and accommodation)

65. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 70:

Article 70

Premises and accommodation

The host State shall assist a delegation to an organ or to a conference, if it so requests, in procuring the necessary premises and obtaining suitable accommodation for its members. The Organization shall, where necessary, assist the delegation in this regard.

66. That text was a combination of the provision on premises and accommodation in the Convention on Special Missions¹⁴ and of article 24, on assistance by the organization, of the Commission's 1969 draft on permanent missions.¹⁵ The Convention on Special Missions had been taken as a model because delegations resembled special missions.

67. Mr. USHAKOV said he would like it to be explained in the commentary that the second sentence of the article referred to a delegation to an organ as well as to a delegation to a conference. The organization convening the conference should, in that case too, assist delegations.

68. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to adopt article 70, on the understanding that the point raised by Mr. Ushakov would be mentioned in the commentary.

It was so agreed.

ARTICLE 70-B (Inviolability of the premises)

69. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 70-B:

Article 70-B

Inviolability of the premises

1. The premises where a delegation to an organ or to a conference is established shall be inviolable. The agents of the host State may not enter the said premises, except with the consent of the head of the delegation or, if appropriate, of the head of the permanent diplomatic mission of the sending State accredited to the host State. Such consent may be assumed in the case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the head of the delegation or of the head of the permanent diplomatic mission.

2. The host State is under a special duty to take all appropriate steps to protect the premises of the delegation against any intrusion or damage and to prevent any disturbance of the peace of the delegation or impairment of its dignity.

3. The premises of the delegation, their furnishings, other property used in the operation of the delegation and its means of transport shall be immune from search, requisition, attachment or execution.

70. The text was similar to that of the corresponding article of the Convention on Special Missions, article 25.¹⁶ The problems of delegations and those of special missions were identical since both were usually housed in hotels.

71. Mr. USHAKOV said he would like it to be explained in the commentary that the Commission was intending to add to article 00, which had been approved at the

¹⁴ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 101, article 23.

¹⁵ *Ibid.*, Supplement No. 10, p. 5.

¹⁶ *Ibid.*, Supplement No. 30, p. 102.

1069th meeting, a definition of the premises of the organization which was not at present included.

72. Mr. THIAM said that "attachment" could be considered as a measure of execution and that, consequently, it was incorrect to speak in paragraph 3 of "attachment or execution".

73. Mr. BARTOŠ said that attachment was a precautionary measure, whereas execution had an effect of finality with respect to the property subject to it.

74. Mr. TESLENKO (Deputy Secretary to the Commission) said that the formula was taken word for word from article 22 of the Convention on Diplomatic Relations¹⁷ and had already been used in article 25 of the present draft, which had been adopted by the Commission at its previous session.¹⁸

75. Mr. ALCÍVAR said he reserved his position with regard to paragraph 1. In the General Assembly, he had opposed the inclusion of a similar provision in the Convention on Special Missions.

76. Mr. USTOR said that he reserved his position with regard to the last sentence of paragraph 1.

77. The CHAIRMAN said he would consider that, subject to the reservations which had been expressed, the Commission agreed to adopt article 70-B.

It was so agreed.

ARTICLE 71 (Exemption of the premises of the delegation from taxation)

78. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 71:

Article 71

Exemption of the premises of the delegation from taxation

1. To the extent compatible with the nature and duration of the functions performed by a delegation to an organ or to a conference, the sending State and the members of the delegation acting on behalf of the delegation shall be exempt from all national, regional or municipal dues and taxes in respect of the premises occupied by the delegation, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State or with a member of the delegation.

79. The text followed closely that of article 26 on exemption of the premises of the permanent mission from taxation.¹⁹

80. Mr. ROSENNE asked that a note should be made, for the second reading, of the need to examine more closely the words "acting on behalf of the delegation". Those words could be confusing, particularly since the

adoption of article 64 *ter* on the acting head of the delegation.²⁰

Article 71 was adopted.

ARTICLE 72 (Freedom of movement)

81. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 72:

Article 72

Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure to all members of a delegation to an organ or to a conference such freedom of movement and travel in its territory as is necessary for the performance of the functions of the delegation.

82. The text was identical with that of article 27 of the Convention on Special Missions.²¹

Article 72 was adopted.

ARTICLE 72 *bis* (Freedom of communication)

83. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 72 *bis*:

Article 72 bis

Freedom of communication

1. The host State shall permit and protect free communication on the part of a delegation to an organ or to a conference for all official purposes. In communicating with the Government of the sending State, its diplomatic missions, consular posts, permanent missions, permanent observer missions, special missions and delegations, wherever situated, the delegation may employ all appropriate means, including couriers and messages in code or cipher. However, the delegation may install and use a wireless transmitter only with the consent of the host State.

2. The official correspondence of the delegation shall be inviolable. Official correspondence means all correspondence relating to the delegation and its functions.

3. Where practicable, the delegation shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission, of the permanent mission or of the permanent observer mission of the sending State.

4. The bag of the delegation shall not be opened or detained.

5. The packages constituting the bag of the delegation must bear visible external marks of their character and may contain only documents or articles intended for the official use of the delegation.

6. The courier of the delegation, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

7. The sending State or the delegation may designate couriers *ad hoc* of the delegation. In such cases the provisions of paragraph 6 of this article shall also apply, except that the

¹⁷ United Nations, *Treaty Series*, vol. 500, p. 108.

¹⁸ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, p. 5.

¹⁹ *Ibid.*, p. 6.

²⁰ See above, para. 8.

²¹ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 102.

immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the delegation's bag in his charge.

8. The bag of the delegation may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. The captain shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the delegation. By arrangement with the appropriate authorities, the delegation may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

84. The text was almost identical with that of article 28 of the Convention on Special Missions.²³ The only difference was in paragraph 3 where, in view of the limited requirements of a delegation, it was suggested that, where practicable, it should use the facilities of the permanent mission or the permanent observer mission.

85. Mr. ROSENNE suggested, as a drafting point, that paragraphs 3 and 4 be combined into a single paragraph simply to preserve the numbering of article 29 of the draft, which was the major article in the present group.

86. Mr. KEARNEY (Chairman of the Drafting Committee) said that the presentation followed was that of article 28 of the Convention on Special Missions. In any case, it seemed to him that the ideas in the two paragraphs were quite different.

87. Mr. USHAKOV said that it would be necessary to explain in the commentary that the word "delegations", as used in the second sentence of paragraph 1, meant delegations to organs or to conferences.

88. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to adopt article 72 *bis* on the understanding that the point raised by Mr. Ushakov would be mentioned in the commentary.

It was so agreed.

ARTICLE 72 *ter* (Personal inviolability)

89. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 72 *ter*:

Article 72 ter *Personal inviolability*

The persons of the representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

90. The text was similar to that of article 29 of the Convention on Special Missions.²³

Article 72 ter was adopted.

²³ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 102.

²⁴ *Ibid.*, p. 102.

ARTICLE 72 *quater* (Inviolability of the private accommodation)

91. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 72 *quater*:

Article 72 quater *Inviolability of the private accommodation*

1. The private accommodation of the representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff shall enjoy the same inviolability and protection as the premises of the delegation.

2. Their papers, their correspondence and, except as provided in paragraph ... of article 72, their property shall likewise enjoy inviolability.

92. The text was similar to that of article 30 of the Convention on Special Missions.²⁴

Article 72 quater was adopted.

ARTICLE 73 (Immunity from jurisdiction)

93. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 73:

Article 73 *Immunity from jurisdiction*

Alternative A

1. The representatives in a delegation to an organ or to a conference and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the host State.

2. They shall also enjoy immunity from the civil and administrative jurisdiction of the host State, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the delegation;

(b) An action relating to succession in which the person concerned is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the person concerned in the host State outside his official functions;

(d) An action for damages arising out of an accident caused by a vehicle used outside the official functions of the person concerned.

3. The representatives in the delegation and the members of its diplomatic staff are not obliged to give evidence as witnesses.

4. No measures of execution may be taken in respect of a representative in the delegation or a member of its diplomatic staff except in the cases coming under sub-paragraphs (a), (b), (c) and (d) of paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person or his accommodation.

5. The immunity from jurisdiction of the representatives in the delegation and of the members of its diplomatic staff does not exempt them from the jurisdiction of the sending State.

Alternative B

1. The representatives in a delegation to an organ or to a conference and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the host State.

²⁴ *Ibid.*, p. 102.

2. (a) The representatives and members of the diplomatic staff of the delegation shall enjoy immunity from the civil and administrative jurisdiction of the host State in respect of all acts performed in the exercise of their official functions.

(b) No measures of execution may be taken in respect of a representative or a member of the diplomatic staff of the delegation unless the measures concerned can be taken without infringing the inviolability of his person or his accommodation.

3. The representatives and members of the diplomatic staff of the delegation are not obliged to give evidence as witnesses.

4. The immunity from jurisdiction of the representatives and the members of the diplomatic staff of the delegation does not exempt them from the jurisdiction of the sending State.

94. The Drafting Committee had prepared alternative texts for the article. Alternative A was modelled directly on article 31, on immunity from jurisdiction, in the Convention on Special Missions.²⁵

95. Alternative B was a somewhat more restrictive proposal and came closer to article IV, section 11, of the Convention on the Privileges and Immunities of the United Nations,²⁶ although it went somewhat beyond that instrument in providing for immunity from the criminal jurisdiction of the host State. It followed section 11 in limiting immunity from civil jurisdiction to acts performed in the exercise of official functions.

96. The provisions concerning measures of execution laid down in paragraph 2 (b) of alternative B were slightly different in so far as such measures could not be taken unless they would not infringe the inviolability of the person or accommodation of the representative in question. The limitations on execution in alternative A, on the other hand, came into play only in the case of the four specific conditions, as described in sub-paragraphs (a), (b), (c) and (d) of paragraph 2, under which civil jurisdiction might be exercised.

97. The question the Commission now had to decide was whether it should submit both alternatives in its report or adopt one or the other of them.

98. Mr. CASTRÉN said he was in favour of alternative B, because he approved of the way in which it limited the scope of the privileges and immunities.

99. Mr. ROSENNE said that he did not think that at the present stage the Commission should take a decision on either alternative.

100. From the point of view of general international law, there was no *lex lata* on the subject, since immunities varied from organization to organization and from conference to conference. He suggested that the Commission include both alternatives in its report, with a view to eliciting the views of governments for consideration at the second reading.

101. Mr. USTOR said that, on the basis of principle, he was inclined to favour alternative A, since he did not think that any distinction should be made between various kinds of representatives; on the basis of practice, he did not think that the adoption of alternative A would impose any serious sacrifice on host States.

102. Mr. REUTER said he associated himself with the views of Mr. Rosenne. If he had to choose between the two alternatives, he would opt for alternative B, which in practice hardly differed from alternative A. To adopt it would, therefore, avoid giving host States the impression that an attempt was being made to overburden them by placing all the staff of a delegation on the same footing as ambassadors.

103. Mr. EUSTATHIADES said that, fundamentally, there was no great practical difference between alternatives A and B. Alternative B merely laid down a more general principle, but it was difficult to see what acts other than those listed in paragraph 2 of alternative A could be regarded as being outside official functions. Alternative B was, therefore, more restrictive in its effect, because in case of doubt it provided for the application of a principle which was not contained in alternative A but which, basically, was subject to the same exceptions.

104. Mr. USHAKOV said he saw little difference between alternatives A and B but preferred alternative A because it was more precise. He would, however, accept the majority view if the Commission decided to refer both alternatives to governments.

105. Sir Humphrey WALDOCK said that, in his opinion, the Commission should submit both alternatives to governments.

106. He personally felt that, while there were some merits in alternative A, alternative B was much more likely to prove acceptable to host States. After all, there were some differences between the two alternatives, since there were cases when the member of a delegation concluded a contract for the purpose of exercising the functions of the delegation, which might involve the lease of an apartment, the purchase of a car and so on, and it was not clear whether such cases were covered by alternative A. Quite a number of States today acted as hosts to international conferences in which many individuals were involved; he was inclined to think, therefore, that host States would tend to prefer alternative B. The question was as much one of policy as of law and it should be put frankly to governments. In any event, a reference to both alternatives should be included in the commentary.

107. Mr. NAGENDRA SINGH said that he agreed with Sir Humphrey Waldock that the Commission should invite the comments of governments on both alternatives. If one were to assume, however, that host States would prefer alternative B and that sending States would prefer alternative A, the majority of replies would surely be in favour of alternative A, since the number of sending States far exceeded that of host States. In that event it would be appropriate for the Commission to take a stand and choose one of the two alternatives. However, if the Commission so wished he would not object to circulating both the alternatives to governments for their opinion. He personally preferred alternative A, as it was precise and clear.

108. Mr. AGO said that he preferred alternative A because he found alternative B ambiguous. A wording as vague as that of sub-paragraph 2 (a) lent itself to any

²⁵ *Ibid.*, p. 102.

²⁶ United Nations, *Treaty Series*, vol. 1, p. 20.

interpretation, liberal or restrictive. Besides, the Commission had already adopted provisions similar to those of alternative A in previous drafts and, if it changed the formula now, that might in the first place cause some surprise and the Commission would have to explain its action; secondly, it might create unjustifiable differences between members of the same delegation. In the interests of the unity of the system, therefore, alternative A was preferable.

109. Moreover, the Commission should not unload part of its responsibilities on to governments, whose replies, after all, might not be of much use to it. Indeed, there was a danger that governments would opt rather hastily for alternative B, because it was shorter. He would, however, bow to the opinion of the majority if it decided to take such a step, provided it was clearly indicated in the commentary that alternative B departed from the system so far followed in all other cases.

110. Mr. RUDA said that he wished to associate himself with the remarks made by Mr. Ago concerning alternative B, although it would seem prudent to send both alternatives to governments. From the point of view of host States, alternative A would probably be more acceptable, since it clearly defined those cases when representatives would not enjoy immunity.

111. Mr. EUSTATHIADES said that the advantage of alternative A was that it detailed the cases in which acts were not performed in the exercise of official functions, and the advantage of alternative B was that it laid down a principle, which was not to be found in alternative A.

112. Under the terms of alternative B, in the event of a dispute, the presumption was that there was no immunity from civil and administrative jurisdiction where the acts in question were not performed in the exercise of official functions. However, it might well be asked whether, on so new a subject, it would not be preferable to leave that interpretation to the actual practice of States.

113. If the Commission did not submit both alternatives to governments, it would not learn their general views. As a possible compromise, perhaps the two texts could be combined by taking alternative B as the basis and adding at the end of sub-paragraph 2 (a), after replacing the full stop by a semi-colon, the phrase "such immunity shall not apply, however, in the case of:", followed by sub-paragraphs (a) to (d) of paragraph 2 of alternative A.

114. Mr. ALCÍVAR said that he could not agree that the difference between the two alternatives was a small one; there was definitely a difference of substance, since alternative A referred to immunity from civil and administrative jurisdiction in an absolute way, subject only to four specific exceptions, whereas alternative B referred to such immunity only in respect of all acts performed in the exercise of official functions. He was inclined, therefore, to favour alternative A.

115. Mr. CASTRÉN said that perhaps he should explain the reasons why he preferred alternative B. Alternative A was not, as some thought, clearer and more precise since, first, its list of exceptions was not

exhaustive, and secondly it contained in sub-paragraph (c) the formula "outside his official functions", and in sub-paragraph (d) the formula "outside the official functions of the person concerned". Mr. Ago had claimed that paragraph 2 (a) of alternative B was open to every kind of interpretation, but that criticism applied even more strongly to the two phrases he had quoted.

116. Furthermore, the limitation of immunities under the terms of alternative B was justified by the fact that the functions of members of delegations to an organ or to a conference were temporary and often very short-lived. There was every reason to believe that the Scandinavian States, which were in favour of such limitation of privileges and immunities, would opt for that alternative. In any event, governments should be consulted.

117. Mr. Eustathiades's proposal to combine the two alternatives was an interesting one and deserved at least to be mentioned in the commentary.

118. Mr. ROSENNE said that he found it difficult at the present stage of the discussion to believe that all host States would necessarily favour one alternative, while all sending States would favour another, since host States were also sending States.

119. In general, he preferred alternative A, although it caused him some perplexity inasmuch as it was drafted in a form which would seem to interfere with the right of States to choose the composition of their delegations. He was thinking, as one example, of the case of a representative who might have been involved in a traffic accident in the host State on some former occasion and who had proceedings brought against him when he returned there to participate in a conference.

120. It had been suggested that alternatives A and B might be combined, but he doubted whether that was really possible. He still felt that the Commission should not take a decision on the matter at the present time but should submit both alternatives to governments.

121. Lastly, he would like to ask the Chairman of the Drafting Committee whether the words "for the purposes of the delegation", in paragraph 2 (a) of alternative A, were really necessary and whether it would not be better to end the sentence after the words "sending State".

122. Sir Humphrey WALDOCK said that he could see some justification for considerable civil immunities for representatives at conferences, for the very reason that conferences were generally of comparatively short duration. The less time there was for completing the work, the greater the interference with the delegate's performance of his functions was likely to be if he was involved in legal proceedings. He could also see, however, that such immunities might give rise to abuse because of the large number of people involved.

123. From a purely drafting point of view, he preferred alternative A, since paragraph 2 (d), in particular, covered the very delicate question of motor vehicle accidents.

124. He suggested that governments be asked to express their views on both alternatives; but if the Commission elected to adopt one of the two alternatives, the other should be set out in the commentary.

125. Mr. KEARNEY (Chairman of the Drafting Committee), replying to Mr. Rosenne, said the words "for the purposes of the delegation" in paragraph 2 (a) of alternative A had been included in order to eliminate any possible confusion between different types of immunity, such as sovereign immunity and diplomatic immunity.

126. As a member of the Commission, he personally favoured alternative B but thought that both alternatives should be sent to governments for their comments. It should be borne in mind that the United Nations Convention which provided immunity from civil jurisdiction only for official acts had not given rise to any really serious problems in the past twenty years.

127. Mr. THIAM said that in his view it would be a wise move and would allow time for reflection to send both alternatives to governments, whose comments would, of course, be based not just on juridical considerations but on political and diplomatic considerations as well.

128. There was a fundamental difference of approach between the two texts, and alternative A left very little freedom of action. If he had to choose, he would opt for alternative A, since it best met the needs of his country.

129. Mr. SETTE CÂMARA said that he wished to state for the record that he preferred the flexible formula used in alternative B, although he would not object to both alternatives being sent to governments.

130. The CHAIRMAN suggested that both alternatives should be sent to governments for their comments, since that seemed to be the view of the great majority of speakers.

It was so agreed.

ARTICLE 74 (Waiver of immunity)

131. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 74:

Article 74

Waiver of immunity

1. The immunity from jurisdiction of the representatives in a delegation to an organ or to a conference, of the members of its diplomatic staff and of persons enjoying immunity under article . . . may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by any of the persons referred to in paragraph 1 of this article shall preclude them from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.

132. The article followed the pattern of article 33 of the present draft²⁷ and that of article 41 of the Con-

vention on Special Missions.²⁸ Paragraph 3, in particular, had been modelled on paragraph 3 of article 41 of the Convention on Special Missions, on the ground that that formulation was clearer and more precise than the one used in article 33.

133. The Drafting Committee considered that it should be pointed out in the commentary that the Commission would review article 33 at its next session.

Article 74 was adopted.

ARTICLE 75 (Exemption from dues and taxes)

134. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 75:

Article 75

Exemption from dues and taxes

The representatives in a delegation to an organ or to a conference and the members of its diplomatic staff shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) Indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) Dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the delegation;

(c) Estate, succession or inheritance duties levied by the host State, subject to the provisions of article . . . ;

(d) Dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State;

(e) Charges levied for specific services rendered;

(f) Registration, court or record fees, mortgage dues and stamp duty, subject to the provisions of article 71;

[(g) Excise duties or sales tax.]

135. With one exception the article followed the pattern of exemptions listed in other conventions on the subject. That exception was contained in sub-paragraph (g), which would include excise duties or sales tax. Because of the administrative difficulties involved, that exemption had given rise to complaints on the part of host States.

136. Mr. ROSENNE said that he could not accept the reference to excise duties; the reference to sales tax should however be included, in view of the very wide variety of such taxes, sometimes down to city level, in many countries.

137. Mr. RUDA, Mr. USHAKOV, Mr. SETTE CÂMARA and Mr. ALCÍVAR said that, in their view, sub-paragraph (g) should be deleted.

138. The CHAIRMAN said that there appeared to be general agreement that sub-paragraph (g) should be deleted.

It was so agreed.

139. Mr. REUTER asked whether the deletion of sub-paragraph (g) meant that the exception referred to was

²⁷ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, p. 10.

²⁸ *Ibid.*, *Supplement No. 30*, p. 104.

covered by sub-paragraph (a) or that it did not apply to members of delegations.

140. The CHAIRMAN said that that question would have to be decided in connexion with sub-paragraph (a).

Article 75, as amended by the deletion of sub-paragraph (g), was adopted.

ARTICLE 76 (Exemption from customs duties and inspection)

141. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 76:

Article 76

Exemption from customs duties and inspection

1. Within the limits of such laws and regulations as it may adopt, the host State shall permit entry of, and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

(a) Articles for the official use of a delegation to an organ or to a conference;

(b) Articles for the personal use of the representatives in the delegation and the members of its diplomatic staff.

2. The personal baggage of the representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. In such cases, inspection shall be conducted only in the presence of the person concerned or of his authorized representative.

142. The article followed the pattern of article 35 of the Convention on Special Missions.²⁹

Article 76 was adopted.

The meeting rose at 1.05 p.m.

²⁹ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 103.

1078th MEETING

Friday, 26 June 1970, at 10.20 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1 and 2)

[Item 2 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of item 2 of the agenda.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

ARTICLE 77 (Privileges and immunities of other persons)

2. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 77:

Article 77

Privileges and immunities of other persons

1. If representatives in a delegation to an organ or to a conference or members of its diplomatic staff are accompanied by members of their families, the latter shall enjoy the privileges and immunities specified in articles ... to ..., provided they are not nationals of or permanently resident in the host State.

2. Members of the administrative and technical staff of the delegation shall enjoy the privileges and immunities specified in articles ... to Members of their families who accompany them and who are not nationals of or permanently resident in the host State shall enjoy the same privileges and immunities.

3. Members of the service staff of the delegation shall enjoy immunity from the jurisdiction of the host State in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment, and exemption from social security legislation as provided in article

4. Private staff of the members of the delegation who are not nationals of or permanently resident in the host State shall be exempt from dues and taxes on the emoluments they receive by reason of their employment. In all other respects, they may enjoy privileges and immunities only to the extent permitted by the host State. However, the host 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 delegation.

3. The article followed the pattern of article 40 of the Convention on Special Missions.¹ It was important to note that the text would require revision along the lines of article 36 of the Convention on Special Missions if alternative B of article 73 were adopted. The number of the articles referred to in paragraphs 1, 2 and 3 had not yet been inserted, but article 77 would include the same range of privileges and immunities as were referred to in article 40 of the draft articles on permanent missions.²

4. Incidentally, the Drafting Committee had noted that paragraph 2 of article 40 of the present draft contained an error in that it stated that the persons referred to would enjoy the privileges and immunities specified in articles 30 to 37. But article 33, concerning waiver of immunity, and article 34, concerning settlement of civil

¹ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 104.

² *Ibid.*, Supplement No. 10, p. 13.

claims, did not really grant any privileges and immunities. The commentary would include a reference to the need to revise article 33, whereas the final version of article 34 would depend on whether the Commission chose alternative A or alternative B of article 73.

5. Mr. USHAKOV said that since the Commission had decided at its previous meeting to send to governments both the alternatives proposed for article 73, two alternatives should now be drafted for article 77 also and be submitted to governments.

6. Mr. KEARNEY, Chairman of the Drafting Committee, said he could assure Mr. Ushakov that the nature of the changes and the need for them would be made clear to governments.

7. Mr. USHAKOV said that the necessary explanations should perhaps appear in the commentary.

8. The CHAIRMAN suggested that the Commission adopt article 77, subject to the necessary changes and to the point made by Mr. Ushakov.

It was so agreed.

ARTICLE 78 (Duration of privileges and immunities)

9. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 78:

Article 78

Duration of privileges and immunities

1. Every person entitled to privileges and immunities under the provisions of this part shall enjoy such privileges and immunities from the moment he enters the territory of the host State in connexion with the meeting of an organ or conference or, if he is already in its territory, from the moment when his appointment is notified to the appropriate authority pursuant to article 67.

2. When the functions of a person entitled to privileges and immunities under this part have come to an end, the privileges and immunities of such person shall normally cease at the moment when he leaves the territory of the host State, or on the expiry of a reasonable period in which to do so, but shall subsist until that time. However, with respect to acts performed by such a person in the exercise of his functions as a member of a delegation to an organ or to a conference, immunity shall continue to subsist.

3. In the event of the death of a member of a delegation, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the territory of the host State.

10. The article was modelled on article 43 of the Convention on Special Missions,³ although a slight change had been made in the final clause of paragraph 1.

11. A reference would be made in the commentary to the possibility of an armed conflict; it would follow the same lines as the reference in paragraph (1) of the commentary to article 48.⁴

12. Mr. ROSENNE said that he was somewhat concerned about the phrase "to the appropriate authority" at the end of paragraph 1. That phrase was not as specific as the corresponding phrase in article 43 of the Convention on Special Missions, which used the words "to the Ministry of Foreign Affairs or such other organ of the receiving State as may be agreed". Article 42 of the draft articles on permanent missions was also quite specific in that respect, since it used the words "from the moment when his appointment is notified to the host State by the Organization or by the sending State".⁵ The language in article 78 was altogether too vague; the passage should either be deleted or else revised along the lines of article 42.

13. Mr. TABIBI said that sometimes the privileges and immunities of a representative did not expire when he left the host State but remained in force until his successor had presented his credentials. Mere departure was not sufficient to bring about the termination of his privileges and immunities.

14. Mr. USHAKOV said that there appeared to be a mistake in paragraph 1; surely the words "notified to the appropriate authority" should read "notified by the appropriate authority"?

15. Mr. KEARNEY (Chairman of the Drafting Committee) said that the passage should read "to the host State by the appropriate authority".

16. The Drafting Committee's original intention had been to follow article 42, as suggested by Mr. Rosenne.

17. Mr. YASSEEN said that the idea of a reasonable time limit should be inserted in the last part of paragraph 1, because States sometimes notified the appointment of their representatives several months before the start of a conference, and the Commission clearly did not intend that persons so appointed who were already in the territory of the host State should enjoy privileges and immunities for such a long period.

18. The CHAIRMAN suggested that the last phrase in paragraph 1 be revised to read "from the moment when the appointment is notified to the host State by the organ or by the conference" and that the element of a reasonable time, proposed by Mr. Yasseen, be also included.

19. Mr. KEARNEY (Chairman of the Drafting Committee) said that Mr. Yasseen's point was a good one and he would suggest that the same change be also made in article 42. A reference to the problem would, of course, be included in the commentary for consideration at the second reading.

Article 78, as amended, was adopted.

ARTICLE 78 bis (Property of a member of a delegation or of a member of his family in the event of death)

20. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 78 bis:

³ *Ibid.*, Supplement No. 30, p. 104.

⁴ *Ibid.*, Supplement No. 10, p. 17.

⁵ *Ibid.*, p. 14.

*Article 78 bis**Property of a member of a delegation or of a member of his family in the event of death*

1. In the event of the death of a member of a delegation to an organ or to a conference or of a member of his family accompanying him, if the deceased was not a national of or permanently resident in the host State, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death.

2. Estate, succession and inheritance duties shall not be levied on movable property which is in the host State solely because of the presence there of the deceased as a member of the delegation or of the family of a member of the delegation.

21. The article followed article 44 of the Convention on Special Missions⁶ and paragraphs 3 and 4 of article 42 of the draft articles on permanent missions.⁷ The problem it dealt with had been made the subject of a separate article because of a decision by the General Assembly during its consideration of the Convention on Special Missions, which would be explained in the commentary.

22. The CHAIRMAN suggested that the Commission adopt article 78 bis, and take note of the explanation given by the Chairman of the Drafting Committee.

It was so agreed.

ARTICLE 79 (Transit through the territory of a third State)

23. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 79:

*Article 79**Transit through the territory of a third State*

1. If a representative in a delegation to an organ or to a conference or a member of its diplomatic staff passes through or is in the territory of a third State while proceeding to take up his functions or returning to the sending State, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the person referred to in this paragraph, whether travelling with him or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the transit of members of the administrative and technical or service staff of the delegation, or of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as the host State is bound to accord under the present part. Subject to the provisions of paragraph 4 of this article, they shall accord to the couriers and bags of the delegation in transit the same inviolability and protection as the host State is bound to accord under the present part.

4. The third State shall be bound to comply with its obligations in respect of the persons mentioned in paragraphs 1, 2 and 3 of this article only if it has been informed in advance,

either in the visa application or by notification, of the transit of those persons as members of the delegation, members of their families or couriers, and has raised no objection to it.

5. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to the official communications and the bags of the delegation, when the use of the territory of the third State is due to *force majeure*.

24. The article was the same as article 42 of the Convention on Special Missions.⁸ It also raised the question of the possibility of an armed conflict, to which reference might be made in the commentary.

Article 79 was adopted.

ARTICLE 80 (Non-discrimination)

25. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 80:

*Article 80**Non-discrimination*

In the application of the provisions of the present part, no discrimination shall be made as between States.

26. The article was the same as all the other articles concerning non-discrimination.

Article 80 was adopted.

ARTICLE 81 (Respect for the laws and regulations of the host State)

27. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 81:

*Article 81**Respect for the laws and regulations of the host State*

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the host State. They also have a duty not to interfere in the internal affairs of that State.

2. In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from criminal jurisdiction, the sending State shall, unless it waives this immunity, recall the person concerned, terminate his functions with the delegation or secure his departure, as appropriate. This provision shall not apply in the case of any act that the person concerned performed in carrying out the functions of the delegation in the premises where the organ or conference is meeting or the premises of the delegation.

3. The premises of the delegation shall not be used in any manner incompatible with the exercise of the functions of the delegation.

28. The article was based on article 45 of the draft articles on permanent missions,⁹ which represented a compromise on a difficult issue.

29. The Committee had had some difficulty, however, in adapting the last sentence in paragraph 2 of that

⁶ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 104.

⁷ *Ibid.*, Supplement No. 10, p. 14.

⁸ *Ibid.*, Supplement No. 30, p. 104.

⁹ *Ibid.*, Supplement No. 10, p. 16.

article to cover certain cases about which host States had complained in the past, especially in connexion with charges of manslaughter following accidents. It had decided to use the words "in the premises where the organ or conference is meeting or the premises of the delegation" to replace the phrase "within either the Organization or the premises of a permanent mission" in article 45.

30. Mr. EUSTATHIADES said he was not satisfied with the second sentence of paragraph 2. Immunity from jurisdiction had always been considered to relate to functions, and he could not see why an idea of place should be introduced.

31. Mr. USHAKOV said he agreed with Mr. Eustathiades. At the Commission's last session and in the Drafting Committee at the present session he had reserved his position on the final words "in the premises where the organ or conference is meeting or the premises of the delegation".

32. At the last session of the General Assembly, which he had attended as Chairman of the International Law Commission, he had noticed that several members of the Sixth Committee had also criticized the corresponding draft article relating to permanent missions. He was prepared, however, to accept the wording of the sentence provisionally, on the understanding that a better form of words would be found on second reading.

33. Mr. NAGENDRA SINGH suggested that, in order to respect the formulation it had already used in article 45, on permanent missions, the Commission might adopt the wording "within the organ or conference". That would avoid introducing the new element of place. The words after "carrying out" in the last sentence of paragraph 2 of article 81 would be deleted and replaced by the words "his functions within the organ or conference".

34. Mr. KEARNEY (Chairman of the Drafting Committee) said that he had used that phrase in his original draft, but the Drafting Committee had decided that it was too vague.

35. Mr. SETTE CÂMARA said that he supported the views of Mr. Eustathiades and Mr. Ushakov. He would have to reserve his position regarding the final phrase in paragraph 2.

36. Mr. CASTRÉN said that he understood the concern expressed by Mr. Eustathiades and Mr. Ushakov. The Commission had discussed the question at length at its previous session,¹⁰ however, and in the end had accepted the wording which was now being criticized. It would therefore be better to wait before altering the words until the comments of governments on the article and on the corresponding draft article on permanent missions had been received.

37. Mr. USHAKOV said that the Drafting Committee had adopted the phrase in question because an organ

or conference did not normally have any premises of its own.

38. The CHAIRMAN said that a majority of the Commission seemed to favour the present text of article 81 subject to reconsideration of paragraph 2, and of paragraph 2 of article 45, at the second reading.

Article 81 was adopted on that understanding.

ARTICLE 82 (End of the functions of a member of a delegation)

39. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 82:

Article 82

End of the functions of a member of a delegation

The functions of a member of a delegation to an organ or to a conference shall come to an end, *inter alia*:

(a) On notification to this effect by the sending State to the organ or the conference;

(b) Upon the conclusion of the meeting of the organ or the conference.

40. The article was based on article 47 of the draft articles on permanent missions;¹¹ the main difference was in sub-paragraph (b), which referred to the conclusion of the meeting of the organ or the conference.

41. Mr. CASTRÉN said that the Commission had already decided that notifications by the sending States should be addressed to the organization and not to the organ. The word "organ" in sub-paragraph (a) should therefore be replaced by the word "Organization".

42. The CHAIRMAN said it was clear that the word "organ" in sub-paragraph (a) should be replaced by the word "Organization".

43. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee had deliberately broadened the title of article 82 in order to cover all members of the delegation. It might, therefore, be necessary to include a reference in the commentary to the possibility of a change in article 47.

44. Mr. ROSENNE said that the word "meeting" in sub-paragraph (b) should be replaced by the word "session".

45. Mr. KEARNEY (Chairman of the Drafting Committee) said that he had originally proposed using the word "session" but the Committee had concluded that "meeting" was somewhat broader.

46. Mr. ROSENNE said that in current United Nations practice the word "session" was surely broader than "meeting".

47. Mr. USHAKOV said that the French version was much clearer and should not be changed.

¹⁰ See *Yearbook of the International Law Commission, 1969*, vol. I, 1030th meeting, paras. 1-52, 1032nd meeting, paras. 26-74 and 1033rd meeting, paras. 1-22.

¹¹ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, p. 17.

48. The CHAIRMAN suggested that the Commission might adopt article 82 provisionally and record the views expressed by members in the commentary.

Article 82 was adopted on that understanding.

ARTICLE 83 (Protection of premises and archives)

49. Mr. KEARNEY (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 83:

Article 83

Protection of premises and archives

1. When the meeting of an organ or a conference comes to an end, the host State must respect and protect the premises of a delegation so long as they are assigned to it, as well as the property and archives of the delegation. The sending State must take all appropriate measures to terminate this special duty of the host State within a reasonable time.

2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and the archives of the delegation from the territory of the host State.

50. The article was based on article 49 of the draft articles on permanent missions,¹² but there was some question as to whether it was really necessary.

51. Mr. EUSTATHIADES said that in the present article the word "*réunion*", as used in the French version, obviously meant "*session*" and not "*séance*". Nevertheless, to avoid confusion and cover the case of a meeting held before the session, perhaps both terms should be used, "*réunion ou session*". The same applied to article 82.

52. Mr. YASSEEN said that the difficulty arose because the same word, "meeting", was used in English for both *réunion* and *séance*. An appropriate term should be found for the English version, but the French version should not be changed.

53. Mr. USHAKOV said it would be helpful if article 00, on use of terms, included a definition of the words "*réunion d'un organe*" in the French and of "meeting of an organ" in the English version.

54. Mr. ROSENNE said that the problem was one which really affected the English version only. In his opinion, it should be decided at the present session and not postponed until 1971.

55. Mr. REUTER suggested, as a device for removing the ambiguity, that the noun be replaced by a verb and that the privileges and immunities be granted "until the moment when the conference or organ ceases to sit".

56. Mr. BARTOŠ said that he had drawn attention in the Drafting Committee to the danger of providing that privileges and immunities should cease with the close of the session, since it was customary to allow delegates a certain time to complete their last duties after the session was over, such as checking the records. The wording proposed for article 83 was therefore not very happy.

57. The CHAIRMAN suggested that the Commission retain the present wording, while bearing in mind that it might be necessary to reconsider it on second reading at the next session. If the word "meeting" were changed in article 83, it might have to be changed in a number of other articles as well.

Article 83 was adopted on that understanding.

58. Mr. USTOR said that the Commission had now adopted articles on permanent missions, permanent observer missions and delegations to meetings of organs and conferences. In the interests of completeness, it was desirable that it should also prepare articles on observer delegations to meetings of organs and to conferences, a subject on which the Special Rapporteur on relations between States and international organizations had prepared a paper (A/CN.4/L.151). Perhaps the Secretariat would get into touch with the Special Rapporteur to obtain his views on the subject.

Organization of work

(resumed from the 1065th meeting)

59. The CHAIRMAN asked the Deputy Secretary to the Commission to read out a telegram he had received from Mr. Bedjaoui.

60. Mr. TESLENKO (Deputy Secretary to the Commission) said the telegram addressed by Mr. Bedjaoui to the Chairman read:

"Referring to our telephone conversation of yesterday afternoon, I confirm that very urgent governmental duties prevent me from attending the Commission's meeting on Monday 29 June for the discussion of my report. It is however not impossible that I may be able to come to Geneva on the following Monday, 6 July, if the Commission can discuss the report on that day. If, as I have been told by telephone, the Commission cannot start a discussion on that day, I shall request you to arrange an agenda for the next session which will allow a full debate on my draft articles and on those which I shall submit then."

61. After an exchange of views in which Mr. YASSEEN, Mr. BARTOŠ, Sir Humphrey WALDOCK, Mr. USHAKOV, Mr. THIAM, Mr. ROSENNE, and Mr. USTOR took part, the CHAIRMAN asked the Deputy Secretary to the Commission to get into touch with Mr. Bedjaoui at once and inquire whether he could be in Geneva on 2 and 3 July, in which case the Commission would devote three meetings to a study of his report.

The meeting was suspended at 11.40 a.m. and resumed at 12.25 p.m.

62. Mr. TESLENKO (Deputy Secretary to the Commission) said that he had telephoned to Algiers and spoken with Mr. Bedjaoui, who had told him that, as the Algerian Government would be travelling in the interior of the country on 2 and 3 July, he would not be able to come to Geneva on those days.

¹² *Ibid.*, p. 17.

63. The CHAIRMAN said that in the circumstances it would unfortunately not be possible to deal at the present session with the topic of succession in respect of matters other than treaties.¹³ The topic would, of course, be on the Commission's agenda for the following session, and at the beginning of the session the officers of the Commission would consider the possibility of allocating a number of meetings to it.

Organization of future work

[Item 8 of the agenda]

(resumed from the 1071st meeting)

REPORT OF THE SUB-COMMITTEE ON TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

64. The CHAIRMAN invited the Commission to consider the report of the Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations.¹⁴ Paragraph 2 of that report related to the internal work of the Sub-Committee and did not call for any action by the Commission. Paragraph 1 related to work to be done by the Secretariat, if the Commission decided to request it.

65. Mr. EUSTATHIADES said the method of work proposed by the Sub-Committee was quite satisfactory. The document the Secretariat was being asked to prepare on the practice of the United Nations and the principal international organizations would be very useful both to the Special Rapporteur and to members of the Commission. It was also important to know how many international organizations had been invited to the Vienna Conference, as it was essential to have as comprehensive a picture of the practice as possible.

66. Mr. USHAKOV said it was only normal that the international organizations invited to the Vienna Conference should be consulted, since the topic to be considered also concerned the law of treaties. It would not, however, be necessary to prepare a full bibliography, so the first line in paragraph 1 (ii) should be amended accordingly.

67. Mr. THIAM suggested that the words "a full bibliography" in paragraph 1 (ii) be replaced by the words "as full a bibliography as possible".

68. Mr. TESLENKO (Deputy Secretary to the Commission) said that in 1966 the Legal Counsel had explained to the Sixth Committee the criteria followed by the Secretary-General in deciding which organizations should be invited.¹⁵

¹³ See also 1044th meeting, para. 52, 1056th meeting, para. 1, and 1066th meeting, para. 1.

¹⁴ For the text of this report, see *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 10, para. 89*.

¹⁵ See *Official Records of the General Assembly, Twenty-first Session, Sixth Committee, 918th meeting, para. 8*.

69. Mr. BARTOŠ said he agreed that there should be close collaboration with the international organizations directly concerned, but it was necessary to be realistic. So far, even when invited they had not shown any particular eagerness to follow the Commission's work. Consequently, though he had not opposed the proposal that the Secretary-General should invite the largest possible number of international organizations to contribute to the study, he had his doubts as to the response the invitation would evoke.

70. He suggested that the Secretary-General be asked to raise the question in the Administrative Committee on Co-ordination, stressing the benefit of continuous contact with the Commission both to the international organizations themselves and to the progress of international law. It was possible that the organizations were afraid of an infringement of their autonomy, so that something more should be done than merely write to them.

71. Mr. AGO said he supported the proposals contained in the Sub-Committee's report. It was important that the document referred to in paragraph 1 (ii) should be as complete as possible, particularly with regard to the practice. The required information could be obtained, not only by consulting the organizations direct but by examining published material.

72. With regard to the international organizations with which the Secretary-General might enter into contact, he hoped that the formula adopted would not result in unfortunate exclusions. Perhaps the words, "in particular" should be added before the words "those which were invited to send observers" in the last sentence of paragraph 1 (ii).

73. Mr. ROSENNE said that, of the specialized and related agencies of the United Nations, the following had been represented by observers at the Vienna Conference on the Law of Treaties: the International Labour Organisation, the Food and Agriculture Organization, the United Nations Educational, Scientific and Cultural Organization, the International Civil Aviation Organization, the International Bank for Reconstruction and Development and the International Development Association, the World Health Organization, the Universal Postal Union, the Inter-Governmental Maritime Consultative Organization and the International Atomic Energy Agency. In addition, the General Agreement on Tariffs and Trade, the United International Bureaux for the Protection of Intellectual Property, the Asian-African Legal Consultative Committee, the Council of Europe and the League of Arab States had been similarly represented.

74. In 1966 the Sixth Committee had discussed the question of the organizations to be invited to the Vienna Conference, and the Legal Counsel had then indicated the criterion by which the Secretary-General would be guided. Apart from the specialized agencies and IAEA, invitations would be extended to those intergovernmental organizations which maintained permanent relations with the United Nations and with the International Law Commission.

75. During the work on the law of treaties, the Commission had not at first formally asked organizations for comments. At a later stage, the Sixth Committee had organized certain consultations, which had resulted in the production of documents A/6827 and A/CONF.39/7, containing material on the views of international organizations on the draft articles on the law of treaties.

76. In the present instance, if the Secretary-General were to communicate the Sub-Committee's conclusions to international organizations, he suggested that it be left to the organizations to reply as they saw fit. Some of them appeared to display considerable reticence in that respect.

77. Sir Humphrey WALDOCK said that the points which had been raised by members had been fully discussed in the Sub-Committee. The Sub-Committee's intention was that as much material as possible should be obtained on the practice in the matter. There was, however, the difficulty that the Secretariat had some sensibilities with respect to formal invitations to organizations.

78. The formula which appeared in the last sentence of sub-paragraph (ii) of paragraph 1 was the one most satisfactory for the purposes of the Secretariat. The opening words "For the time being" reserved the Commission's right to consult any further organization in the future. For example, the European Economic Community had developed a considerable practice with regard to treaties, and information on the practice of the Council for Mutual Economic Assistance (CMEA) would also be of interest. Probably, the Commission would not need to obtain information from a very large number of organizations in the initial stages; later, it could widen the scope of the research.

79. During his own work on the law of treaties, he had made some inquiries of the legal advisers of international organizations, and had found that at that date some of them had no great enthusiasm to take up the subject. He had gained the impression that many organizations were developing their practice and felt that, if codification took place too early, it might inhibit that development.

80. Since then, however, there had been the resolution adopted by the Vienna Conference¹⁶ and the decision taken by the General Assembly calling for the study of the subject by the Commission.¹⁷ The Secretariat would refer to those important decisions in its invitations to the organizations and it was to be hoped that information would be readily supplied.

81. Mr. RUDA said that information should also be obtained from the Organization of American States; in inter-American affairs, there was a practice of seventy years' standing which it would be of interest to explore.

82. Mr. ALCÍVAR said that the point had been raised in the Sub-Committee both by him and by Mr. Sette Câmara.

83. Mr. NAGENDRA SINGH said he supported Mr. Ago's suggestion that as wide a field as possible should be covered in the inquiries from international organizations.

84. Mr. BARTOŠ said that he knew of two organizations concerned with strictly legal matters which had not been invited to Vienna: the International Institute for the Unification of Private Law and The Hague Conference on Private International Law.

85. Mr. THIAM said he noted that the Organization of African Unity was not included in the list given by Mr. Rosenne.

86. Mr. USHAKOV said that the matter had rather important political implications and that the Commission should be guided by the decisions of the General Assembly. He therefore fully supported the criterion proposed in the Sub-Committee's report, namely, the international organizations which were invited to send observers to the Vienna Conference on the Law of Treaties. If it were proposed to change that formula he would ask that the proposal be put to the vote, and would vote against it.

87. Mr. TABIBI said that the question of invitations to international organizations was a sensitive political question which was best left to the judgement and practice of the Secretariat.

88. The presence of an observer for the Asian-African Legal Consultative Committee at the Vienna Conference was understandable because that Committee had discussed the law of treaties very fully immediately before the Conference.

89. Mr. AGO said that it was not a question of inviting organizations, as had been the case at Vienna, but merely of gathering information on the practice followed by the organizations.

90. Sir Humphrey WALDOCK said that the question was one of sending an invitation to international organizations. The question of the choice of the organizations to be invited undoubtedly posed problems for the Secretariat.

91. He thought that in certain cases legal advisers might hesitate to give information without obtaining the approval of a higher authority in the organization. That could well be because some of the practices which had developed might not have a very clear constitutional basis.

92. Apart from the information that might be obtained in response to an official invitation, the Special Rapporteur would have his own means of research into the practice of international organizations, with the help of the Secretariat.

93. Mr. EUSTATHIADES said that while the Secretary-General should be left to make the final choice, after

¹⁶ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/26, annex* (United Nations publication, Sales No.: E.70.V.5).

¹⁷ General Assembly resolution 2501 (XXIV).

taking into account all the difficulties that had been mentioned, it might help him if he were asked to choose those organizations which it seemed most advisable to consult on the subject.

94. Mr. ROSENNE said that the last sentence of paragraph 1 could be left as it was. Once the two lists of treaties requested in paragraph 1 had been compiled, they would reveal which organizations had concluded treaties. The Commission could then take its decision in the light of that information.

95. Mr. CASTRÉN said that the formula used in the Sub-Committee's report was a very cautious one and left the Secretary-General full discretion, since it stated "the Secretary-General might consider".

96. He endorsed Mr. Ago's proposal that the words "in particular" should be added.

97. Mr. TESLENKO (Deputy-Secretary to the Commission) said that the list of the organizations that had been invited to Vienna was longer than the one Mr. Rosenne had given, which was the list of organizations that had attended the Conference.

98. He must reserve the Secretary-General's position on the question of the choice of organizations. It would put the Secretary-General in a delicate position if he were asked to make such a choice without the help of an objective criterion. The study of the topic was still in the initial stage; later, when more documentation was available to the Commission, it might itself be able to draw up the list of organizations to be consulted.

99. Mr. BARTOŠ said that if the text of the report were amended as Mr. Ago had suggested, the Commission should put the matter to the vote; he would vote against that amendment.

100. Mr. AGO said that he had not formally proposed any amendment, so there was no need for a vote.

101. Mr. BARTOŠ said that in that case it would be sufficient to mention in the Commission's report that several members had requested that the list of organizations be expanded.

102. The CHAIRMAN said it would be enough if the points raised by Mr. Ago and Mr. Bartoš were recorded in the summary record to the meeting.

103. If there were no further comments, he would take it that the Commission agreed to request the Secretary-General to prepare the documents mentioned in sub-paragraphs (i) and (ii) of paragraph 1 of the Sub-Committee's report (A/CN.4/L.155) with only one change: in the first sentence of sub-paragraph (ii), the words "a full bibliography" would be replaced by the words "as full a bibliography as possible".

It was so agreed.

The meeting rose at 1.20 p.m.

1079th MEETING

Monday, 29 June 1970, at 3.15 p.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

State responsibility

(A/CN.4/233)

[Item 4 of the agenda]

(resumed from the 1076th meeting)

1. The CHAIRMAN invited the Commission to resume consideration of the Special Rapporteur's second report on State responsibility (A/CN.4/233).

2. Mr. USTOR paid a tribute to the Special Rapporteur for the skill and elegance with which he had handled a wealth of material in his report. He fully agreed with the view, expressed in paragraph 24, that the notion of international responsibility was extremely complex and was one with respect to which the claims of progressive development of international law might assert themselves more forcefully than they did with respect to other notions. Not much had been done in that direction hitherto, and the life of the international community demanded that a great measure of progressive development should be introduced into the Commission's draft articles on State responsibility. The Commission should not focus its attention exclusively on injuries done to aliens, but should deal with international responsibility in general, including responsibility for the gravest acts in international life, such as aggression, genocide and the use of weapons of mass destruction.

3. The remarks he was about to make were of a tentative character; indeed, they related to a report which was itself, in a sense, provisional.

4. With regard to the delimitation of the subject, he fully agreed with the Special Rapporteur's approach in paragraphs 5 and 6, but thought that the delimitation should perhaps be stated in the draft articles themselves, not only in a commentary. In the first place, the topic of State responsibility, as its title indicated, covered only the responsibility of States, not the responsibility of other subjects of international law, especially international organizations. In the second place, the draft would cover only responsibility for illicit acts and not responsibility for risk. He therefore suggested that it might well begin with an article stating that the international responsibility of a State could derive either from illicit acts or from actions which were not in themselves unlawful, but which could result in injury to another State, or endanger life

or the environment in one or more other States. An alternative method would be to amend the title to read "State responsibility for unlawful acts". In one way or another, however, the articles should show that the draft related only to responsibility for unlawful acts.

5. Article I stated the basic rule; it brought out the notion of an "international illicit act", the meaning of which was defined in article II. Whether that definition was kept in article II or put into a general article on the use of terms was purely a drafting matter. It would, however, be more in conformity with the Commission's practice to have one article defining the terms used throughout the text.

6. "International illicit act" was a rather heavy expression and it would over-burden the text of the draft articles, if used throughout. Moreover, the adjective "international" had the connotation of the opposite of internal, although it was clear that an internal measure, such as the practice of *apartheid*, could constitute an "internationally illicit act".

7. He therefore suggested that the expression "illicit act" be used throughout the articles; it would be explained in the article on the use of terms that that expression meant acts contrary to international law. That suggestion was in keeping with the title of the topic, which was "State responsibility", although it clearly meant the international responsibility of States.

8. When article I stated that "Every international illicit act by a State gives rise to international responsibility", it meant, of course, the responsibility of the State committing the international illicit act. It did not, however, answer the question *vis-à-vis* whom the responsibility came into play, in other words, what legal relation or relations came into being as a result of an international illicit act. That problem had been very lucidly explained by the Special Rapporteur: the question arose whether a legal relation came into being only between the guilty State and the injured State. In his introductory statement, the Special Rapporteur had explained that he had an open mind on the vitally important question whether, owing to the seriousness of a particular act, other States, or indeed all States, might have the right to invoke the responsibility of the delinquent State.¹ The Special Rapporteur did not, therefore, maintain the statement in paragraph 22 of his report that "What must be ruled out, it appears, at least at the present stage in international relations, is the idea that as a result of an international illicit act general international law can create a legal relationship between the guilty State and the international community as such...".

9. The Commission itself, in its report on the work of its twenty-first session, had specifically referred to "cases in which... a particularly serious offence might also give rise to the establishment of a legal relationship between the guilty State and a group of States, or eventually between that State and the entire international community".² Equally relevant was article 53 of the Vienna

Convention on the Law of Treaties, which defined a peremptory norm of general international law as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted...".³

10. He therefore believed that, even at the present stage of development, the idea of reference to the international community of States in cases of very grave violation of international law should not be ruled out. The manner in which such reference would be made would, of course, remain open. Whatever the method chosen by the Special Rapporteur, the question of the legal relation created by the commission of the illicit act should be dealt with in the articles immediately following article I, for otherwise the provisions of that article would remain, as it were, in the air. The situation was ripe for such progressive development. He did not share the Special Rapporteur's belief that the Commission would not have to take a position on that question in the early stages of its work.

11. Article II was, of course, a crucial article: its purpose was to define the international illicit act as a basis of international responsibility. The article was consistent with the statement made by the Commission, in its report on the work of its twenty-first session, that "The starting point should be the imputability to a State of the violation of one of the obligations arising from those rules", that was to say the "rules of international law which laid obligations upon States in one or other sector of inter-State relations".⁴

12. Article II was preceded by 22 pages of commentaries and explanations which testified to the thorough examination the Special Rapporteur had made of all the material available to him. There was one theory, however, which he had not considered: that put forward by Mr. Ushakov.⁵ That theory, which prevailed among international lawyers in the USSR, dispensed with the idea of imputation in establishing the responsibility of a State. It deserved very serious consideration, since its purpose was to reduce the elements of uncertainty and subjectivity in the establishment of State responsibility in particular cases. It was obviously applicable in practice, particularly in cases where responsibility came into play for acts of State *stricto sensu*. If the Head of State, the Head of Government or some other duly accredited representative of a State acted on behalf of the State, it would be much too artificial and, for all practical purposes, perhaps futile to consider the imputability of the act.

13. It might, of course, be said that there was no real difference between the approach of the Special Rapporteur and that of Mr. Ushakov, since whenever one of them said that a State was responsible for a certain act, the other could express the same idea by saying that

³ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/27* (United Nations publication, Sales No.: E.70.V.5).

⁴ *See Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10, p. 30, para. 80.*

⁵ *See 1076th meeting, paras. 20-23.*

¹ *See 1074th meeting, para. 13.*

² *See Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10, p. 30, para. 81.*

certain acts of certain people were imputable to the State and that the State was therefore responsible. The difference would then come down to a mere question of terminology. Although he, for his part, was inclined to believe that the difference went deeper than that, he felt sure the Special Rapporteur would give serious consideration to the views of Mr. Ushakov, as he had done to the views of many other writers. It was in the interests of the international community that the rules governing State responsibility should be placed on the most solid foundations, that the identification of an international delinquency should be made as simple and easy as possible, and that the possibility of escaping responsibility for an illicit act should be reduced to a minimum, without of course excluding the possibility of exoneration in such cases as *force majeure*. If agreement could be reached on those aims, it would be possible to adopt a generally acceptable formula for the definition of an illicit act and of the other basic notions relating to State responsibility.

14. The experience of the Commission showed that the less theoretical questions were brought into a discussion, the greater were the chances of achieving practical results. That was a direct consequence of the fact that, although members of the Commission belonging to different schools of thought might be unable to agree on theoretical points, they did not find it too difficult to agree on practical solutions. For those reasons he urged that, in continuing the work on the topic, a more pragmatic approach should be adopted than was reflected in the present report. Such an approach would, of course, demand a certain self-restraint and even self-sacrifice on the part of a scholar of the stature of the Special Rapporteur, but that sacrifice would be rewarded by the recognition and gratitude of the General Assembly and the international community, which eagerly awaited a set of articles setting out the modern rules on State responsibility.

15. He had serious doubts about the advisability of retaining the provision in paragraph 1 of article III. Internal law analogies were not, of course decisive in international law, but he ventured to ask whether, in municipal law, it had ever been enacted that all men possessed the capacity to commit crimes and illicit acts.

16. With regard to paragraph 2 of article III, he understood the Special Rapporteur's concern. His own country—Hungary—had suffered foreign occupation for a long time and the problem had arisen of the legality or nullity of acts committed and treaties concluded on behalf of the occupied country during the period of occupation. He was not opposed to the inclusion of a provision on that subject, but he did not think it should appear in the introductory articles, because it was not of a general character. Consideration might be given to the inclusion, elsewhere in the draft, of a provision explicitly reserving the problems arising out of a military occupation as belonging to another branch of international law.

17. In conclusion, he commended the Special Rapporteur for his efforts to build a solid foundation for the Commission's future work on State responsibility.

18. Mr. NAGENDRA SINGH said he associated himself with the tributes paid to the Special Rapporteur for his systematic and exhaustive report. He would only comment on the articles themselves, beginning with article II, because the constituent elements of State responsibility must be determined before article I could be understood. As article II defined the conditions for the existence of an international illicit act, it had to be examined first.

19. He agreed with the Special Rapporteur on the following constituent elements which gave rise to State responsibility: *first*, a subjective element, which was an act or omission; *second*, the fact that the said act or omission was attributable to a State under international law; *third*, an objective element, which was the failure to fulfil an international obligation of the State. He believed, however, that the element of injury, which the Special Rapporteur had ruled out, should also be included as a constituent element. That was a controversial point depending on the concept of injury.

20. It was significant, however, that both the Permanent Court of International Justice and the International Court of Justice had recognized injury as an element of the international illicit act, and the concept had a place in authoritative writings on international law. He urged that further research should be done before injury was ruled out. In the English-speaking world, including both the USA and the Commonwealth, the factum of injury was recognized. The Continental concept of State responsibility without injury had the backing of the Spanish-speaking world. The Special Rapporteur would have to reconcile these two approaches in his attempt at codification.

21. In the *Case concerning the factory at Chorzow* the Permanent Court had held it to be a principle of international law, and even a general principle of law, that any breach of an international obligation which caused an injury gave rise to the obligation to make reparation for such injury.⁶ Such writers as Anzilotti and Oppenheim had laid stress on the concept of injury: Oppenheim had spoken of "internationally injurious acts" and had stressed that such acts could result either in direct injury to a State or in injury to an individual and through him to the State to which he belonged.⁷ There was the conception of original and vicarious responsibility which, though old-fashioned, was still basically quite correct; he would speak of that aspect later in greater detail. In many legal writings, injury appeared as the very *raison d'être* of international responsibility; in international law, injury was equated with the breach of an obligation.

22. The Special Rapporteur had stated, in paragraph 53 of his report, that "Often, however, what those who assert the requirement of an injury have in mind is not so much damage done to a State at the international level as injury caused to an individual at the municipal level". For his part, he would submit that injury could be

⁶ P.C.I.J., Collection of Judgments, Series A, No. 17 (1928), Judgment No. 13, p. 29.

⁷ *Oppenheim's International Law* (Lauterpacht), eighth edition, 1955, Vol. I, paras. 157-162.

sustained by the State itself; a State could be injured by an unjustified intervention or by a breach of treaty obligations. The reparation, of course, could take different forms: compensation, restitution, or a mere apology or declaration giving satisfaction. It was not necessary, therefore for the injury to be such as to cause economic damage. It was sufficient if a State was hurt by a breach of an international duty by another State. Apology was sufficient, without payment of any compensation, for an injury sustained by a State consequent on a breach of an international obligation by another member of the international community.

23. He also wished to comment on the question of terminology, which was extremely important in the present instance. The French-speaking members of the Commission had been satisfied that "*fait illicite*" was the proper expression to use in that language; the corresponding Spanish "*hecho ilícito*" had been accepted by the Spanish-speaking members. In the English-speaking world, however, the term "illicit" would not be accepted. It had not been used in important text books of international law or in leading decisions of the Permanent Court of International Justice and the International Court of Justice. In municipal law, the term "illicit" was used in connexion with matrimonial matters and also in excise legislation where "illicit distillation" was defined. He therefore suggested that the term "illicit act" should be replaced either by "wrongful act" or by "unlawful act". His own preference was for "wrongful act".

24. It would also create confusion to refer to an "international illicit act. What was meant in the present instance was "an internationally wrongful act" or an "internationally injurious act". The act could well be an internal act having international repercussions. The word "international" should therefore be dropped, along with the word "illicit".

25. He suggested that, in sub-paragraph (b) of article II, the reference to "an external event" should be dropped, and the words "failure to carry out an international obligation" be replaced by "breach of an international obligation". He would also prefer to say that certain conduct was "attributable" to a State in international law, rather than that it was "imputed" to a State. The word imputed hurt the traditional concept of sovereignty of a State and it was doubtful if the USSR would accept it. The article could therefore be reworded to read:

"A State becomes engaged in international responsibility for acts of omission or commission which according to international law are attributed to it and constitute a breach of international obligations thereby causing injury to another State or States."

26. If an internationally wrongful act was to be defined, it could perhaps be defined as "An act or omission attributable to a State under International Law which constitutes a breach of international obligations". There was no need to mention an "external event", as there might be none; it might be an internal event having external repercussions.

27. He emphasized the importance of the distinction between original and vicarious responsibility. According

to *Oppenheim*, a State bore original responsibility for its own, that was to say its government's, actions and for such actions of its agents or private individuals as were performed at the government's command or with its authorization. The State bore vicarious responsibility for certain unauthorized injurious acts of its agents or subjects, and even of aliens resident in its territory.⁶ If such persons committed an internationally injurious act without authorization, vicarious responsibility required the State not only to apologize, but also to compel those persons to make reparation, as far as possible, for the wrong done, and to punish them if necessary. A State complying with those requirements would incur no blame for such acts, but a State refusing to do so would thereby commit an international delinquency and its vicarious responsibility would become original responsibility. A suitable reference to the distinction between vicarious and original responsibility, though it might look outmoded, appeared to be necessary, as it would help to secure acceptance of the basic principles of State responsibility, particularly in developing countries, where the plea could not be raised that, if the acts were not authorized by the government, a State could not be held responsible for them. The concept of vicarious responsibility would help people to appreciate the position better than the blunt statement "attributed to the State". Again, to make codification clear and precise, the circumstances in which a State agent was acting—for example, personally or officially—should be clearly brought out in the articles yet to be drafted.

28. It might thus be useful to specify whose internationally injurious acts would be considered as acts of the State itself and hence as international delinquencies. He believed that all such acts performed by a Head of State or by members of a government acting in that capacity, and all acts of officials or other individuals commanded or authorized so to act by the government, would fall into that category. Acts committed by a Head of State or members of a government acting not in their official capacity, but in a purely personal capacity, and not on behalf of the State, but simply as individuals, might not be international delinquencies as such, but the State concerned would bear a vicarious responsibility for such acts and be liable to pay damages or make appropriate amends. The Commission would have to consider whether such a clear-cut distinction could in fact be made or not. It might be useful to indicate to whom a State was responsible. There were also various kinds of responsibilities to international organizations which needed to be mentioned.

29. He believed that the question of abuse of rights warranted further study and should not be excluded from the Commission's codification work. The principle involved in abuse of rights was of vital importance in an age when scientific experimentation in one State, which would be an entirely lawful act, might quite easily cause injury to another State. There was, for example, a clear instance of conventional regulation of a nuisance committed by private persons which affected injuriously the

⁶ *Op. cit.*, para. 149.

territory of a neighbouring State. On 15 April 1935, a Convention had been signed by Canada and the United States for the settlement of difficulties arising out of the complaint of the United States that fumes discharged from the smelter of the Consolidated Mining and Smelting Company in British Columbia were causing damage to the State of Washington. In the *Trail Smelter Arbitration* arising out of that Convention it had been held, in 1941, that under international law no State had the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another State.⁹ Though that was a controversial subject and some speakers had felt that it should be omitted, he would submit that it should be taken up last and not rejected outright without a close and proper examination.

30. He agreed with Mr. Ushakov that the wording of article III, paragraph 1, raised certain difficulties. Since there were virtually no limits to the capacity to commit internationally injurious acts, it was perhaps unnecessary to deal with capacity at that stage. Although capacity to conclude treaties provided a valid precedent, it might be better to adopt a different approach. According to *Oppenheim*, an international delinquency could be committed by any member of the family of nations, whether a full sovereign, half sovereign or part sovereign State. However, a half sovereign State could commit an international delinquency only in so far as it had an international status and corresponding international duties of its own. The circumstances of each case decided whether the delinquent half sovereign State was answerable directly to the wronged State for its neglect of an international duty, or whether the sovereign State, federation or protectorate to which the delinquent State was attached must bear a vicarious responsibility for the delinquency.¹⁰ The federating states of the United States of America, for example, had no international status, since all international relations were conducted by the Federal Government, so they could not commit an international delinquency. The United States Government would bear a vicarious responsibility for any internationally injurious act committed by one of the states of the Union. Those were all problems of capacity to commit an injurious or wrongful act and had to be mentioned. The best approach would be one involving the use of the words "may commit" or "could commit", but not "capacity to commit", which could be easily misunderstood.

31. He thought that paragraph 2 of article III could have given a more striking example of the limitation of capacity than that of the occupation of territory; the difficulties raised by federal systems might perhaps have been mentioned. In any case, it seemed somewhat unwise to try to draft an article dealing with capacity before articles on other important aspects of State responsibility had been formulated.

32. Mr. THIAM congratulated the Special Rapporteur on the excellent report he had submitted to the Com-

mission, in which he had tried, not always successfully, to avoid sacrificing essentials to specific aspects of responsibility, while still taking those aspects into account sufficiently to avoid over-simplification. A reading of the report had brought out two problems with which he proposed to deal.

33. The first was connected with the criterion for responsibility. The Special Rapporteur had stated that the source of responsibility was the international illicit act. He (Mr. Thiam) doubted whether it could be said that the international illicit act in itself sufficed as a source of responsibility. Responsibility was always linked with reparation for an injury and it was difficult to see how the concept of injury could be left entirely out of account when speaking of responsibility. The Special Rapporteur himself admitted as much when he said, in paragraph 46 of his report, that "it seems perfectly legitimate, in international law, to regard the idea of the breach of an obligation as the exact equivalent of the idea of the impairment of the subjective rights of others". That being so, it would be better to state clearly that the idea of injury could not be dissociated from the concept of responsibility. Moreover, the idea of injury so dominated the subject-matter of responsibility that provision had been made to impute responsibility to the State for a lawful act, precisely because reparation must be made for the injury and, consequently, a basis had to be found for responsibility. It would therefore be well to introduce the idea of injury into the draft, especially as the main point was to bring responsibility into play and it would be vain to do that solely by invoking the illicit act.

34. More thought should also be given to the concept of abuse of rights, which the Special Rapporteur rejected as a possible source of responsibility because every State could allege that it had acted in the exercise of its sovereignty, which was unlimited. It therefore seemed necessary to limit the exercise of sovereignty.

35. The second problem he wished to examine was that of the scope of responsibility. The Special Rapporteur had himself put the question whether, in studying responsibility, everything which might have the character of a sanction, in the penal sense of the word, should automatically be excluded. That question was important, first, because even in internal law it was difficult to make a clear distinction between civil and criminal responsibility, since the same act could give rise to both, and secondly, because in practice there was a very close relationship between criminal law and civil law, even in regard to procedure. Similarly, in international law it was sometimes difficult to say whether a measure taken had the character of reparation or of a sanction. Hence there was no denying that the idea of a sanction could be introduced in international law. It was, of course, understandable that young States should be opposed to it, since they were not in a position to apply sanctions themselves, but might have disproportionate sanctions imposed on them. It might be pointed out to them, however, that in practice no powerful State could impose sanctions on a weak State without setting off a solidarity reaction, which was a guarantee for defenceless States. It seemed necessary, therefore, to re-examine the problem of sanctions, having

⁹ *Annual Digest and Reports of Public International Law Cases*, 1938-1940, Case No. 104, p. 317.

¹⁰ *Oppenheim*, op. cit., para. 152.

particular regard to the gravity of the offence, and to consider whether it might not be possible to state a number of principles or rules governing the subject at the bilateral level. States should know that it was not enough to make reparation. A sanction could have a preventive character.

36. With regard to terminology, he saw no objection to using the term "illicit act", since it was accompanied by explanations making it quite clear that it denoted either an action or an omission. The essential point was to know what was meant. On the other hand, it was to be feared that to use the expressions "vicarious responsibility" or "responsibility for the act of another" might be to transfer to international law a concept of internal law which did not have the same meaning. Responsibility for the act of another required a relationship of authority between two persons. But that was not how the problem arose in international law, in which it was always the State that acted, even though it acted through its organs. Either a State was sovereign or it was not, and in the latter case no responsibility could be imputed to it. Further consideration should therefore be given to that notion.

37. He did not think it was appropriate, either, to speak of "capacity to commit international illicit acts"; that idea seemed to derive too directly from the concept of legal capacity in internal law. In international law, since the State was regarded as a subject of international law, it was not necessary to add that a sovereign State had the capacity to commit international illicit acts, especially as that wording was ambiguous.

38. It was also difficult to consider new States separately, because responsibility was the counterpart of sovereignty. That did not mean that problems connected with the behaviour of new States did not arise, but they were special problems of secondary importance, which should be considered as the Commission's work progressed.

39. Mr. BARTOŠ said that, in view of the short time at the Commission's disposal, he would confine himself to the questionnaire submitted by the Special Rapporteur at the 1074th meeting.

40. In reply to question I (a), he stressed that the Special Rapporteur, in his report, had not specified the different kinds of responsibility, namely, political, financial and moral responsibility, but had confined himself to the notion of responsibility in general, which covered all the aspects of State responsibility, because he had wished to consider the general legal order of the international community. The fundamental question which should be given priority was that of the source of responsibility. The Special Rapporteur regarded the forms and content of responsibility as being of secondary importance. He (Mr. Bartoš) therefore favoured the composite formula proposed, which in no way prejudged the content of responsibility. He did not think that responsibility was necessarily linked to reparation. For one thing, all responsibility did not lead to reparation or satisfaction, and for another, reparation and satisfaction were part of the material and moral consequences of responsibility, which the Commission did not intend to consider for the moment.

41. He therefore approved of the formula according to which the source of responsibility lay in the violation of the international legal order. The sovereignty of States was in no way incompatible with their responsibility. For if the too general conception of the sovereignty of States were taken to justify the conclusion that it was not possible to assign responsibility to them, that would be equivalent to denying that they could have any obligations at all.

42. On question I (b), he maintained that the responsibility of a State could be engaged for an illicit act, for an act that was not illicit but was harmful to other States, and lastly for the act of another. The Special Rapporteur, moreover, had rightly explained what constituted responsibility for the act of another.

43. There was no need to dwell too long on questions of terminology. That aspect of the Special Rapporteur's work should, on the whole, be approved; the terminology could be studied in greater detail at a later stage.

44. The subjective and objective elements of the international illicit act, referred to in question II (a), must always be regarded as indissolubly linked, not by analogy with internal criminal law, which should be disregarded, but in accordance with the facts of diplomatic history. It might happen that a State had, subjectively, no intention of committing a violation, but that it was objectively linked to other States which became guilty of a violation. That link could be objectively so close that the State concerned could not successfully claim exemption from responsibility by invoking the absence of the subjective element in its own case.

45. As to question II (b), there was no doubt that the subjective element could consist in an omission as well as an act. That was most clearly demonstrated by the *Corfu Channel Case*.¹¹

46. So far as imputation was concerned (question II (c)), analogies between internal law and international law should be avoided. The concept of imputation was especially important in the case of an omission constituting an international illicit act. Conventions imputing responsibility to a State which had not taken the precautions or carried out the inspections required under their provisions were becoming more and more numerous; examples were the conventions concluded on narcotics and on space law. The Special Rapporteur ought therefore to study the legal operation of imputation and its consequences for State responsibility.

47. The definition of the objective element of the international illicit act, proposed in question II (d), clearly showed that the subjective element and the objective element could not be dissociated, since only failure to fulfil an international legal obligation was necessarily conduct imputable to the State which was bound by that obligation.

48. Like several members of the Commission, he was of the opinion that abuse of rights (question II, (e)) should be considered as a special source of international

¹¹ *I.C.J. Reports 1949*, p. 4.

responsibility. It frequently happened that powerful and technically advanced States could, even when exercising their rights, cause difficulties for other States. For instance, at the time of the *rapprochement* between Serbia and France, Austria-Hungary had carried on a Customs war against Serbia to prevent the exportation of Serbian livestock. Austria-Hungary had claimed that it had the right to permit or to refuse the passage of the livestock through its territory as it saw fit. A similar situation had arisen in the Near East a few years ago in connexion with oil. The problem had also arisen in connexion with the land-locked countries. On the one hand, States had invoked their right not to permit the creation of an international right-of-way through their territory; on the other hand, the land-locked countries had maintained that refusal of the right of passage constituted an intolerable abuse of rights. A Convention had been concluded in 1965,¹² under the auspices of the United Nations, in which the right to passage in such cases was recognized. Problems of the same kind might arise in regard to the supplying of water to African countries suffering from drought. It might be doubted whether the sovereignty of a State should go so far as to prevent other States from living.

49. The distinction between illicit conduct and illicit events, proposed in question II (f), was justified. But an effort should be made to bring those two cases as close together as possible.

50. Injury (question II, (g)) might be disregarded if the international illicit act was taken as the point of departure; for injury was then only the consequence of the fact which had generated responsibility. On the other hand, where abuse of rights was concerned, it might perhaps be necessary to take injury into consideration as a constituent element of the abuse. It might be asked whether the injury must necessarily be a material injury or whether the notion of moral injury could be accepted. In international law, there were sanctions for moral injury. They could be applied when the national flag had been insulted. For example, he had once seen a military detachment present arms before a flag which had been thus dishonoured.

51. The idea of capacity to commit international illicit acts, referred to in question III (a), could be accepted, but it was necessary to provide for other exceptions than the case of military occupation. He would therefore be in favour of a more flexible formula, covering, in particular, cases of direct or indirect pressure on a State, which could exempt it from responsibility. It must not be forgotten that States which were sovereign in law were not necessarily sovereign in fact.

52. For that reason it was, of course, desirable to mention the possibility of there being limits to the international delictual capacity of States (question III, (b)), subject to the reservation he had just made.

53. In conclusion, he thought the Commission should not only approve the Special Rapporteur's proposals as

a whole, but should congratulate him on having done work the success of which would be particularly valuable in an international community in which breaches of international law were so frequent.

The meeting rose at 6 p.m.

1080th MEETING

Tuesday, 30 June 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

State responsibility

(A/CN.4/233)

[Item 4 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's second report on State responsibility (A/CN.4/233).
2. Mr. CASTAÑEDA, after paying a tribute to the Special Rapporteur for the high quality of his report, said that he was basically in agreement with his understanding of the problem.
3. As to question I (a) of the Special Rapporteur's questionnaire,¹ he agreed that a composite formula should be adopted that would not prejudge the highly controversial issue of the content of responsibility, in connexion with which the Commission would have to answer the question whether sanctions could be applied in the field of State responsibility and whether they could be of a punitive nature. He was glad the Special Rapporteur had not asked the Commission to take a position on that point.
4. He agreed with Mr. Ustor that the formula finally adopted should make it clear that responsibility could arise out of both illicit and non-illicit acts.
5. He agreed with Mr. Nagendra Singh that it was not really necessary to insert the word "international" before the words "illicit acts". Purely international illicit acts, such as piracy and genocide, were comparatively rare. What had to be considered were acts committed on the internal level which had international repercussions.

¹² Convention on Transit Trade of Land-locked States, United Nations, *Treaty Series*, vol. 597, p. 42.

¹ See 1074th meeting, para. 1.

6. The Special Rapporteur had been wise to leave aside, for the time being, any consideration of the problem of risk arising from lawful acts, but in view of the growing importance of space law and the control of nuclear explosions, the Commission should not postpone that topic for too long.

7. With regard to section II of the questionnaire, he could answer questions (a) and (b) in the affirmative, but question (c) raised the extraordinarily difficult problem of imputation. In criminal law, imputation merely qualified an individual as the author of an act, but in international law, imputation to a State meant that an act committed by an individual must be juridically attributed to the State. He would be interested to hear from Mr. Ushakov and Mr. Ustor on the new trend in Soviet law concerning imputation.

8. Sub-paragraph (a) of article 2 might be less ambiguous if the word "imputed" were replaced by the word "attributed".

9. He fully agreed with the view expressed in question II (d) of the questionnaire, that the objective element in an international illicit act consisted of failure to fulfil an international legal obligation. Mr. Tammes had made a very pertinent observation on that subject,² but he himself supported the Special Rapporteur.

10. With regard to the abuse of rights, he agreed with Mr. Tammes that that was a key notion which could not be excluded from the draft articles.³ In some cases, where there was no overt violation of a rule, abuse of rights might be the only source of law. A classic case involved an arbitral award against seal fishermen who had killed female seals during their breeding season.

11. As to injury as a third constituent element of the international illicit act, he fully agreed with what the Special Rapporteur had raised in paragraph 53 of his report, namely, that it was not an additional element.

12. With regard to section III of the questionnaire, he agreed with several members in rejecting the idea of capacity to commit international illicit acts.

13. His reply to question II (b) was that there might be some value in drafting a rule concerning limits to the international delictual capacity of States.

14. Lastly, with regard to the three draft articles prepared by the Special Rapporteur, he agreed with Sir Humphrey Waldock and Mr. Tammes that it was difficult at the present stage to express any judgement, since it was not yet known what position those articles would occupy in the draft as a whole.

15. Mr. ALCÍVAR said that the report presented by the Special Rapporteur was obviously the product of great erudition. In the light of modern doctrine, the Special Rapporteur had taken as his point of departure the existence of an international juridical order which logically imposed obligations on the subjects making up the international community. When a State omitted to fulfil an international obligation, it was committing an

illicit act which placed responsibility on the author of that act. Up to that point, he was in absolute agreement with the Special Rapporteur.

16. However, he was inclined to believe that the legal relationship created by the commission of an internationally illicit act was a relationship with the international community, which today was organized by law. Up to a certain point, although not altogether, his thinking was on the same lines as that of Kelsen. The conception of law as both a normative and a coercive order was certainly the closest he came to the pure theory of law.

17. But he also believed that the world was moving with increasing speed towards the centralization of power in the international community, and that led him away from the idea of a similarity between the present legal order and the decentralized order of primitive societies. The nature of the United Nations Charter was that of general international law, and it went beyond the traditional conception of that law as being merely customary law. It might be said that he was trying to proceed too quickly, but it must be remembered that modern international society was evolving quickly. They were confronted with a world in which the vast majority of nations were rising to demand a distributive justice which would at least give them a chance to live, now that they were faced with the misery of underdevelopment and the danger of perishing in a thermo-nuclear blaze.

18. The Special Rapporteur favoured the thesis that two types of legal relationship resulted from an illicit act: that of reparation and that of sanction. However, the articles which had been submitted to the Commission so far did not reflect the position expressed by the Special Rapporteur in his commentary, and he would therefore reserve his final opinion until he knew how it was proposed to balance those two legal situations.

19. The Special Rapporteur had pointed out that the illicit character of the act followed from the violation of obligations laid down in a legal rule, and rejected the common expression which referred to violation of the rule. He was in full agreement with that technical interpretation. The legal rule commanded, prohibited or protected and it included the establishment of obligations and rights. It was therefore the non-fulfilment of those obligations—and possibly the exercise of rights going beyond the limits established in the rule—which constituted the illicit act.

20. The obligations and rights were established by what the Special Rapporteur called "primary rules", and the consequences which followed from the violation of those obligations corresponded to what he called "secondary rules". He had emphasized that it was the latter rules which were the subject of the work on which the Commission was engaged. He (Mr. Alcívar) believed, however, that when establishing the different categories of responsibility, it would be impossible to avoid referring specifically to a number of primary rules, particularly the principles of international law incorporated in the United Nations Charter, which were peremptory norms of international public order and ranked as constitutional precepts.

² See 1075th meeting, para. 39.

³ *Ibid.*, para. 40.

21. He was decidedly in favour of using the Special Rapporteur's composite formula for laying down the basic rule on State responsibility. It was true that in international law, unlike internal law, no difference was made between civil and criminal responsibility; but the difference would emerge spontaneously, whatever the terminology used in cataloguing the wide range of State responsibility. The problem was not one of names, but of the legal effect of the illicit act.
22. The use of the expression "*hecho ilícito*" presented certain difficulties in Spanish legal terminology. An *hecho ilícito* was something produced by fault or negligence which was not classed as a criminal offence. The consequence of the *hecho ilícito* was reparation for the injury caused, and that was only one of the aspects which the Special Rapporteur had attributed to State responsibility.
23. An *acto ilícito*, on the other hand, consisted in human conduct which was objectively contrary to law and punishable by penal measures, or which, without being of that nature, involved the loss of a right or of a favourable legal situation, or the aggravation of an existing obligation, or the creation of an obligation to make reparation for the injury caused. As a rule, an *acto ilícito* was imputable to its author by virtue of intention (*dolus*) or fault (*culpa*). The expression *acto ilícito* was a generic one and therefore included criminal offences, civil offences, failure to take due care—culpable negligence—and objectively anti-legal acts which, although not culpable, in exceptional cases created responsibility of their author for the injury caused.
24. He hoped, therefore, that in formulating the Spanish version of article I, the Special Rapporteur would use the words "*acto ilícito*" instead of "*hecho ilícito*". He understood that it was the English version rather than the French which was the real difficulty.
25. With regard to the Special Rapporteur's questionnaire, his answer to question I (b) was in the affirmative, although his future position would depend on the approach adopted to each of the subjects mentioned.
26. He had not the slightest doubt about the imputability of the illicit act in international law, but would add that, although the State was the primary subject of imputability, its executive organs were also involved. In view of the Nuremberg judgement, there was no need for him to comment on such a well-recognized principle. The problems still outstanding would be solved with the support of the juridical organization of the international community, and there it was the "conscience of the world" that spoke—to use the phrase employed by the Nuremberg Tribunal—so that more and more headway was being made every day in the progressive development of international law.
27. With regard to section II of the questionnaire, he could answer all the questions affirmatively including question (g); indeed, he did not think it was possible to include injury as a third constituent element of the international illicit act. In criminal law an attempt was a thwarted crime, which established much greater responsibility than the commission of a less serious offence, and intent was an important element in the illicit act.
28. He supported the idea that the abuse of rights should be dealt with in the draft articles in so far as that would help to harmonize the rules of positive law with the ideal of justice.
29. Some adverse comments had been made on paragraph 1 of draft article III, which read: "Every State possesses capacity to commit international illicit acts". He himself would prefer some other wording, but must point out that the Special Rapporteur had stated a legal situation which should surprise no one. In the broad sense of the term, legal capacity was the capacity which a man possessed to be the subject of legal relationships; and that led to its being considered, on the one hand, as the capacity to acquire rights and contract obligations, and on the other hand, as the capacity to enter into a commitment and to remain bound by the commission of an illicit act. In the latter sense, of course, it was the capacity of a person to answer for punishable acts or omissions, and it was well known that persons whom the law regarded as lacking capacity were not subjects of civil or criminal liability. He was convinced that what the Special Rapporteur was referring to in that paragraph was capacity and not a faculty; but since a different interpretation was possible, it would be wise to make the wording more precise.
30. The limitation of capacity in special situations caused him some anxiety, though he would not go so far as to reject it. The example of military occupation was frightening, since it was the most serious crime that could be committed against a State, but he could not close his eyes to reality. In the circumstances he preferred to reserve his opinion until the draft had reached a more advanced stage.
31. Mr. KEARNEY, after congratulating the Special Rapporteur on his report, said that he would first like to express qualified approval of the plan suggested and the method followed. That plan was an extremely reasonable approach to what was a most difficult series of problems of international law, because they were not only legal, but also highly political.
32. Judging by the examples already submitted, the Special Rapporteur proposed first to present a number of general rules on the abstract aspect of State responsibility; he feared, however, that rules limited to pure, abstract responsibility might prove to be too metaphysical for the kind of international society that existed in the world today. He agreed with Mr. Yasseen, therefore, that the short series of articles which the Special Rapporteur had in mind would not provide the Commission with a sufficiently broad solution to the many complex problems of State responsibility. If the Commission were to produce more than a mere showcase of legal learning, it would have to work out the many detailed rules to which Mr. Yasseen had referred.⁴
33. His approval of the Special Rapporteur's plan, therefore, was qualified by the assumption that his short series of general and abstract articles was intended to serve as the foundation on which the Commission would

⁴ See 1076th meeting, paras. 32-37.

build up a complete and detailed code dealing with all aspects of the problem, both general and specific. That assumption was based on the rather brief reference to the second phase of the Commission's work in the last sentence of paragraph 9 of the report and was confirmed by the Special Rapporteur's observations in paragraph 25.

34. He had also qualified his approval of the Special Rapporteur's method of work because, while the deductive system of thought was of great value in constructing first principles and working out an abstract system, when the Commission came to consider detailed rules on State responsibility, greater emphasis would have to be placed on an inductive approach. In particular, many more examples would be needed, so that the Commission could be sure that everyone was talking about the same thing.

35. He found no serious problems in connexion with article I, though he shared the view expressed by Sir Humphrey Waldock and Mr. Nagendra Singh that the English version was couched in language of considerable obscurity.

36. With regard to the question of sanctions, he agreed with Mr. Thiam that that was a problem to which the Commission should give serious consideration. He himself felt that one of the fundamental objectives of the Commission's work should be to establish a system so complete and self-contained as to eliminate both the need and the ability of individual States to resort to the unilateral application of sanctions as a response to another State's wrongful act or failure to make reparation.

37. That was an extremely difficult aim to achieve; the Commission would have to work out rules not only for determining the existence of responsibility, but also for application of the necessary principles and methods in order to obtain reparation from States which had committed a wrong. As Mr. Yasseen had said, the problems involved had to be settled by the legislative process and the Commission was the key element in that process.

38. With regard to article II, he agreed with Mr. Reuter that the contrast between the subjective and objective elements was not too happily brought out in the English version. It did not seem logically possible to separate the two elements of imputability to the State and conduct that violated an international obligation of the State. He suggested, therefore, that sub-paragraphs (a) and (b) might be combined to read: "An international illicit act exists where conduct that constitutes a failure to carry out an international obligation of the State is imputed to a State under international law".

39. The question then arose whether the international obligation existed because the conduct was imputed to the State under international law, or whether the conduct was imputed to the State under international law because the international obligation existed. The question might also be put negatively: could a State fail to carry out an international obligation if the act or omission constituting the failure could not be imputed to the State under international law? To his mind, the answer must clearly be in the negative. If, under the rules of international law, conduct was not imputable to the State,

the State could not have violated an international obligation.

40. There was no valid reason why the Commission should not deal with the problem of imputation in the draft articles, but it should not allow the existence of rules governing special situations, such as failure to safeguard embassy property from mob violence, to distort what should be the automatic and unquestioning acceptance of the basic principle that a State was responsible for all the official acts of its public officials and servants.

41. The notion of abuse of rights should, he thought, be dealt with as a separate topic. With regard to question II (f) of the questionnaire, he agreed with those members who had said that they were not sure what was the distinction between illicit conduct and illicit events.

42. To question II (g) he would reply that if the question was merely whether the definition in article II was acceptable without a specific reference to injury, his answer would be in the affirmative. But if the question was whether the draft articles could be completed without any reference to injury, he must reply that he doubted very much whether that would be possible.

43. It was necessary to distinguish between injury as constituting evidence of the existence of the violation of an international obligation and injury as determinative of the problem of damages or reparation. That distinction was ignored in the key sentences in paragraph 54 of the report, which read: "The extent of the material injury caused may be a decisive factor in determining the amount of the reparation to be made. But it cannot be of any assistance in establishing whether a subjective right of another State has been impaired and so whether an international illicit act has occurred". That seemed to him an overstatement, since the fact of injury obviously could be, and usually was, a factor which determined that the right of another State had been impaired. It seemed essential to develop, at an early stage of the draft articles, the fact that injury did play an important part in determining the failure to carry out an obligation.

44. With regard to article III, he shared the views of those members who had questioned the need for a paragraph dealing with capacity to commit international illicit acts; if article II had any meaning in so far as it referred to the failure to carry out an international obligation, then paragraph 1 of article III would seem to be superfluous.

45. The problem dealt with in paragraph 2 of article III would have to be taken up some time, but he doubted whether it was necessary at the present stage to include a clause dealing with exceptions. Certainly, if such a clause was drafted, it should refer to a reasonable number of exceptions and not single out the example of military occupation.

46. All the other questions in the questionnaire he would answer in the affirmative.

47. Mr. ROSENNE said that the classical Roman lapidary quality of the Special Rapporteur's work reminded him of a saying by Boileau which the late

Gilberto Amado used to quote: “*ce que l'on conçoit bien s'énonce clairement*”.

48. He proposed to make a few remarks on the questionnaire submitted by the Special Rapporteur. His silence on any given question would indicate that provisionally he was not in disagreement with the proposition it contained, though he was not necessarily able fully to subscribe to it at the present stage.

49. The prime question was that of the meaning of “responsibility”. The topic was a vast one and it was therefore necessary to keep it within manageable proportions at every stage. He believed it was necessary first to deal with terminology and, in particular, with the question whether there was any difference of substance between the concept of “liability” and that of “responsibility” and, if so, what that difference was.

50. The problem was not merely one of terminology; it was not a technical matter to be left to the Drafting Committee or to the language services, it was a question of substance which applied as much to the draft articles as to the commentaries. The translator’s note to paragraph 27 of the report, on the use of the expression “illicit act” as the translation of “*fait illicite*”, was extremely revealing; it was of special significance that the problem arose only in respect of the English version and not in respect of the Spanish or Russian versions. Personally, he believed that the most neutral and most general expression was “wrongful act”. The word “wrongful” carried the meaning of “contrary to law or established rule” and also that of “unjustifiable”. The word “act”, which covered conduct, applied both to acts of commission and acts of omission. The expression “wrongful act” would thus incorporate the idea that a State could be answerable to another international person which might have been harmed by the impugned conduct.

51. He could not fully subscribe to the Special Rapporteur’s statement, in paragraph 27 of his report, that “It is obvious, in any event, and almost goes without saying, that the choice of one particular term rather than another does not affect the determination of the conditions for, and characteristics of, an act generating international responsibility, with which most of the articles in this first part of this report will be concerned”. Such expressions as “guilty State”, which appeared in several places in the report, could be a source of confusion by creating an association of ideas that could quickly lead to an incorrect conclusion, and they were prejudicial to the establishment and functioning of a workable international legal order. The terms “answerable” or “responsible” were not necessarily, or always, the equivalent of “guilty”.

52. He agreed that within the general context of the international wrongful act it might become possible gradually to outline a concept of “crime” in international law, as was stated in paragraph 23 of the report. That development, however, would probably take place at a later stage, when the general concepts of responsibility and of international community interest had been acceptably clarified. In that connexion, the discussions which had taken place at the Vienna Conference on the

Law of Treaties about the proposed article 5 *bis*⁵ had shown that the membership of the United Nations was not the same as the universal international community.

53. For the time being, therefore, he thought it would be better to keep within the realm of “civil responsibility” and to establish its component elements, as well as any lawful justifications for the acts in question and the modalities for the resolution of outstanding questions between States regarding alleged responsibility. Such a course would conform with the terms of General Assembly resolution 799 (VIII), which referred to the codification of the principles of international law governing State responsibility as being “desirable for the maintenance and development of peaceful relations between States”.

54. That brought him to the question of imputability. It was necessary to break down that abstract and confusing expression into its component elements and to establish accurately its function in the scheme of things and how it was verified. Imputability was the mechanism by which the State, or other international person concerned, and the act were brought into a mutual relationship which introduced the concept of responsibility. Viewed in a broader context, imputability was a term which applied in general not only in relation to wrongful acts, but also in relation to rightful and creditable acts. Therefore, in analysing its elements, it was necessary not to be confined to precedents culled from the books dealing with State responsibility. It was essential to avoid optical illusions and facile analogies with domestic legal systems. The concept of imputability referred to the process through which a juridical person—the State or other subject of international law—became answerable according to international law for the act of an individual.

55. Imputability was, he submitted, always a matter for the law, not for the courts as such, to determine. In internal law systems, the courts operated to apply predetermined and objective law in order to determine whether a given act was or was not imputable to a juridical person. Imputability did not really arise when a mere individual alone was involved.

56. It had always been his understanding that in the doctrine of international law the same basic concept applied. There, imputability was a conclusion reached by the application of international law. The label “subjective” or “objective” might not be of any great moment in that connexion. He was rather afraid that any serious attempt to displace the concept of imputability from its central place would lead rapidly to a state of anarchy.

57. On the other hand, he had doubts about the advisability of using the word “impute” or its derivatives in the draft articles; it would certainly not be used in the introductory articles, since one of the prime functions of codification would be to clarify what was meant by imputability and how it was to be established. He

⁵ *United Nations Conference on the Law of Treaties, Second Session, Official Records*, pp. 229-252 and 343-344 (United Nations publication, Sales No.: E.70.V.6).

had been much impressed by Mr. Castañeda's remarks on that question.

58. In thinking about the question of imputability he had begun to doubt whether the distinction between "primary" and "secondary" rules, in the sense described in paragraph 11 of the report, could be fully or consistently maintained. Basically, the distinction was sound and valid, but the Commission should not allow itself to become the prisoner of its own dialectic. He was not at all certain that imputability operated in an identical way regardless of the content of the primary rule non-observance of which was the generator of answerability. At all events, he would not take that as axiomatic, but rather as a hypothesis which needed to be proved.

59. Those doubts were strengthened by the very concept of normative causality discussed in paragraph 52 of the report. It would be necessary to have made substantial advances in the examination of that difficult aspect before the Commission could reach definitive conclusions on how far the distinction between primary and secondary rules could be carried in the codification of the present topic.

60. With regard to the subject of abuse of rights, and going back to the framework of General Assembly resolution 799 (VIII), the question was whether the responsibility engendered by abuse of rights had not threatened the maintenance and development of peaceful relations between States. The contents of the Secretariat memoranda in documents A/CN.4/165⁶ and A/CN.4/209,⁷ on the one hand, and a close reading of the collections of resolutions of the Security Council and of the political organs of the General Assembly since 1946, on the other hand, led him to think there might be more in the context of political jurisprudence than was to be found in the classical legal treatment of the topic. The prolonged discussions at the Vienna Conference leading to the adoption of article 66 of the Vienna Convention on the Law of Treaties⁸ should encourage the Commission to look more closely at political jurisprudence of that kind. The matter needed to be scrutinized much more closely before a viable conclusion could be reached.

61. On the question of injury, he was compelled to admit that he was not at all certain of its real meaning. Of course, the question of damage arose in close connexion with the reparation due, in other words, with the liquidation of the abnormal legal relationship generated by the act creative of the condition of answerability. In a sense, injury was notionally a constitutive element of the act generative of answerability, but it was a specific kind of injury, similar to the special kind of breach of a treaty referred to in article 60, paragraph 2 (b) of the Vienna Convention.⁹ As the International Court of

Justice had stated in its judgement of 5 February 1970 in the *Case concerning the Barcelona Traction, Light and Power Company Limited*, responsibility was the necessary corollary of a right.¹⁰

62. He agreed, of course, that there was a general international interest in the continued observance of the rules of international law. At the same time, it would not be proper to frame the present articles in such a way as to convey the impression that every State was entitled at all times to exact observance of all those rules. A State needed something more than general interest; it must show some right which was at the same time direct and specific.

63. In a sense, the concept of injury operated as a limiting factor and as a deterrent to too undisciplined and far-reaching an approach to the topic. That had been surely the *ratio decidendi* of the International Court of Justice in the *Barcelona Traction* case.

64. As he had already said in 1965, in connexion with the law of treaties, he had always had great difficulty in understanding the concept of *capacité d'agir* (capacity to act), which seemed a highly abstract generalization that needed to be given concrete expression according to the different circumstances in which it arose.¹¹ In paragraph 58 of his report, the Special Rapporteur had explained that he was not using the term "capacity" to correspond with the German notion of *Deliktsfähigkeit* (delictual capacity), a proposition with which he (Mr. Rosenne) fully agreed. Unfortunately, if it were written into a draft article, that term could lead to misunderstandings and even to a juridical absurdity. For example, the contents of article III could be paraphrased as: "Every State can commit international illicit acts" or even "Every State may commit international illicit acts". Such a statement would be simultaneously a truism and an inexactitude, and in any event it was not necessary for the purposes of the present draft. Accordingly, while he understood and accepted the underlying basis which the Special Rapporteur had had in mind, he believed it would be unwise to attempt to formulate a rule such as that contained in paragraph 1 of article III.

65. His conclusion was that the three articles now before the Commission needed to be completely recast as a matter of presentation and, at the same time, probably slightly adjusted as a matter of formulation.

66. The draft should begin with a positive statement indicating what the whole draft related to, followed by appropriate reservations as to matters it did not touch on. Paragraph 5 of the report was determining in giving the necessary orientation. It showed that there was need for an article—modelled on article 1 of the Vienna Convention on the Law of Treaties—stating that the draft applied to responsibility owed by States to States. Such a provision would make an article on capacity *per se* redundant.

67. The next provision would state the essential of what was understood by responsibility, the wrongful act which

⁶ See *Yearbook of the International Law Commission, 1964*, vol. II, p. 125.

⁷ *Op. cit.*, 1969, vol. II, p. 114.

⁸ *United Nations Conference on the Law of Treaties, Official Records*: see discussions on article 62 *bis* at both sessions and Second Session, pp. 188 *et seq.* (United Nations publications, Sales Nos.: E.68.V.7 and E.70.V.6).

⁹ *Op. cit.*, Documents of the Conference, document A/CONF.39/27 (United Nations publication, Sales No.: E.70.V.5).

¹⁰ *I.C.J. Reports 1970*, p. 33, para. 36.

¹¹ See *Yearbook of the International Law Commission, 1965*, vol. I, p. 25, para. 31.

was imputed—not imputable—to a State causing injury, even if metaphysical, to another State. That provision would be followed by all the necessary reservations, such as the responsibility of a State to an international organization, or of an international organization to a State or to another organization, and the responsibility of other subjects of international law and of States whose capacity was limited.

68. Finally, he did not believe that the question of procedure for determining whether responsibility existed or did not exist in concrete cases could be neglected even at the present preliminary stage. Even if, as the Special Rapporteur had said in another connexion some years previously, any effort to combine rules of substance and rules of procedure might lead to dangerous confusion, at the same time, as the Special Rapporteur had then recognized, the development of substantive international law was bound to demonstrate more clearly the need for parallel development of the international law of procedure.

69. In one way or another, the question of machinery had been touched upon in several of the working papers submitted to the Commission's Sub-Committee on State Responsibility in 1963.¹² Since the word "procedure" was so liable to misinterpretation, he was prepared to use a circumlocution such as machinery or modalities for establishing the existence of a case of responsibility and the solution of the question. The situation was very similar to that which had confronted the Commission in 1963, when it had first dealt with the invalidity and termination of treaties. Now, as then, the Commission must face up to the question of machinery at the initial stage and not discard it on the specious ground that it related to another branch of international law.

70. To indicate the point of contact and the modalities of operation of the means mentioned in the United Nations Charter for the settlement of questions and differences arising out of the interpretation and application of the codified law of State responsibility, would be a worthwhile effort in the direction of the progressive development of international law. It would, moreover, conform with the letter and the spirit of the draft Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States, adopted by the Drafting Committee of the 1970 Special Committee.¹³

71. Subject to those reservations and speaking generally, he accepted the broad outline of the plan suggested by the Special Rapporteur and the method he had followed.

72. Mr. USHAKOV said that, in order to avoid any misunderstanding, he wished to make it clear that the notion of imputation was, of course, known in Soviet internal law. As in all systems of internal law, however, it was intimately linked with the concept of fault (*culpa*). In that sense, it would be said that fault could not be

imputed to a child or to a person of unsound mind. It was because of the link with the concept of fault that most Soviet writers rejected the notion of imputation in international law, since in contemporary international law the concept of fault was not accepted.

73. However, there was sometimes a problem of attribution of an international illicit act when the State which had committed the act denied it. But then it was other subjects of international law, not international law itself, which attributed the act to the State. Sub-paragraph (a) of article II would be acceptable if it were drafted on that basis.

74. Sometimes it was the very existence of an act which had to be established. That was another question, on which he would refer members to paragraph 2 of article 36 of the Statute of the International Court of Justice, which dealt with the jurisdiction of the Court in all legal disputes concerning, *inter alia*, "the existence of any fact which, if established, would constitute a breach of an international obligation".

75. Moreover, article II of the Special Rapporteur's draft referred to failure to carry out an international obligation. According to the Soviet interpretation of international law, States had, on the one hand, rights, and, on the other hand, duties and obligations. If, in that article, the concept of obligation did not also include the duties of States, then it should be carefully explained what was meant by an obligation.

76. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur's report came up to the Commission's highest expectations. However, the intellectual effort which had gone into that report might lead to the emphasizing of distinctions of which the international community might not be fully aware. The political overtones with which it was charged made State responsibility a very difficult subject to deal with.

77. The Special Rapporteur had not limited his consideration to cases of injury done to aliens, but had taken up the subject in its widest connotation. At the same time, however, he had limited it to responsibility arising from unlawful activities as distinct from responsibility for lawful activities, also called responsibility for risk.

78. The limits to the scope of the report also limited the ability of the Commission to visualise the direction in which the Special Rapporteur was moving. Some questions could not be answered fully until the Commission knew what proposals he would be making in connexion with some of the concepts with which he would deal in later articles.

79. In paragraphs 22 and 23 of his report, the Special Rapporteur had outlined the different conceptions of responsibility: first, the traditional notion; secondly the position of such writers as Kelsen and Guggenheim, that the legal order was a coercive order; and thirdly, the more reasonable view that State responsibility should give rise to both sanctions and reparation.

80. Situations could arise in which reparation would not be enough and some sanction would be necessary. He could think of the example of a strong State shelling,

¹² See *Yearbook of the International Law Commission, 1963*, vol. II, pp. 237-259.

¹³ See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18*, para. 83.

from territory under its control, innocent villages in a neighbouring African country. It would not be enough just to state the law of State responsibility, because the African State concerned would not be able to enforce that responsibility.

81. The Special Rapporteur had been right in saying that there were situations which could lead to the establishment of the concept of an international crime. He was glad to note that the Special Rapporteur had not shied away from the concept of modern international law which had been accepted at the Vienna Conference on the Law of Treaties. Traditional international law had regarded treaties concluded under duress as valid, but the Vienna Conference had acknowledged that error or fraud could vitiate consent and invalidate treaties. It had even gone so far as to accept the notion of peremptory norms of international law from which no derogation was possible by treaty. It was therefore appropriate to think, not of an international society, but of an international community which would evolve concepts of public policy.

82. The notion of abuse of rights was not viewed with much favour by lawyers from the common law countries; the concept of unjust enrichment, however, was known to the common law. Even in the civil law countries, it was significant that there existed few judicial decisions relating to the abuse of rights. As far as international law was concerned, there was a paucity of State practice and judicial precedent in the matter, but it was not justified to exclude the important concept of abuse of rights from the Commission's study, especially in view of the acceptance of rules of *ius cogens*. He therefore urged that the question of the abuse of rights should engage the Commission's attention at an early stage.

83. With regard to injury, it seemed unduly subtle to ask whether it should be considered as a third constituent element of an international illicit act. In any event, it would be difficult to formulate practical rules of international law on State responsibility without reference to injury. There was a logical relationship between reparation and damage.

84. It seemed to him that there was a danger that the articles might be too abstract and might draw distinctions which could be understood by legal minds, but were not suitable for the international community.

85. He would find it very difficult to support the provisions of article III, paragraph 1, on the capacity to commit international illicit acts. The analogy with the law of treaties was not very apt. The question of the capacity to conclude treaties had served to emphasize the equality of States. In the present instance, there was no need to stress the notion of capacity in connexion with the commission of wrongs. The emphasis should be placed on liability for wrongdoing rather than on the power to commit wrongs. A provision such as article III, paragraph 1, would be unnecessary if the notion of liability were fully stressed, possibly by a provision to the effect that no State should be free from responsibility.

86. With regard to the limitation of capacity specified in article III, paragraph 2, it was undesirable to single out the particular case of military occupation. It would

be better to reserve the question of exceptions to responsibility until the Commission had proceeded further in its work.

87. With regard to article II, he agreed with the other English-speaking members of the Commission in finding the expression "international illicit act" unsuitable. The term "illicit" was a synonym of "illegal", but it had also a moral connotation. In the present context, he preferred the expression "wrongful act".

88. The subtle distinction made in the two sub-paragraphs of article II could no doubt be perceived intellectually, but it must be remembered that the Commission was drafting a convention for persons who would not be able to appreciate such a level of abstraction.

89. Article I was a very difficult provision. For the reasons he had already stated, he would suggest that the opening words be amended to read: "Every wrongful act of a State . . .". As for the rest of the sentence, he had serious doubts about the use of the words "gives rise to" and would prefer a statement to the effect that every wrongful act of a State engaged that State's international responsibility.

90. He had no doubt that, in his next report, the Special Rapporteur would clear up many of the doubts which had been expressed by members during the present discussion and would broaden some of the concepts which appeared in the first three articles so as to relate them more closely to the facts of international life.

91. The wealth of literature, legal decisions and State practice which had been examined by the Special Rapporteur was apparent from the fact that the footnotes exceeded in length the text of his report. The report showed the range of his scholarship and his ability to put together often disparate ideas. He hoped that, under the leadership of the Special Rapporteur, it would be possible for the Commission to prepare a set of draft articles which would gain general if not unanimous acceptance.

The meeting rose at 1 p.m.

1081st MEETING

Thursday, 2 July 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Kearney, Mr. Nagendra Singh, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

State responsibility

(A/CN.4/233)

[Item 4 of the agenda]

(continued)

1. The CHAIRMAN invited the Special Rapporteur on State responsibility to reply to the points raised during the discussion on his second report (A/CN.4/233).

2. Mr. AGO (Special Rapporteur) said he was most grateful to the Commission for having devoted more meetings to his report than originally planned. In spite of that, the time available had, of course, been too short for a detailed analysis, so that members had been obliged to review the report generally and give only their provisional views. Before dealing with the replies to his questionnaire,¹ he would like to touch on some of the general observations and the comments on questions of method that had been made.

3. At the 1076th meeting, Mr. Reuter had expressed approval of his method of proceeding from the general to the particular. At the 1080th meeting, Mr. Kearney had described his method as proceeding from the abstract to the concrete and Mr. Rosenne had even quoted one of his (the Special Rapporteur's) early works, of which, incidentally, he would not wish to withdraw a single line. He had naturally tried to lay down the most general rules first, as was only normal, but it could happen that some general rules would be found later in the body of the draft. That had been so in the draft on the law of treaties, particularly in the case of the most general rule, namely, *pacta sunt servanda*.

4. The adjectives "abstract" and "concrete" were perhaps misleading, because they did not have exactly the same meaning in English as in French. Every legal rule was necessarily formulated in abstract terms: for instance, to state that theft was punishable with imprisonment involved recourse to a concept, "theft", which had only been arrived at by a logical process of abstraction. The purpose of using that concept was to express synthetically an indefinite number of concrete situations. But it was only the formulation of the rule that was abstract; the rule itself had a very concrete content. Nothing could be more concrete than the statement that a State was internationally answerable for any illicit act it committed. The same was true of the statement that, for it to be possible to accuse a State of having committed an internationally illicit act, two conditions must be fulfilled: the conduct in question must appear in international law as conduct of the State and it must constitute failure to fulfil an international obligation.

5. Mr. Kearney had also mentioned the deductive and the inductive methods. He himself relied mainly on the inductive method. Of course, in his exposition of the doctrine, he had had to refer to the views of writers who relied largely on the deductive method. For example, he had pointed out that, for certain writers, the fundamental principle of responsibility was based on the very

existence of the international order as a legal order, or on the notion of sovereignty. But his intention in doing so had been merely to indicate some of the deductive arguments to be found in the literature. Personally, when he stated a rule it was always because it derived from the practice of States and from international jurisprudence, not because it followed logically from *a priori* premises.

6. He agreed with several members of the Commission, in particular Mr. Ustor, that State responsibility was a topic on which the Commission would have to introduce a large measure of progressive development of international law. For the time being, however, it did not seem possible to go further than he had done or to decide what should be the respective shares of progressive development and codification. The proportion would be found pragmatically when the work was completed.

7. He had departed from the method of formulating articles followed by commentaries, and some members had perhaps regretted it. He had thought it better, at that stage, for the Commission to have before it all the relevant data, considerations and arguments which had led him, as Special Rapporteur, to the final result concentrated in each of the articles proposed.

8. Some members of the Commission had said that they could only express their views on various points very provisionally, because they did not know what was going to follow. He fully understood that position, but would remind the Commission that in 1963 the Sub-Committee on State Responsibility had submitted a detailed plan of work on the topic.² Then, in 1967, after the membership of the Commission had changed, he himself had prepared a note which included that plan.³ Finally, the same plan had been referred to again in his first report, which he had submitted to the Commission at its previous session.⁴ The various points in that plan indicated quite clearly the course he intended to follow.

9. Sometimes, in the course of his reasoning, he had intentionally gone rather beyond the strict limits of the topic under study, which now had to be settled. For instance, in dealing with the fundamental rule of responsibility, he had thought it desirable to indicate the main schools of thought concerning the content of responsibility, though that was not strictly necessary, because it was a point which would naturally have to be examined at length later on. But he had done so for two reasons: first, because it seemed to him essential not to prejudge, by adopting a particular formula, the position which the Commission might take at a later stage on the question of the content of responsibility; and secondly, because he wished the Commission to be aware from the outset of the essential aspects of his point of view on the content of responsibility. It was now clear that, in that matter, he was prepared to depart from the traditional concept and to accept a large measure of progressive development.

² See *Yearbook of the International Law Commission, 1963*, vol. II, p. 228, para. 6.

³ *Op. cit.*, 1967, vol. II, p. 325.

⁴ *Op. cit.*, 1969, vol. II, Document A/CN.4/217, para. 91.

¹ See 1074th meeting, para. 1.

10. The problems arising from the use of different languages were particularly acute where responsibility was concerned. The difficulties were largely due to the fact that every language had its own genius and sometimes attached a different meaning to terms which had the same etymological origin. Misunderstandings due to language were among the most serious obstacles to the conduct of a fruitful discussion. That was why he asked members of the Commission who used a language other than French to be good enough to refer if possible to the French text, which was the original of his reports, whenever any doubt arose.

11. He did not think it would be possible to draft a preliminary article containing definitions immediately. The articles he had drafted so far were substantive articles and not definitions. It would be better for the Commission to await the conclusion of his work before deciding whether it was necessary to draft articles containing definitions or setting out the points not dealt with in the report, rather than lose time at the start in discussing those questions. In any case, he preferred the positive method of stating what the report dealt with, to the negative method of stating what was excluded.

12. With regard to sources, a substantial number of cases were cited in the report and he was indebted to the Secretariat for the valuable assistance it had given him in that respect. If a great many cases were noted on certain points and only a few on others, it was simply because that was, in fact, the position.

13. Similarly, with regard to practice, there were some replies by governments to the questionnaire sent to them in 1928 by the Preparatory Committee for the Codification Conference of 1930. Those replies provided a great deal of information on the views of governments on certain problems; but naturally governments had not taken a position on questions which had not been put to them.

14. As to writers, the notes in the report might seem to take up a lot of space, but it had not been for pleasure that he had undertaken the considerable amount of personal work they had involved; it was because it was essential not only to give a picture of the doctrinal views followed in the different legal systems, but also to show the trend of thought of the majority of writers. And there were few writers on international law who had not expressed their views on the subject of responsibility.

15. To come to the replies to his questionnaire, in regard to question I (a) he noted that the majority of members favoured the adoption, for the general basic rule, of a synthetic formula which did not prejudice the content of responsibility. Some members, of course, anticipated that the Commission would run into difficulties regarding the content. But the Commission would have to surmount each fresh obstacle as it appeared; at the present stage it should only consider the obstacles immediately before it. He would not dwell, therefore, on the comments made by members concerning the content of responsibility, except to mention a remark by Mr. Alcívar, who had aptly observed that the conclusion as to the existence of criminal responsibility would emerge spontaneously once the Commission had

determined the positive consequences of an internationally illicit act.⁵ That statement was correct and was a useful application of the inductive method.

16. In reply to question I (b), several members had stressed the advisability of studying the question of responsibility for acts that were not illicit. He agreed in principle but, in the first place, he did not think there should be an opening article stating that the responsibility of a State could be engaged either for a lawful act or for an illicit act. Those two forms of responsibility had, in fact, hardly anything in common but the word "responsibility". In the one case there was a rule intended to lay down the consequences of the violation of an obligation established by another rule. In the other case, there was a rule which merely provided for the possible consequences of a lawful activity.

17. In addition, as Mr. Ushakov had pointed out, the content of those two types of responsibility was not the same.⁶ Mr. Ushakov had observed that an illicit act involved both an economic responsibility and what Soviet writers called a "political" responsibility, whereas a lawful act could only have economic consequences. To deal with those two kinds of responsibility together would therefore cause confusion. On the other hand, there was nothing against making a separate study of responsibility for lawful acts, though it would be rather difficult to determine in what matters such responsibility existed and he doubted whether the question was really quite ripe for codification.

18. Several members had said that the concept of vicarious responsibility should be retained. Mr. Thiam, however, had suggested that it might be an importation from municipal law and should therefore be avoided.⁷ He did not share that view, because cases in which the responsibility of a State could be engaged in respect of an act materially committed by another State were quite real. As Max Huber had once said, when there was freedom there was responsibility. Consequently, whenever the action of a State in a particular sector was not really free, but subject to pressure or control by another State, it was the State which restricted the other's freedom which must be held responsible for any illicit act committed in the controlled sector of activity. That principle had to be safeguarded. But to do so, it was not perhaps essential to keep the formula provisionally proposed in article I, and he would be quite prepared to insert the word "its" before "international responsibility". It would be sufficient to make the appropriate reservation in the commentary; the exception would be dealt with later in the draft articles.

19. With regard to terminology, he was particularly glad that Mr. Reuter, who was one of the French writers who had hitherto used the word "*acte*", should have said that he had been convinced by the arguments advanced in the report that the word "*fait*" should be adopted.⁸

⁵ See previous meeting, para. 21.

⁶ See 1076th meeting, para. 17.

⁷ See 1079th meeting, para. 36.

⁸ See 1076th meeting, para. 7.

20. For the Spanish version, Mr. Ruda and Mr. Castañeda had expressed a preference for the term “*hecho*”, but Mr. Alcívar favoured the word “*acto*”. He had the feeling, however, that even in Spanish the word “*acto*” denoted rather an expression of the will to which the law attached a result corresponding to the will expressed. The word “*hecho*”, like the word “*fait*”, was derived from the Latin verb “*facere*”, which denoted any human conduct, whether an act or an omission. On the other hand, the word “*acto*” came from the Latin verb “*agere*”, which meant to act in a positive manner. For that reason, the terms “*fait*” and “*hecho*” seemed more appropriate than the terms “*acte*” and “*acto*”, if it were desired also to cover acts of omission.

21. With regard to the Russian version, if Mr. Ushakov had any doubts about the terminology used, he (Mr. Ago) would willingly trust him to propose what was appropriate.

22. In English, he himself had proposed the expression “wrongful act” and regretted that in the translation the expression “*fait illicite*” had been rendered by “illicit act”. Moreover, in French, the two expressions “*fait illicite international*” and “*fait internationalement illicite*” had the same meaning; they meant that the act in question was illicit in international law. In English, on the other hand, the expressions “international wrongful act” and “internationally wrongful act” were not synonymous, since the term “wrongful” had to be qualified by indicating that what was involved was wrongful in international law. Hence the second formula was the one to be preferred.

23. It had also been suggested that the reference to the international character of the wrongful act should be omitted from all those expressions. He hoped that it would be retained, however, since it was important to prevent any attempt by States to evade their responsibility by claiming that their act was not unlawful under their internal law. Since the purpose was to attach responsibility to any act which was wrongful on the international plane, it was necessary to say so.

24. The expression “guilty State” might perhaps occur in the report, but certainly not in the text of the articles, and it had always been his intention to use a common expression to indicate the State to which the wrongful act was attributed.

25. With regard to question II (a), concerning the existence of two elements in the wrongful act, the majority of the members of the Commission had agreed that they recognized the existence of an objective element and a subjective element, but some had pointed out that the two elements were closely linked. He hoped, however, that the distinction would be clearly maintained for the time being, since, in logic, the two elements were distinct and, according to the method followed in the draft, they should be analysed separately one after the other.

26. With regard to question II (b), all the members agreed that the subjective element could be an act or an omission, but Mr. Ushakov had criticized the notion of

imputation and imputability.⁹ His criticism, however, had been the result of a misunderstanding, which had now fortunately been cleared up. He (Mr. Ago) entirely agreed that, if the word “imputation” were taken in the sense it had in internal criminal law, the notion could not be accepted in international law. The writers who had introduced that notion into international law had been careful to point out that the meaning of the term was by no means the same as in internal criminal law. What was meant, and Mr. Ushakov had himself made that clear at the previous meeting,¹⁰ was only that it must be possible to consider the act in question as an act of the State; in other words, when confronted with a given conduct it was necessary to know by what criteria that conduct could be attributed to the State, rather than to the person or persons who had physically engaged in it. He was therefore willing to use the term “attribution”, where appropriate, instead of the term “imputation”, if that would help to remove any misunderstanding.

27. Again, if he had on one occasion referred to the State as an abstract entity, it was because that expression was the one used by most writers. He himself regarded the State as a completely real entity. All that was meant was that the State was a legal person which was only able to act in a physical sense through the acts of natural persons who were its organs.

28. Question II (c), concerning the international character of imputation to the State of a given conduct, arose mainly because States sometimes sought to evade international responsibility by claiming that the act or omission in question was not within the competence of the organ which had committed it, or was not in conformity with the instructions given to that organ, and hence could not be attached to the State. To say that attribution to the State took place under international law meant, therefore, that even in such cases the act or omission in question was an act or an omission of the State. Within the same category came cases in which the act was committed by a public institution distinct from the State under internal law, or by private persons employed by the State.

29. He was very pleased at the favourable response to question II (d), concerning the objective element in an internationally wrongful act. Mr. Tammes had suggested referring to a violation of international law rather than of an international obligation.¹¹ To speak of a violation of the law certainly avoided the error which was implicit in the expression “breach of a rule”, but he (the Special Rapporteur) found the expression too vague. He thought that, as Mr. Ushakov had said, by “obligation” should also be understood any international duty of the State.¹² The intention was to say in the clearest possible way that responsibility must be attributed to a State which had not done what it ought to have done or which had done what it ought not to have done. As to terminology, although the writers used various expressions, practice

⁹ *Ibid.*, paras. 21-23.

¹⁰ See para. 72 *et seq.*

¹¹ See 1075th meeting, para. 39.

¹² See previous meeting, para. 75.

and jurisprudence were unanimous in speaking of the violation or non-fulfilment of an obligation.

30. Mr. Tabibi had suggested that, besides breaches of international legal obligations, express reference should be made to acts which were prohibited by the United Nations Charter.¹³ Without denying that certain principles of the Charter held a paramount position, he was afraid that such a formula might give the strange impression that in the Commission's opinion the principles of the Charter did not impose legal obligations. In any case, when the content of responsibility was examined, it would become apparent that violations of certain principles of the Charter constituted particularly serious internationally wrongful acts.

31. With regard to abuse of rights, he had not wished to take a position on that notion itself. Nevertheless, he believed that in international law there were cases in which the exercise of a subjective right came up against the limits of "reasonable" exercise—to adopt a criterion dear to English jurists. His idea, however, was that to maintain that there were limits to the exercise of certain rights in international law was to recognize the existence of an obligation: the obligation not to exercise a right beyond the limits of what was reasonable. There was therefore no reason to consider inadequate the general formula by which responsibility derived from failure to fulfil an international legal obligation. Even if the Commission were later to define the notion of abuse of rights, it would still not conflict with that basic rule.

32. As to the distinction between wrongful conduct or behaviour and an illicit event, in paragraph 51 of his report he had not meant to cite as an example the case of an act committed deliberately or on instructions, but the case in which a State failed to exercise due diligence. It was precisely in that case that negligent conduct alone did not in itself constitute an internationally wrongful act unless some subsequent external element was added as a direct or indirect consequence of that conduct. That was true, for example, in all cases in which the State was under an obligation to prevent possible action by a private person. A specific example was the disturbance of the work of an embassy staff, referred to by Sir Humphrey Waldock, which might be caused by the presence of a hostile crowd outside the premises, even if it did not commit acts of violence. That was an important distinction which would have to be taken into account and to which the Commission might revert at its next session.

33. He had used the term "*événement*", which was familiar in criminal law, but it was probably the same notion that Mr. Nagendra Singh had had in mind when he had said, in English, that he was in favour of taking the element of injury into consideration.¹⁴ Several members had agreed that the idea of injury (*dommage*) as a necessary additional element of an internationally wrongful act should be rejected. The principal reservations to that view had been made by the English-speaking mem-

bers, who considered that the presence of the element of injury was necessary.

34. It was important, however, to reach a clear understanding on what was meant by that term. Nobody denied that, except where it was the actual content of the violated obligation which imposed the necessity of protecting foreign private persons from injury, the term "injury" was used only when referring to infringement of the subjective right of another, which was exactly equivalent to failure to fulfil a legal obligation to another. But the "injury" of English writers and the French "*dommage*" were not the same thing. The point which had to be decided was whether, for there to be an internationally wrongful act, it was or was not necessary that, in addition to infringement of the subjective right of another State, there should be the further element of economic injury. An examination of State practice showed that it was the settled view of States that whenever the subjective right of another State was infringed there was an act giving rise to responsibility; no State could escape the responsibility arising out of that act by alleging that, in a specific case, there had been no "economic injury". That element was only taken into account for the purpose of determining the amount of the reparation.

35. With regard to question III (a), on the idea of "capacity" to commit internationally wrongful acts, he had attempted in his report to show how illogical it was to present "delictual capacity" as something analogous to the capacity to act or the capacity to conclude treaties, and that it should be understood only as the physical possibility of committing, in a certain sector of activity, a breach of an international obligation. In order to avoid any misunderstanding it might perhaps be possible to use a negative formula and say, for example, that no State could claim to lack the possibility of committing an internationally wrongful act and thus avoid responsibility.

36. As Mr. Thiam had rightly said, responsibility was the counterpart of sovereignty¹⁵ and even new States could not take advantage of the temporary weakness of their internal organization to evade responsibility. In that connexion, it might be useful to point out that the notion of a "minor" State not possessing delictual capacity was not accepted in international law.

37. Lastly, the question of possible limits to "delictual capacity" in certain cases was perhaps more delicate than might appear. There were cases in which it was not sufficient merely to say that it was another State which had committed a wrongful act and bore the responsibility for it. If a State was in military occupation of the territory of another State and replaced the police of that other State by its own police, the problems which might arise if the occupying police acted in breach of an international obligation of the occupied State were twofold. As to the occupying State, it would have to be decided whether it was specifically bound to respect an international obligation of the occupied State towards a third State;

¹³ See 1075th meeting, para. 24.

¹⁴ See 1079th meeting, para. 19 *et seq.*

¹⁵ See 1079th meeting, para. 38.

but as to the occupied State, it would have to be established whether or not, in the sector in which the act had occurred, it had been physically possible for it to commit a breach, seeing that its organization in that sector had been replaced by the organization of another State. Of course, the Commission did not necessarily have to solve problems of that kind at the start, but it was necessary to keep them in mind, because such situations could arise.

38. In conclusion, he thanked the members of the Commission for the thoroughness with which they had examined his report. Their observations as a whole had given him a feeling of encouragement to pursue his analysis. He now intended to resume work on the articles he had already drafted, to revise them and to fit them back into the more comprehensive report he proposed to submit to the Commission at its next session, which would include the parts relating to the detailed determination of the subjective and objective conditions for the existence of an internationally wrongful act.

**Draft report of the Commission on the work
of its twenty-second session**

(A/CN.4/L.156-160 and Addenda)

Chapter I

ORGANIZATION OF THE SESSION

39. The CHAIRMAN invited the Commission to consider chapter I of the draft report (A/CN.4/L.156) paragraph by paragraph.

Paragraphs 1 to 3

Paragraphs 1 to 3 were approved.

Paragraph 4

40. Mr. BARTOŠ (Rapporteur) said that he had used the phrasing "All members attended meetings of the 22nd session of the Commission" because it was the accepted practice. It was not, however, a practice that he favoured, because it did not reflect the true situation, which was that some members had only attended part of the session. That point should be made clear in the Commission's report and not merely in the summary records.

Paragraph 4 was approved.

Paragraphs 5 and 6

Paragraphs 5 and 6 were approved.

Paragraph 7

41. Mr. ROSENNE said he must point out that the Director of the Codification Division of the Office of Legal Affairs had been away from Geneva for part of the session, and had not therefore represented the Secretary-General during that period, as was suggested

by the words "represented the Secretary-General at the other meetings of the session".

42. Mr. KEARNEY suggested that the difficulty be overcome by replacing the words "at the other meetings" by the words "at other meetings".

It was so agreed.

Paragraph 7, as amended, was approved.

Paragraph 8

43. Mr. USHAKOV said that the Commission had decided two years ago that the words "and Governments" be deleted from the title of item 3 of the agenda, but they still appeared; they should now be dropped.

It was so agreed.

44. Mr. BARTOŠ suggested that a sub-paragraph be included in paragraph 8 recording that, in addition to the items on its agenda, the Commission had also considered the question of treaties concluded between States and international organizations or between two or more international organizations, had appointed a sub-committee to study the question, and had adopted the proposals contained in the sub-committee's report (A/CN.4/L.155).

45. Mr. USHAKOV, Mr. AGO and Mr. THIAM supported Mr. Bartoš' suggestion.

46. Mr. ROSENNE said he too supported the suggestion to add a reference to the Commission's action on the question of treaties concluded between States and international organizations or between two or more international organizations.

47. Another matter to which reference should be made was the Commission's discussion on its contribution to the commemoration of the twenty-fifth anniversary of the United Nations. Both those matters had arisen from resolutions adopted by the General Assembly, the first directed specifically to the International Law Commission and the other to all United Nations bodies.

48. The best method of making such reference might be to insert in chapter I of the report, immediately after paragraph 8, a new paragraph stating that the Commission had discussed those questions in connexion with item 8 of the agenda.

49. Mr. MOVCHAN (Secretary to the Commission) said the Secretariat had intended to include a reference to those questions in chapter V, in accordance with the usual practice.

50. Sir Humphrey WALDOCK said he agreed that chapter V was the appropriate place for such a reference.

51. The CHAIRMAN said that, if there were no objection, he would take it that the Commission approved paragraph 8 with the deletion of the words "and Governments" from the title of item 3 of the agenda and on the understanding that the other matters mentioned in the discussion would be dealt with in chapter V.

It was so agreed.

Paragraph 8, as amended, was approved.

Paragraph 9

52. Mr. ROSENNE suggested that some indication be given in paragraph 9 of the number of meetings held by the officers of the Commission and by the Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations.

53. Mr. BARTOŠ said he supported Mr. Rosenne's suggestion in principle, but felt that such an indication was perhaps unnecessary, since the officers of the Commission had only met once.

54. The CHAIRMAN said that, if there were no objection, he would take it that the Commission approved paragraph 9 on the understanding that the Secretariat would include a mention of the meetings of the officers and of the Sub-Committee.

It was so agreed.

Paragraph 9, as amended, was approved.

Paragraph 10

55. Mr. TABIBI said that paragraph 10, recording the Commission's tribute to the memory of the late Gilberto Amado, should be placed much earlier in the report, immediately after paragraph 2.

56. Mr. YASSEEN said he supported that suggestion.

57. Mr. ROSENNE proposed that the words "paid tribute to the memory of its former member and dean, Mr. Gilberto Amado" be replaced by the words "paid tribute to the memory of the late Mr. Gilberto Amado, who had served continuously as a member of the Commission since he was first elected in 1948".

It was so agreed.

58. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to move paragraph 10, as thus amended, from its present position and combine it with paragraph 3.

It was so agreed.

Paragraph 10, as amended, was approved.

Paragraph 11

59. Mr. ROSENNE proposed that the full texts of both the letter from the President of the Security Council of 14 May 1970 (A/CN.4/235) and the reply of the Chairman of the Commission of 12 June 1970 (A/CN.4/236) be given in the paragraph.

It was so agreed.

Paragraph 11, as amended, was approved.

Chapter I, as amended, was approved.

Draft resolution in connexion with the celebration of the twenty-fifth anniversary of the United Nations

60. The CHAIRMAN said that certain proposals with regard to the forthcoming celebration of the twenty-fifth anniversary of the United Nations had been mentioned

during the discussion on the organization of future work,¹⁶ and he now submitted the following draft resolution for the consideration of the Commission:

"The International Law Commission, considering the forthcoming celebration of the twenty-fifth anniversary of the United Nations,

"(a) *Recommends* that the General Assembly should appeal to States to expedite the process of ratification of or accession to the Vienna Convention on the Law of Treaties of 1969 and other codification conventions adopted on the basis of the draft articles prepared by the International Law Commission—such as the four Conventions on the law of the sea, adopted at Geneva in 1958, the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, and the Convention on Special Missions of 1969—in order to shorten the final stage of the codification of international law and place the codified international law upon the widest and most secure foundations.

"(b) *Asks* the Secretary-General to up-date as soon as possible the publication entitled "The Work of the International Law Commission" with a view to summarizing the work of the Commission during the whole period of its existence and presenting texts of the Commission's drafts and codification conventions adopted on this basis."

61. Mr. ROSENNE said that paragraph (b) dealt with a rather secondary matter. He therefore suggested that it be removed from the draft resolution and turned into a paragraph of the report.

62. Mr. USHAKOV suggested that the opening words of paragraph (b) be modified so as to request the Secretary-General to recommend to the Office of Public Information that it bring the publication¹⁷ up to date.

63. Mr. AGO said he was in favour of separating paragraph (b) from the remainder of the resolution. It dealt with an entirely different matter from paragraph (a) and would detract from the importance of paragraph (a) if it were left in its present place.

64. Mr. ROSENNE suggested that the point raised by Mr. Ushakov be dealt with by mentioning that the publication had been issued by the Office of Public Information. He also suggested that the expression "up-date" should be replaced by more suitable wording.

65. The CHAIRMAN said that, if there were no further comments on that point, he would consider that the Commission agreed to detach paragraph (b) from the draft resolution and to turn it into a paragraph of the report, with the appropriate drafting changes.

It was so agreed.

66. Mr. ROSENNE said he did not think that the Commission should produce a resolution for submission to the General Assembly. It should rather suggest something to the General Assembly in order to give delegations an

¹⁶ See 1066th meeting.

¹⁷ United Nations publication, Sales No.: 67.V.4.

opportunity to raise the matter in the Assembly. He accordingly proposed that the opening words "Recommends that the General Assembly should appeal . . ." in paragraph (a) be replaced by the words "Suggests that the General Assembly might wish to adopt a resolution appealing . . .".

67. He also proposed the introduction of two pre-ambular paragraphs. The first would recall that, under Article 13, paragraph 1a of the United Nations Charter, the General Assembly was called upon to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification and that the Statute of the International Law Commission had been adopted in pursuance of that charge of the General Assembly under Article 13, paragraph 1a of the Charter. The second would recall that a whole series of codification conferences had been convened and that, on the basis of the Commission's work, a number of conventions had been adopted.

68. Mr. USTOR said that the purpose of paragraph (a) was to try to ensure that the codification conventions were accepted on as wide a basis as possible. That purpose could be achieved in two different ways: either by urging those States which could become parties thereto to ratify or accede to the various codification conventions; or by the General Assembly adopting a resolution in line with the Declaration on Universal Participation in the Vienna Convention on the Law of Treaties adopted by the Conference as part of its Final Act,¹⁸ calling upon the General Assembly to invite as many governments as possible to participate in the codification conventions.

69. Mr. ROSENNE said that the Commission should confine itself to drawing attention to its own work and should not get involved in other items on the agenda of the General Assembly.

70. That being said, he would urge that the words "the codified international law", which were used in the draft of paragraph (a), be subjected to careful scrutiny. Codified international law comprised more than just the codification conventions adopted as a result of the Commission's work.

71. Mr. USHAKOV said he supported Mr. Ustor's proposal, which was in conformity with the principle of universality.

72. Mr. YASSEEN said that the wording "*Recommends* that the General Assembly should appeal . . ." was too strong, coming from the Commission, which was a subsidiary organ of the Assembly. He suggested that it be replaced by the wording: "*Recommends* that the General Assembly appeal . . .".

73. Mr. TABIBI said that the Declaration on Universal Participation in the Vienna Convention on the Law of Treaties was not the only declaration adopted by the Vienna Conference. It had also adopted a Declaration on

the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties.¹⁹ He therefore suggested that a suitable reference to that Declaration be included in the Commission's resolution as well.

74. Mr. KEARNEY said it seemed to him that some of the suggestions now being made were leading the Commission away from its functions as a group of independent experts and taking it into the political sphere.

75. The CHAIRMAN said he noted that there was general support for the introduction of the two pre-ambular paragraphs suggested by Mr. Rosenne and for the change in the opening words suggested by Mr. Yasseen. Perhaps the Commission would wish to adopt the draft resolution with only those changes and leave controversial issues aside.

76. Mr. USTOR said that the Declaration on Universal Participation had been adopted unanimously by the Vienna Conference. There were a number of treaties codifying general international law and it was desired that those treaties should be adopted as widely as possible. Even if they were to be ratified or acceded to by all the States that were eligible to sign them, however, they would not become general, because they were not open to signature by all States.

77. He suggested that further discussion should be postponed and, at a future meeting, he would submit a proposal in writing on the lines he had indicated.²⁰

It was so agreed.

78. Mr. ALCÍVAR said he wished to have it placed on record that he was opposed to paragraph (a).

The meeting rose at 1 p.m.

¹⁹ *Ibid.*

²⁰ For the resumption of the discussion, see 1083rd meeting, para. 63.

1082nd MEETING

Friday, 3 July 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Kearney, Mr. Nagendra Singh, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

¹⁸ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/26 (United Nations publication, Sales No.: E.70.V.5).*

Organization of future work

(A/CN.4/L.154)

[Item 8 of the agenda]

(resumed from the 1078th meeting)

1. The CHAIRMAN said that, at a private meeting two days previously, the Commission had considered the financial implications of three proposals before it.

2. The first proposal would recommend to the General Assembly that the Commission should hold a fourteen-week session in 1971. The financial implications of that proposal were set out in document A/CN.4/L.154. During the private meeting, further explanations had been given to the Commission by the Deputy Chief of the Budget Division of the United Nations Office at Geneva.

3. The second proposal would recommend that the publication entitled "The Work of the International Law Commission",¹ issued in 1967 by the Office of Public Information, should be brought up to date as soon as possible in connexion with the celebration of the twenty-fifth anniversary of the United Nations. The Secretariat had explained orally that it was believed that the only item which could not be absorbed in the regular budget was the cost of printing in the three languages in which the original publication had been issued, namely, English, French and Spanish; the total of that item had been provisionally estimated at \$18,400. Some members had pointed out that, since the publication was first issued, Russian had become one of the working languages of the General Assembly, and had expressed the wish that this new edition of the publication should accordingly be issued in Russian also.

4. The third proposal would ask the Secretary-General to prepare a new edition of the "Summary of the practice of the Secretary-General as depositary of multilateral agreements", of 7 August 1959.² The Secretariat had informed the Commission orally that, if the new edition were issued as a Commission document in the A/CN.4/... series, it would seem at present that the cost of translation could be absorbed in the regular budget. However, in view of the highly technical nature of the subject-matter, the Legal Counsel was of opinion that it would be necessary to engage a consultant possessing the required experience to prepare the study. The fee to be paid to the consultant had been provisionally estimated at \$15,000. Some members had expressed the view that the study could be prepared by the staff of the Office of Legal Affairs and that no consultant was required. Others had considered, however, that the choice of the person or persons to whom the task of preparing the study should be entrusted could only be made by the Legal Counsel acting on behalf of the Secretary-General.

5. Mr. USHAKOV said it should be noted that, at the same private session, the Commission had also discussed the organization of work for the next session.

6. The CHAIRMAN said that the International Law Association had expressed the wish that a member of the Commission should attend the forthcoming Congress of the Association, to be held at The Hague in August next. Sir Humphrey Waldock had tentatively agreed to attend.

Draft report of the Commission on the work of its twenty-second session

(A/CN.4/L.156-160 and Addenda)

(resumed from the previous meeting)

Chapter II

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

A. Introduction (Paragraphs 1-15)

7. The CHAIRMAN invited the Commission to consider the part of chapter II of its draft report contained in document A/CN.4/L.157.

8. Mr. BARTOŠ (Rapporteur) said that, to avoid repetition, he would speak only after hearing the comments of members of the Commission on each paragraph, and then only to call attention to points not already mentioned by them.

Paragraph 1

Paragraph 1 was approved.

Paragraph 2

9. Mr. ROSENNE suggested that a further sentence be added at the end of the paragraph to read: "The same year, the General Assembly, at its twenty-fourth session, adopted resolution 2501 (XXIV) which, *inter alia*, recommended that the Commission should 'continue its work on relations between States and international organizations, with a view to completing in 1971 its draft articles on representatives of States to international organizations'".

It was so agreed.

Paragraph 2, as amended, was approved.

Paragraph 3

10. Mr. KEARNEY suggested that the last sentence, with its reference to the Special Rapporteur's working paper (A/CN.4/L.151), be deleted, since the Commission had not taken any action on the subject-matter of the paper.

11. Mr. USTOR said that in its draft articles the Commission had dealt with permanent missions, permanent observer missions and delegations to meetings of organs and to conferences convened by international organizations. Some mention was needed in the report of the fact that the Commission had not dealt with the fourth category, namely, temporary observer delegations and delegations to conferences not convened by international organizations.

¹ United Nations publication, Sales No.: 67.V.4.

² ST/LEG/7.

12. The CHAIRMAN suggested that the last sentence be retained subject to the replacement of the concluding phrase "intended to be taken into account at the Commission's second reading of the draft as a whole" by the phrase "but the Commission did not consider that it should take up the matter at this time".

It was so agreed.

Paragraph 3, as amended, was approved.

Paragraph 4

Paragraph 4 was approved.

Paragraph 5

13. Mr. KEARNEY pointed out that the title of section 2 of part IV "Facilities, privileges, immunities and obligations" was provisional; when the commentaries to the articles in the section were completed, it might be necessary to alter the title, particularly the word "obligations".

14. The CHAIRMAN said that, if there were no further comment, he would take it that the Commission agreed to approve paragraph 5, subject to Mr. Kearney's observation.

Paragraph 5 was approved.

Title of section 2 of the Introduction

15. Mr. KEARNEY proposed that, in the title of section 2 of the Introduction, the word "Presentation" be replaced by the word "Arrangement".

It was so agreed.

Paragraph 6

16. Mr. ROSENNE suggested that, in the second sentence, the opening words "Having the character of permanent missions and not that of *ad hoc* diplomacy" be replaced by the words "Having the character of permanent missions rather than of special missions".

17. Mr. BARTOŠ (Rapporteur) said that the Commission had already decided not to use the term "*ad hoc* diplomacy", in order to take account of protests from certain diplomatic circles which opposed the establishment of an analogy between diplomacy and special missions. He agreed, therefore, that the words "*ad hoc* diplomacy" should be replaced by the words "special missions".

18. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to approve paragraph 6 as amended by Mr. Rosenne.

Paragraph 6, as amended, was approved.

Paragraph 7

19. Mr. KEARNEY proposed that, in the first sentence, the word "draft" before the word "articles" and the words "question of the" before the word "method" be deleted.

20. He also suggested that the penultimate sentence, reading "Other members, also for the purposes of the

first reading, favoured a more elaborate, self-contained set of articles", be deleted.

21. The concluding words of the last sentence "the positions taken by members on the question" should be replaced by the words "the two positions outlined above".

It was so agreed.

Paragraph 7, as amended, was approved.

Paragraph 8

22. Mr. KEARNEY proposed that the words "for parts III and IV, the Drafting Committee established a complete set of draft articles" in the first sentence be replaced by the words "for part III the Commission developed a set of draft articles"; that the words "and thereby thoroughly examined" be replaced by the words "and a set of draft articles for part IV based mainly on the pertinent provisions of the Convention on Special Missions and part II of the present draft articles. In doing so, it carefully examined"; and that the concluding words "each group of persons that might be entitled to them" be replaced by the words "both permanent missions and delegations to organs of international organizations or to conferences convened by an international organization".

23. In the second sentence, he proposed that the opening words "The Drafting Committee and subsequently the Commission in its review were" be replaced by the words "In its review, the Commission was"; that the words "whether any" be replaced by the word "what"; that the words "between permanent missions on the one hand and permanent observer missions" be replaced by the words "between special missions, permanent missions, permanent observer missions"; and that the concluding words "on the other" be deleted.

24. In the third sentence, he proposed that the opening words "They satisfied themselves" be replaced by the words "It satisfied itself"; that the words "should not be drawn in view of the few and unsubstantial differences found" be replaced by the words "need not be drawn"; and that the word "generally" before the word "necessary" be deleted.

25. In the last sentence, he proposed that the opening words "The Commission, therefore, decided to adopt a mixed method whereby, first, it elaborated" be replaced by the words "Consequently, in parts III and IV, there are both specific articles"; that the word "given" be replaced by the words "to take into account"; and that the concluding words "second, used the technique of legislating by reference when, as was generally the case, there were no substantial differences" be replaced by the words "articles which employ the technique of legislating by reference".

26. Mr. BARTOŠ (Rapporteur) said he recognized that, in principle, there were sound reasons for Mr. Kearney's amendment but, although the report was on the work of the Commission, he thought that the part played by the Drafting Committee should be acknowledged by

mentioning specifically that the Commission had based its work on that of the Drafting Committee.

27. Mr. CASTRÉN said he approved the text proposed by Mr. Kearney. He could not accept Mr. Bartoš' view, because it had never been the Commission's practice to mention the work of the Drafting Committee in its report.

28. Mr. BARTOŠ (Rapporteur) said that the Commission was master of its own procedure and of its report; if it preferred not to mention the Drafting Committee, however, he would abide by the Commission's wishes.

29. Mr. ROSENNE said he noted that, in the text read out by Mr. Kearney, the word "thoroughly" before the word "examined", in the first sentence, had been replaced by the word "carefully". Personally, he was in favour of dropping the adverb altogether; it should be assumed that all work done by the Commission was done carefully.

30. He would also suggest that, in the text read out by Mr. Kearney, the words "legislating by reference", at the end of the paragraph, be replaced by the words "drafting by reference".

31. The CHAIRMAN suggested that the Commission approve Mr. Kearney's revised text for paragraph 8, as amended by Mr. Rosenne.

Paragraph 8, as amended, was approved.

Paragraph 9

32. Mr. KEARNEY proposed that, in the first sentence, the words "that the first two groups, dealing with permanent missions" be replaced by the words "that two groups of articles, dealing with general principles and with permanent missions", and that the second sentence be reworded to read: "The Commission intends, during the second reading of the whole draft, to determine whether it would be possible to reduce the number of articles by combining provisions which are susceptible of uniform treatment".

It was so agreed.

Paragraph 9, as amended, was approved.

Paragraph 10

33. Mr. ROSENNE said that, as he recollected, the Commission had agreed that the provisions of article 50 should apply to the present group of articles as well. He therefore proposed the insertion at the end of the paragraph of an additional sentence reading: "The Commission intends article 50 to apply also to the articles on permanent observer missions and on delegations to organs and to conferences, and during the second reading will decide on a suitable place for article 50".

It was so agreed.

Paragraph 10, as amended, was approved.

Paragraph 11

34. Mr. KEARNEY proposed that, in the second sentence, the opening words "In view of the delicate and

complex nature of those questions and having in mind the decision taken at its twenty-first session on the subject" be replaced by the words "In view of the decision taken at the twenty-first session".

It was so agreed.

Paragraph 11, as amended, was approved.

Paragraph 12

35. Mr. KEARNEY suggested that, in the first sentence, the reference to "the modern rules of international law concerning permanent observer missions" be dropped. What the Commission's research had revealed was that there were very few rules on the subject.

36. Mr. ROSENNE suggested that, in the phrase "the modern rules of international law", the words "rules of" be deleted.

37. Mr. AGO said that he thought it would be better to say simply: "the rules concerning permanent observer missions...". Furthermore, since the matter did not warrant speaking of "progressive development as well as codification", the last sentence should be deleted.

38. Sir Humphrey WALDOCK said he could not agree. It was the task of the Commission to clarify points of uncertainty and to fill in the gaps in the law. The formula employed in the report described exactly what the Commission usually did and what was happening in the present case.

39. Mr. BARTOŠ (Rapporteur) said he had noted in the course of the discussion in the Commission that several members had spoken of the progressive development and of the general development of international law but not of the stability of its rules. Some had even said that permanent observer missions were a new institution for which the traditional rules could not be taken as a starting-point.

40. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to approve paragraph 12 with the change suggested by Mr. Rosenne.

It was so agreed.

Paragraph 12, as amended, was approved.

Paragraph 13

41. Mr. KEARNEY suggested that a sentence be added at the end of the paragraph reading: "It also appeared appropriate to request the views of those States which have permanent observer missions at United Nations Headquarters in New York or at Geneva".

42. Mr. USHAKOV said that that wording would not cover all the cases. There were other States which had applied to have permanent observer missions.

43. Mr. BARTOŠ (Rapporteur) said that, as a general rule, it was proper to use the expression "Member States", but in the case in point, it would be better to say "to Governments of Member States and of other States directly concerned", in view of the fact that many

non-member States also had permanent observer missions. He therefore agreed with Mr. Ushakov.

44. Mr. CASTRÉN said that the expression "other States directly concerned" was not sufficiently precise; it would be clearer to say "other States having permanent observer missions".

45. Mr. TESLENKO (Deputy Secretary to the Commission) said he must remind the Commission of the position taken by the Secretary-General with regard to formulas such as "all States" or "all States directly concerned". It would be very difficult to apply paragraph 13 if one of those formulas were used.

46. Mr. USTOR said that paragraph 13 was similar to paragraph 16 of the Commission's 1969 report.³ He therefore saw no reason why it should not be approved as it stood.

Paragraph 13 was approved.

Paragraph 14

47. Mr. BARTOŠ (Rapporteur), speaking as a member of the Commission, said that the date of 1 January 1971 fixed for the submission of observations from Governments was too early. The Commission's session would not begin before the end of April and both the Secretariat and Governments would be busy with the General Assembly during the last quarter of the present year. It would be better, therefore, to fix the time limit at 1 February.

48. Mr. TESLENKO (Deputy Secretary to the Commission) said he was afraid that, if the date fixed for the submission of observations from Governments were put back, the Special Rapporteur's report would not be ready in time for the next session. The Special Rapporteur should be given time to prepare a consolidated report, with a complete table of the draft articles, and the Secretariat should be given time to edit and translate the report. To save time, the Secretariat was proposing to communicate the report to Governments as soon as it was ready, which would be towards mid-August, direct from Geneva, as a document of the Commission, without waiting for it to be issued as a document of the General Assembly.

49. Mr. ROSENNE said he welcomed the statement by the Deputy Secretary of the Commission. Personally he did not think that transmitting the draft articles to the Geneva missions would expedite matters; a question of that sort would normally be dealt with by the permanent delegations in New York. It should also be remembered that in August, the diplomatic services were in the midst of their preparations for the forthcoming General Assembly.

50. He suggested that the words "not later than 1 January 1971" should be replaced by the words "not later than 15 January 1971".

It was so agreed.

Paragraph 14, as amended, was approved.

³ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10, p. 3.*

Paragraph 15

Paragraph 15 was approved.

B. Draft articles on representatives of States to international organizations

Title of part B of chapter II

51. Mr. USHAKOV said he noted that part B of chapter II was entitled "Draft articles on representatives of States to international organizations", a title which no longer corresponded to the contents of the articles.

52. Mr. ROSENNE said that the title in question was the title of the whole draft. If the articles were arranged so as to constitute a single draft and not several sets of draft articles, that title would remain.

53. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission agreed to retain that title for the time being.

PART III. Permanent observer missions to international organizations

Section 1. Permanent observer missions in general

GENERAL COMMENTS

Paragraph (1)

54. Mr. ROSENNE suggested that the Secretariat should recast paragraph (1) so as to give a complete list of the countries which maintained permanent observer missions. In paragraph (3) of the general comments to section 2 (Facilities, privileges and immunities of permanent observer missions) another list was given.

55. Mr. SETTE CÂMARA said that the permanent observer mission of the Holy See should be mentioned together with the others and not in a separate sentence; it was no longer correct to say that the Holy See had "recently established" a permanent observer mission at New York and Geneva.

56. Mr. TESLENKO (Deputy Secretary to the Commission) said that the Secretariat would include in paragraph (1) a complete list in alphabetical order of the permanent observer missions at United Nations Headquarters and at Geneva.

57. Mr. BARTOŠ (Rapporteur) said he supported Mr. Rosenne's suggestion that the paragraph should include a complete list of the States which, at the present time, had observer missions, using a formula which would guard against the possibility of omissions.

58. Mr. ROSENNE suggested that the passage to be prepared by the Secretariat should replace the first two and the last two sentences of paragraph (1). The third sentence, reading "Observer missions were also established by States such as Austria, Finland, Italy and Japan before they became Members of the United Nations" should be retained, because much of the practice to which reference was made in the report was connected with those countries.

59. The CHAIRMAN suggested that the Commission approve paragraph (1), with the changes indicated by the Deputy-Secretary and by Mr. Rosenne.

Paragraph (1), as amended, was approved.

Paragraph (2)

60. Mr. CASTRÉN proposed that, in the second sentence of the French version, the words "*a parlé des*" be replaced by the words "*s'est référé aux*", and that the words "provide a legal basis for" be replaced by the words "determine the legal status of".

61. Mr. ROSENNE suggested that, in the second sentence, the concluding words "but no action was taken by the Assembly to provide a legal basis for permanent observer missions" be replaced by the words "but the resolutions adopted by the General Assembly were silent on permanent observer missions".

62. Mr. ALCÍVAR suggested as an alternative wording: "but no resolution made any mention of permanent observer missions".

63. The CHAIRMAN suggested that the Commission approve paragraph (2) with the change proposed by Mr. Alcívar.

Paragraph (2), as amended, was approved.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were approved.

Paragraph (6)

64. Mr. AGO suggested that in the first sentence the words "as regards privileges" should be replaced by the words "as regards their privileges".

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph (7)

65. Mr. CASTRÉN asked that, in the French version of the penultimate sentence, the words "*tels que*" be replaced by the words "*à savoir*".

66. Mr. ROSENNE proposed that paragraph (7) be dropped altogether. The Commission had always been careful not to involve itself in the interpretation of the Charter. In any case, the contents of the paragraph were completely irrelevant.

67. Mr. KEARNEY said he supported that proposal.

68. Mr. YASSEEN said he was in favour of retaining paragraph (7). No one denied that the Charter of the United Nations was based on the principle of universality, and a proper understanding of that principle was essential for the subsequent draft articles.

69. Mr. AGO said he agreed with Mr. Yasseen. The paragraph should end after the second sentence, where the word "well-known" should be added before the word "reasons".

70. Mr. BARTOŠ (Rapporteur) said that paragraph (7) had been included because it was the only place in the

report where there was any mention of the situation of States that were not members of the United Nations but were members of specialized agencies. The Secretariat could perhaps prepare a new draft of the paragraph, but it would be a mistake to delete it.

71. The CHAIRMAN said he would put the proposal for the deletion of paragraph (7) to the vote.

The proposal was rejected by 6 votes to 5.

72. Mr. AGO suggested that the reference to Western Samoa be deleted and that it should be specified that Switzerland was a member of specialized agencies. He proposed, therefore, that the third sentence of paragraph (7) should read as follows:

"Some States, like Switzerland, have chosen not to become members of the United Nations, although they became members of several specialized agencies".

73. Mr. TSURUOKA said that wording such as "succeeded in" and "was blocked" was inappropriate in the Commission's report. He suggested that the last sentence be recast to read: "Some of the constituent parts of those 'divided countries' became members of specialized agencies, others did not".

74. The CHAIRMAN suggested that the Commission approve paragraph (7) subject to, first, the deletion, from the third sentence, of the words "and Western Samoa", secondly, the addition, at the end of the same sentence, of the words "although they became members of several specialized agencies", and thirdly, the replacement in the last sentence of the words "succeeded in gaining admission to specialized agencies while the admission of others was blocked" by the words "became members of specialized agencies, others did not".

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraph (8)

75. Mr. ROSENNE said that, in his opinion, the entire paragraph should be deleted. If, however, the Commission took the view that the idea it contained was worth mentioning, it should limit that paragraph to the two quotations from the Secretary-General and then add the following three sentences: "The matter is under consideration by the Security Council following the initiative of the Permanent Representative of the United States in his letter of 18 August 1969 to the President of the Security Council (S/9397). An interim report (S/9836) of the Committee of Experts established by the Security Council after a discussion at its 1505th and 1506th meetings has recently been submitted. No recommendations have yet been made by the Committee of Experts".

It was so agreed.

Paragraph (8), as amended, was approved.

COMMENTARY TO ARTICLE 0 (Use of terms)

76. Mr. ROSENNE said that he was still very confused as to the relationship between the present articles and the previous ones. It had always been his understanding

that the present articles were additional to articles 1 to 50 and that therefore the definitions in article 1 should apply to them, except where that would obviously be inappropriate.

77. The same confusion already existed in connexion with the definition of "Organization" in article 1.

78. Mr. KEARNEY (Chairman of the Drafting Committee) said that he had suggested including at the end of paragraph (1) a sentence reading: "The Commission will, in the course of its review of the entire draft in 1971, consider the extent to which an amalgamation of the definitions is possible".

79. Mr. ROSENNE asked what would be the situation with regard to those definitions which were not repeated, such as the definition of "Organization", which was necessary for the understanding of some of the articles.

80. Mr. KEARNEY (Chairman of the Drafting Committee) said that it was the intention to view the present series of articles as additional articles, although that intention was somewhat obscured by the fact in some cases the Drafting Committee had included precisely the same definition as was found in article 1. Mr. Rosenne's problem would appear to be that if that approach were adopted at the present stage, the definition of "Organization" ought also to be included.

81. Mr. ROSENNE said that the question was one of substance and went much farther than that. The Commission had already been confronted with the problem of articles 3, 4, 5 and 50 and their application to the present articles. Were the present articles part of a single set of draft articles or not? If they were, it should be stated that those definitions in article 1 which were not repeated in article 0 also applied to the present articles.

82. Mr. USHAKOV said that paragraph (1) of the commentary stated that the terms defined in article 1 related only to permanent missions. Moreover, article 0 opened with the phrase: "For the purpose of the present part". Something, therefore, might have to be added.

83. The CHAIRMAN, speaking as a member of the Commission, said he was inclined to agree with Mr. Rosenne that the present text was rather confusing.

84. Mr. BARTOŠ (Rapporteur), speaking as a member of the Commission, said he did not share the opinion of Mr. Rosenne and the Chairman on sub-paragraphs (a), (b), (c) and (d), since those four sub-paragraphs concerned permanent observer missions, which were not dealt with in article 1. Perhaps the substance of the article should appear in the report, not as a draft article, but in a note to article 51, where it would be explained that the Commission had prepared those definitions to supplement article 1, on terminology, and that they would serve as a working basis for the second reading.

85. Mr. USHAKOV said he wished to raise a point of procedure: it was his impression that the Commission had to vote on each article and not merely on the commentaries.

86. Mr. KEARNEY said he agreed that that was the Commission's normal procedure; but the problem raised by Mr. Rosenne was whether, unless some changes were made in the form of presentation, it might not be necessary to add a definition of "international organization" to articles 0 and 00.

87. Mr. USHAKOV proposed that the Commission vote on each article.

88. Mr. ROSENNE said that Mr. Ushakov was correct in thinking that all the articles had to be voted on at some stage. He would suggest, however, that the Commission follow the precedent established at the first reading of the draft articles on the law of treaties in 1962, whereby no vote had been taken unless it had been particularly requested for a particular article.

It was so agreed.

89. Mr. ROSENNE suggested that the discussion on the commentary to article 0 should be deferred until the Commission had taken up article 00, the commentary to which was quite different.

It was so agreed.

ARTICLE 51 (Establishment of permanent observer missions)

90. Mr. TESLENKO (Deputy Secretary to the Commission) said that, in the text of the article, the word "establish" had been misplaced and should appear after the word "may" in the first line.

91. Mr. BARTOŠ (Rapporteur) said that some members of the Commission had expressed the view that there had to be an agreement between the organization and the State for the rule in article 51 to be applicable, and wished that point to be mentioned in the commentary. The Drafting Committee had not shared that view. He therefore wondered whether those members wished to make a formal proposal on the subject. Personally, he considered such a proviso unnecessary, since the article contained the qualification "in accordance with the rules or practice of the Organization".

92. Mr. USHAKOV said he would ask for a separate vote on the phrase "in accordance with the rules or practice of the Organization", both in article 51 and in the commentary, since the phrase did not appear in the corresponding article on permanent missions—article 6—and the point was covered by article 3. He would reserve his position as far as the second reading was concerned. He was not in favour of the qualification unless it was also applied to permanent missions. At the present stage he would therefore vote against it.

93. Mr. CASTRÉN said that the point had given rise to long discussions first in the Commission, then in the Drafting Committee and then again in the Commission. The text of article 51 represented a compromise. Permanent missions and permanent observer missions could not be placed on the same footing, as they were very different. It was therefore natural that there should be a difference between article 51 and article 6.

94. With regard to the reference to the rules or practice of the organization, it should be noted that article 3 spoke only of the relevant rules of the organization; it was only in the commentary to article 3 that it was stated that the phrase also covered the practice of the organization. He was therefore in favour of retaining that phrase.

95. Mr. USTOR said that he supported Mr. Ushakov's view. Although the Commission had accepted article 51 on first reading, it was apparent after due reflection that the phrase in question was redundant, since article 3 gave precedence to the rules of the organization, while the commentary interpreted the words "the relevant rules of the Organization" as including the practice.

96. The CHAIRMAN put Mr. Ushakov's proposal to delete the words "in accordance with the rules or practice of the Organization" to the vote.

The proposal was rejected by 11 votes to 2, with 1 abstention.

COMMENTARY TO ARTICLE 51 (Establishment of permanent observer missions)

Paragraph (1)

97. Mr. CASTRÉN said that at the beginning of the paragraph there was a reference to "non-member States", whereas at the end of the paragraph the words used were "short of full membership". He suggested that the word "full" be deleted in order to remove the inconsistency.

98. Mr. BARTOŠ (Rapporteur) said that the reason for the choice of wording was that the Holy See, for example, was a member of the Executive Committee of the High Commissioner's Programme for Refugees without being a Member of the United Nations. The phrase "short of full membership" covered such situations precisely.

99. Mr. ROSENNE said that he would have thought that the words "short of full membership" could have safely been omitted. If the Commission wished to add something in their place, he would suggest the words "and their participation in its work".

100. Mr. KEARNEY suggested that the words "short of full membership" be replaced by the words "when such establishment is permitted by the rules or practice of the Organization".

It was so agreed.

Paragraph (1) as amended, was approved.

Paragraph (2)

101. Mr. KEARNEY suggested that the whole of the final part of paragraph (2), beginning with the words "A common interest", be deleted.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

102. Mr. ROSENNE said that the word "Organization" should be written with an initial capital letter throughout the paragraph.

103. Mr. CASTRÉN said he must point out that the opinion mentioned in the first sentence of the paragraph had been expressed by only three members of the Commission. He therefore suggested that the word "several" be replaced by the word "certain".

104. Mr. USHAKOV said he supported that suggestion, as it was in conformity with the Commission's usual practice.

It was so agreed.

Paragraph (3), as amended, was approved.

COMMENTARY TO ARTICLE 52 (Functions of a permanent observer mission)

105. Mr. BARTOŠ (Rapporteur) said that article 52 had given rise to a long discussion in the Commission and members had asked that the commentary should explain the method used in describing the functions of a permanent observer mission, and also the basis of the privileges and immunities it had been granted. Those explanations were at present contained in section 2 of the introduction to chapter II, in the paragraphs dealing with the arrangement of the draft articles. It had not therefore been considered necessary to reproduce them in the commentary to article 52.

Paragraph (1)

106. Mr. ROSENNE said that the passage cited in paragraph (1) only repeated what had already been stated in paragraph (3) of the general comments at the beginning of section 1. He suggested that it be deleted.

107. The CHAIRMAN suggested that, since the passages cited did not seem to be exactly the same, the paragraph be retained as it stood.

It was so agreed.

Paragraph (1) was approved.

Paragraph (2)

108. Mr. CASTRÉN, referring to the second sentence, said that the final words of the article in the French version should read "à l'Organisation" and not "auprès de l'Organisation". The English version was correct and the French version should be amended accordingly.

It was so agreed.

109. Mr. CASTRÉN proposed the deletion of the passage beginning with the words "The most recent case" and ending with the words "in the same manner as the Members of the United Nations". The passage contained two examples and, with regard to the first example, his impression was that the representative of Switzerland had been required to produce special powers.

110. With regard to the second example, he doubted whether it was a case of representation, since it concerned

the participation in the election of members of the International Court of Justice by States which, although not Members of the United Nations, were parties to the Statute of the Court.

111. Mr. BARTOŠ (Rapporteur), speaking as a member of the Commission, said that the presence of the representative of Switzerland during the Sixth Committee's consideration of the draft convention on Special Missions was the result of an arrangement made with the Secretary-General at the request of the representative of Switzerland. The Chairman of the Sixth Committee had merely welcomed the representative of Switzerland; the Committee had not had to consider under what conditions he was acting as representative. The first example might therefore be retained.

112. Participation in the election of judges of the International Court of Justice, however, was a right possessed by every State which, even though not a Member of the United Nations, was a party to the Statute of the Court. He therefore supported the proposal for the deletion of the second example.

113. Mr. ROSENNE said that he agreed with Mr. Castrén that both examples should be deleted.

114. Mr. ALCÍVAR said that, in the interest of clarity, he would like to draw the Commission's attention to the fact that Switzerland had participated in the meetings of the Sixth Committee in both 1968 and 1969. On the first occasion, the Committee had agreed that the Swiss observer might participate without the right to vote; on the second occasion he had merely been invited to attend on the same conditions as in the previous year.

115. Mr. YASSEEN said that paragraph (2) contained a reference to the possibility of an organ of an international organization playing the role of a conference of plenipotentiaries. The fact that the organ fulfilled the role of a conference meant that it was not a conference in the proper sense of the term. The French version therefore should not go on to say that non-member States were invited to participate "*à cette conférence*"; it should say "*à cet organe*". In view of the difficulties they raised, both examples should be deleted.

116. Mr. KEARNEY said that the whole passage should be deleted, since it was dependent on the last sentence.

117. Mr. USHAKOV said that, if the two examples were to be deleted, it would be necessary to delete the entire passage beginning with the words "In particular, the function of negotiation" and ending with the words, "in the same manner as the Members of the United Nations".

118. The CHAIRMAN said that the proposal was to delete the whole of the rest of the paragraph, beginning with the words "In particular".

119. Mr. AGO proposed that, in addition, the second and third sentences beginning with the words "They do not, in particular", and ending with the words, "rather they represent it 'at' the Organization", be deleted. The

distinction they were intended to draw was difficult to express and raised translation problems.

120. Mr. CASTRÉN said that, in view of the change in the closing words of article 52, the information conveyed in the two sentences which Mr. Ago wished to have deleted was necessary in order to explain why the wording differed from that of paragraph (a) of article 7. It was in that way that the Special Rapporteur had tried to bring out that, in the case of a permanent observer mission, representation was limited.

121. After a brief discussion, in which Mr. USHAKOV, Mr. KEARNEY, Mr. ROSENNE, the CHAIRMAN and Mr. CASTRÉN took part, Mr. KEARNEY proposed that the passage beginning with the words "In particular" and ending with the words "the Organization" be amended to read: "In particular, the function of negotiation can be exercised by permanent observers when an agreement with the international organization is under consideration. As such negotiation is not a regularly recurrent part of a permanent observer mission's activity, the Commission added in the text of article 52 the expression 'when required' after the words 'negotiation with the Organization'". The earlier part of the paragraph would remain unchanged.

It was so agreed.

Paragraph (2), as amended, was approved.

The commentary to article 52, as amended, was approved.

The meeting rose at 1.5 p.m.

1083rd MEETING

Monday, 6 July 1970, at 3.10 p.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Alcívar, Mr. Castañeda, Mr. Castrén, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

**Draft report of the Commission on the work
of its twenty-second session**

(A/CN.4/L.156-160 and Addenda)
(continued)

Chapter II

RELATIONS BETWEEN STATES AND INTERNATIONAL
ORGANIZATIONS
(continued)

**PART III. Permanent observer missions to international
organizations**

*Section 1. Permanent observer missions in general (con-
tinued)*

1. The CHAIRMAN invited the Commission to continue consideration of the part of chapter II of its draft report contained in document A/CN.4/L.157 and Add.1.

ARTICLE 52 bis. (Accreditation to two or more international organizations or assignment to two or more permanent observer missions)

2. Mr. CASTRÉN said that there were a number of words missing from the French version of the article. In paragraph 1, the words "d'observation" should be inserted after the words "une autre de ses missions permanentes", while in paragraph 2 the words "en qualité de membre de cette mission" should be inserted after the words "une autre de ses missions permanentes d'observation".

It was so agreed.

COMMENTARY TO ARTICLE 52 bis

3. Mr. CASTRÉN said that the commentary was too brief. It referred only to the title of article 8, the wording of which did not cover the four cases dealt with in article 8. He therefore suggested that it be redrafted to read: "Article 52 bis is based on article 8 relating to the accreditation of the same person or of a member of the staff of a permanent mission to two or more international organizations, or to the assignment of a permanent representative or of a member of the staff of a permanent mission to two or more permanent missions".

4. Mr. ROSENNE said that he had been asked by the General Rapporteur, Mr. Bartoš, to draw attention to the need to add to the commentary a footnote referring to the Special Rapporteur's note on assignment to two or more international organizations or to functions unrelated to permanent missions. He suggested that the drafting of the footnote be left to the Secretariat.

5. The CHAIRMAN suggested that the Commission approve the commentary to article 52 bis with the changes proposed by Mr. Castrén and on the understanding that the Secretariat would prepare a footnote as suggested by Mr. Rosenne.

It was so agreed.

The commentary to article 52 bis, as amended, was approved.

COMMENTARY TO ARTICLE 53 (Appointment of the members of the permanent observer mission) and to ARTICLE 54 (Nationality of the members of the permanent observer mission)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

6. Mr. KEARNEY proposed the deletion of the second, third, fourth, fifth, sixth and seventh sentences as well as the opening six words of the eighth sentence. The first sentence would then be linked up with the remainder of the eighth sentence and the paragraph would begin: "Article 54 is based on article 11 which states that the permanent representative and the members of the diplomatic staff. . .". The purpose of that deletion was to eliminate a lengthy reference to considerations which were referred to by the Special Rapporteur in his original report but were not necessary in the Commission's report.

It was so agreed.

Paragraph (4)

Paragraph (4) was approved.

The commentary to articles 53 and 54, as amended, was approved.

COMMENTARY TO ARTICLE 54 bis (Credentials of the permanent observer)

Paragraph (1)

7. Mr. USTOR suggested that a footnote should be added giving the document number of the study by the Secretariat.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) and (3)

8. Mr. ROSENNE said that, as he saw it, the Commission's report was hardly the proper place to reproduce the form of the credentials of permanent observers and permanent representatives. He therefore proposed the deletion from paragraph (2) of the concluding passage beginning with the words "Such letters are usually based on the following model" and the whole of paragraph (3).

It was so agreed.

Paragraph (2), as amended, was approved: paragraph (3) was deleted.

Paragraph (4)

9. Mr. KEARNEY proposed the deletion from the second sentence of the words "since the Commission had included representation and negotiation among the func-

tions of permanent observers". That was not the only reason for the provision.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

10. Mr. TSURUOKA proposed that, in the French version, the first sentence be amended by replacing the words "*produire des pouvoirs essentiellement sous la même forme que les pouvoirs des représentants permanents*" by the words "*produire des pouvoirs sous une forme essentiellement similaire à celle des pouvoirs des représentants permanents*".

It was so agreed.

11. Mr. ROSENNE said that the meaning of the last sentence was not altogether clear.

12. Mr. TESLENKO (Deputy Secretary to the Commission) said that the Special Rapporteur had had in mind the case in which a very simple letter was addressed to the Secretary-General by the State establishing a permanent observer mission.

13. Mr. SETTE CÂMARA suggested that the sentence be deleted. The word "substantially", which was used in the first sentence, allowed sufficient flexibility.

14. Mr. ROSENNE said he supported that suggestion. The whole purpose of article 54 *bis* was to assimilate the position of permanent observers to that of permanent representatives; the same form of credentials should therefore be required and the reference to "credentials in simplified form" was not appropriate.

15. The CHAIRMAN suggested that the Commission approve paragraph (5) subject to the deletion of the last sentence and to the alterations to the French version proposed by Mr. Tsuruoka.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

The commentary to article 54 bis, as amended, was approved.

COMMENTARY TO ARTICLE 54 *ter* (Full powers to represent the State in the conclusion of treaties)

16. Mr. ROSENNE said that he had been asked by Mr. Bartoš to suggest that, in the second sentence, the words "it was thought desirable" be replaced by the words "the majority of the Commission thought it desirable".

It was so agreed.

The commentary to article 54 ter, as amended, was approved.

COMMENTARY TO ARTICLE 55 (Composition of the permanent observer mission), ARTICLE 56 (Size of the permanent observer mission) and ARTICLE 57 (Notifications)

The commentary to articles 55, 56 and 57 was approved.

COMMENTARY TO ARTICLE 57 *bis* (Chargé d'affaires *ad interim*)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

17. Mr. KEARNEY proposed the deletion of the concluding words of the first sentence "with two exceptions" and their replacement by an additional sentence reading: "There are two differences". In the second sentence, he proposed that the concluding words "states a faculty and not an obligation" be replaced by the words "provides a faculty rather than imposes an obligation".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

The commentary to article 57 bis, as amended, was approved.

COMMENTARY TO ARTICLE 58 (Offices of permanent observer missions)

The commentary to article 58 was approved.

COMMENTARY TO ARTICLE 59 (Use of [flag and] emblem)

Paragraph (1)

18. Mr. KEARNEY proposed the deletion from the last sentence of the words "particularly in New York". It had become apparent that there was no established custom anywhere regarding the display of the flag on the residence or the vehicle of a permanent observer.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

New paragraph

19. Mr. ROSENNE said that Mr. Bartoš had asked him to propose the insertion of an additional paragraph reading "Some members suggested that the Commission should consider during its second reading whether the expression 'regulations and usages of the host State' should be replaced by 'regulations and usages in the host State'".

20. The CHAIRMAN said that, if there were no objection, he would consider that the Commission approved

the insertion of that additional paragraph as paragraph (3).

It was so agreed.

The commentary to article 59, as amended, was approved.

Section 2 (Facilities, privileges and immunities of permanent observer missions)

GENERAL COMMENTS

Paragraphs (1), (2) and (3)

Paragraphs (1), (2) and (3) were approved.

Paragraph (4)

21. Mr. KEARNEY proposed that in the first sentence the words "to full diplomatic immunity was rejected since the Department of State of the United States of America had not recognized the defendant as an official with diplomatic status" be replaced by the words "to immunity from giving evidence was rejected. The Court referred to the fact that the Department of State of the United States of America had not recognized the defendant as possessing immunity under any applicable statute or treaty"; that in the second sentence the opening words "The Court also referred" be replaced by the words "The Court referred"; and that in the last sentence the phrase "The Court remarked that" be inserted before the words "the benefits" and that the concluding passage, "this phrase has been interpreted as applying to permanent observers", be deleted.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

22. Mr. CASTRÉN said that the analogy with members of consular posts suggested by Mr. Kearney, and referred to in the last sentence of the paragraph, had not been supported by any other member.

23. Mr. KEARNEY suggested that the last sentence be deleted.

It was so agreed.

24. Mr. ROSENNE suggested that, in the first sentence, the words "were not identical to permanent missions—they do not participate to the same extent in the activities of the organization, they do not have the obligations which permanent missions have towards the organization and, generally, their functions differ—they should not be equated for the purposes . . ." be replaced by the words "do not participate directly in the activities of the Organization, they do not have the relationship which permanent missions have with the Organization. As their functions differ, they should not be equated with permanent missions for the purposes . . ."

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

25. Mr. ROSENNE suggested that, in the first sentence, the words "they have a similar status, since" be replaced by the words "the nature of their functions requires them to have a similar status".

26. Mr. KEARNEY suggested that it would be simpler to delete the words "they have a similar status, since".

It was agreed to delete those words.

Paragraph (6), as amended, was approved.

Paragraph (7)

27. Mr. ROSENNE suggested that, in the first sentence, the words "legislating by reference" be replaced by the words "drafting by reference" and that at the end of the paragraph the words "part I" should be replaced by the words "part II".

It was so agreed.

Paragraph (7), as amended, was approved.

The "General comments" on section 2, as amended, were approved.

COMMENTARY TO ARTICLE 60 (General facilities)

28. Mr. KEARNEY proposed that, in the second sentence, the words "to receive" be replaced by the words "to be given" and that the concluding words, "especially from the Organization", be deleted. He also proposed that the last sentence be deleted.

It was so agreed.

The commentary to article 60, as amended, was approved.

COMMENTARY TO ARTICLE 60-A (Accommodation and assistance)

The commentary to article 60-A was approved.

COMMENTARY TO ARTICLE 60-B (Privileges and immunities of the permanent observer mission)

The commentary to article 60-B was approved.

COMMENTARY TO ARTICLE 60-D (Personal privileges and immunities)

The commentary to article 60-D was approved.

COMMENTARY TO ARTICLE 60-J (Non-discrimination)

The commentary to article 60-J was approved.

COMMENTARY TO ARTICLE 61 (Conduct of the permanent observer mission and its members)

The commentary to article 61 was approved.

COMMENTARY TO ARTICLE 61-A (End of functions)

The commentary to article 61-A was approved.

PART IV. *Delegations of States to organs and to conferences* (A/CN.4/L.157/Add.1)

Section I. Delegations in general

29. Mr. CASTRÉN said he was surprised to find that article 00, unlike other parts of the draft, was not preceded by general comments, although the Special Rapporteur had drafted several pages of general comments in his report (A/CN.4/227/Add.1). He therefore proposed that at least some of the Special Rapporteur's general comments be reproduced in the Commission's report, with any necessary amendments.

30. Mr. KEARNEY said that a general commentary of considerable length had been sent by the Special Rapporteur in connexion with the section on privileges and immunities. The Drafting Committee had decided that, with a few drafting changes, that commentary would serve adequately as a general commentary to Part IV. A proposal in that sense would be made at a forthcoming meeting.

COMMENTARY TO ARTICLE 00 (Use of terms)

Paragraph (1)

31. Mr. ROSENNE suggested that paragraph (1) be moved to the commentary to article 0, the necessary drafting changes being made by the Chairman of the Drafting Committee.

It was so agreed.

Paragraphs (2), (3), (4), (5) and (6)

Paragraphs (2), (3), (4), (5) and (6) were approved.

The commentary to article 00, as amended, was approved.

COMMENTARY TO ARTICLE 61-B (Derogation from the present part)

32. Mr. ROSENNE said that article 61-B was not in fact based on article 5. It had a different purpose; it could perhaps be described as an extension of article 5. He therefore proposed that the words "is based on" in the first sentence be replaced by the words "is supplementary to", and that, in the third sentence, the words "of course" be deleted.

It was so agreed.

The commentary to article 61-B, as amended, was approved.

TEXT OF ARTICLE 61-C (Conference rules of procedure)¹

33. Mr. ROSENNE said that the Commission still had to adopt the final text of article 61-C. At the 1073rd meeting, article 61-C had only been adopted provisionally, pending insertion of the numbers of the specific articles in the blank space in the first line. The Drafting Committee now suggested inserting numbers 62, 63, 64 *ter* and 66.

34. He would, however, like to ask the Chairman of the Drafting Committee whether it would not be appropriate to include articles 65 and 67 *bis* in that list.

35. Mr. CASTRÉN asked the Chairman of the Drafting Committee why articles 62 *bis* and 67 had not been mentioned.

36. He was in favour of including article 67 *bis*, but did not consider it necessary to mention article 65.

37. Mr. KEARNEY (Chairman of the Drafting Committee), replying to Mr. Rosenne, said he agreed that article 67 *bis* should be added to the list. As for article 65, the wording of the article itself was sufficiently flexible for its inclusion to be unnecessary; the formulation "if that is allowed in relation to the conference in question" was even broader than the reference in article 61-C to the rules of procedure.

38. Replying to Mr. Castrén, he said it would not be appropriate to include a reference to article 62 *bis* because it would appear surprising to suggest that the rules of procedure might authorize a delegation to be larger than what was reasonable or normal. Nor should article 67, which dealt with notifications, fall under article 61-C, since notifications were essential with regard to privileges and immunities and any rule enabling notifications to be avoided might run counter to arrangements made with a host State.

39. The CHAIRMAN invited the Commission to adopt the final text of article 61-C, which read:

Conference rules of procedure

The provisions contained in articles 62, 63, 64 *ter*, 66 and 67 *bis* shall apply to the extent that the rules of procedure of a conference do not provide otherwise.

Article 61-C was adopted.

COMMENTARY TO ARTICLE 61-C (Conference rules of procedure)

The commentary to article 61-C was approved.

COMMENTARY TO ARTICLE 62 (Composition of the delegation)

The commentary to article 62 was approved.

COMMENTARY TO ARTICLE 62 *bis* (Size of the delegation)

The commentary to article 62 bis was approved.

COMMENTARY TO ARTICLE 63 (Principle of single representation)

40. Mr. ROSENNE said that article 63 expressed a residuary rule. He therefore proposed that the commentary should describe the rule as a residuary one.

41. He also proposed that the Secretariat should include in the commentary a reference to the little-known data which had been collected by the Special Rapporteur and the information which had been brought to light by the discussion.

It was so agreed.

The commentary to article 63, as amended, was approved.

¹ See 1073rd meeting, paras. 1-29 and 102-104.

COMMENTARY TO ARTICLE 64 (Appointment of the members of the delegation)

42. Mr. KEARNEY (Chairman of the Drafting Committee) said that in the second sentence the phrase "requirement of agreement" was a mistake for "requirement of an *agrément*", and should be corrected accordingly.

The commentary to article 64, as corrected, was approved.

COMMENTARY TO ARTICLE 64 *bis* (Nationality of the members of the delegation)

The commentary to article 64 bis was approved.

COMMENTARY TO ARTICLE 64 *ter* (Acting head of the delegation)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

43. Mr. CASTRÉN proposed that the phrase "which is based on article 19, paragraph 2, of the Vienna Convention on Diplomatic Relations" be inserted after the opening words "Paragraph 2" in the first line.

It was so agreed.

The commentary to article 64 ter, as amended, was approved.

COMMENTARY TO ARTICLE 65 (Credentials of representatives)

The commentary to article 65 was approved.

COMMENTARY TO ARTICLE 66 (Full powers to represent the State in the conclusion of treaties)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

New paragraph

44. Mr. ROSENNE proposed the insertion of an additional paragraph dealing with the question of the signature of the Final Act, on which the Secretariat had made a statement.

45. Mr. NAGENDRA SINGH said he supported that proposal.

46. The CHAIRMAN suggested that the Secretariat should be asked to draft the additional paragraph.

It was so agreed.

The commentary to article 66, as amended, was approved.

COMMENTARY TO ARTICLE 67 (Notifications)

The commentary to article 67 was approved.

COMMENTARY TO ARTICLE 67 *bis* (Precedence)

Paragraph (1)

47. Mr. ROSENNE proposed that the first sentence, reading "Article 67 *bis* is akin to article 19 relating to

precedence among permanent representatives" be replaced by the sentence "Unlike article 19, which relates to precedence among permanent representatives, article 67 *bis* relates only to precedence among delegations".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

The commentary to article 67 bis, as amended, was approved.

Chapter III

SUCCESSION OF STATES AND GOVERNMENTS

(A/CN.4/L.158 and Add.1)

48. The CHAIRMAN invited the Commission to consider the part of chapter III of its draft report contained in document A/CN.4/L.158.

49. Mr. USHAKOV said that the title should read "Succession of States" and not "Succession of States and Governments".

50. The CHAIRMAN said that the Secretariat would make the necessary change.

A. Introduction (paragraphs 1-9)

Paragraphs 1, 2 and 3

Paragraphs 1, 2 and 3 were approved.

Paragraphs 4 and 5

51. Mr. CASTRÉN said that it was unnecessary to repeat the symbols of the Special Rapporteur's reports as they were already given in paragraph 3. He suggested that they be deleted.

It was so agreed.

Paragraphs 4 and 5, as amended, were approved.

Paragraph 6

Paragraph 6 was approved.

Paragraph 7

52. Mr. CASTRÉN suggested that the symbol of the Special Rapporteur's report be deleted, as it was already mentioned in paragraph 6.

It was so agreed.

Paragraph 7, as amended, was approved.

Paragraph 8

53. Mr. CASTRÉN said he thought that the last two sentences were not an accurate record of what had actually taken place. He accordingly proposed that the fourth sentence be amended to read: "The Commission considered together, on a preliminary basis, certain draft

articles in the second and third reports . . .”, and that in the last sentence, the words “and the absence of the Special Rapporteur” be inserted after the words “Owing to the lack of time”.

54. Mr. USTOR said that it would be better to divide paragraph 8 into two separate paragraphs, one referring to Sir Humphrey Waldock’s report and the other to Mr. Bedjaoui’s.

55. The CHAIRMAN said that the third and the last sentence, as amended by Mr. Castrén, would be combined to form a separate paragraph.

56. Mr. REUTER thought it was not customary for the Commission to refer in its report to the absence of members. It would be better to say: “Owing to the lack of time and other circumstances . . .”.

57. Mr. NAGENDRA SINGH said that he supported Mr. Reuter’s view.

58. Mr. AGO said that the Commission did not have to make excuses. It would be sufficient to say: “Unfortunately, the Commission was unable . . .”.

59. Mr. ROSENNE said that he could accept Mr. Ago’s formula.

60. He suggested that the words “concerning the subject” in the third sentence should be replaced by the words “concerning certain aspects of the subject”.

It was so agreed.

61. Mr. AGO formally proposed that the reports of Sir Humphrey Waldock and Mr. Bedjaoui should be dealt with in two separate paragraphs.

It was so agreed.

Paragraph 8, as amended, was approved.

Paragraph 9

62. Mr. AGO suggested that the words “and Governments” in the second line be deleted.

It was so agreed.

Paragraph 9, as amended, was approved.

Chapter V

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

63. The CHAIRMAN invited the Commission to consider the following text which had been proposed for section C, paragraph 4, of chapter V: ²

“C. CELEBRATION OF THE TWENTY-FIFTH ANNIVERSARY OF THE UNITED NATIONS

“4. By letter dated 23 March 1970 (A/CN.4/231) addressed to the Chairman of the International Law Commission, the Secretary-General brought to its attention the text of General Assembly resolution 2499 (XXIV) of 31 October 1969, on the celebration of the twenty-fifth anniversary of the United Nations, and

in particular, operative paragraphs 17 and 18 of part A of the said resolution. Wishing to associate itself with this celebration, the Commission adopted at its . . . meeting the following resolution:

“The International Law Commission,

“Recalling that under Article 13, paragraph 1 a, of the Charter of the United Nations the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification and that the Statute of the International Law Commission has been adopted in pursuance of that task of the General Assembly,

“Recalling further that a series of codification conferences has been convened by the General Assembly and that, on the basis of the Commission’s drafts, a number of codification conventions has been adopted by those conferences,

“Convinced that conventions dealing with the codification and progressive development of international law should be open to universal participation as has been stated in the ‘Declaration on Universal Participation in the Vienna Convention on the Law of Treaties’ adopted by the United Nations Conference on the Law of Treaties,

“Recommends that the General Assembly appeal to States to expedite the process of ratification of or accession to the Vienna Convention on the Law of Treaties of 1969 and other codification conventions (adopted on the basis of draft articles prepared by the International Law Commission)—such as the four Conventions on the law of the sea adopted at Geneva in 1958, the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, and the Convention on Special Missions of 1969—in order to shorten the final stage of the codification of international law and place international law upon the widest and most secure foundations.”

64. Mr. KEARNEY, referring to the third preambular paragraph, said that at the Vienna Conference a number of States had made statements to the effect that they did not consider that the Declaration on Universal Participation in the Vienna Convention on the Law of Treaties³ represented any commitment for them to vote one way or the other in the General Assembly. In the circumstances, he did not think that the Commission could adopt such a paragraph without seeming to take sides on what was an open political issue.

65. Sir Humphrey WALDOCK said that, first, he did not see any logical connexion between the third preambular paragraph and the operative paragraph, and secondly, in his opinion, the Commission might be thought to be exceeding its terms of reference in addressing a recommendation to the General Assembly when the matter had already been covered by the resolution adopted by the Vienna Conference, which was itself addressed to the General Assembly.

66. Mr. USTOR said that he would have to differ from Mr. Kearney and Sir Humphrey Waldock. It was his impression that there had been unanimous agreement at the Vienna Conference concerning the principle of universality as applied to conventions dealing with the codi-

² See also 1081st meeting, paras. 60-78.

³ United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, document A/CONF.39/26.

fication and progressive development of international law. Surely the best way to enforce the rule of general international law was to permit all States to participate in such conventions.

67. The only problem that might arise was in connexion with States which were recognized by certain States but not by others. He personally could see no harm in adopting the present text of the third preambular and operative paragraphs, although, as Sir Humphrey Waldock had pointed out, there might not be a strict logical connexion between them.

68. Mr. YASSEEN said that the Commission should be guided by logic and technical considerations, not by political prejudice. Its mandate was to encourage codification of a universal character. The Commission's work should serve the whole of mankind. The Commission was called upon to formulate rules of international law which, by definition, should be applicable to the international community as a whole. If there were political considerations which limited the scope of its work, that was not the concern of the Commission but of other organs. The third preambular paragraph should therefore be retained.

69. Mr. TABIBI said that he was inclined to support the views of Mr. Ustor and Mr. Yasseen, since fundamentally the principle of universality was supported by the Charter.

70. He considered, however, that the words "adopted on the basis of draft articles prepared by the International Law Commission" in the operative paragraph were too strong; after all, there were other important conventions in which the Commission had not had a hand. Even at the Conferences on the law of the sea, many decisions had been taken which had not been based on the Commission's draft articles. The Commission should not give the impression that it was claiming a monopoly in the preparation of draft articles for international instruments.

71. Mr. CASTRÉN proposed as a compromise formula for the third preambular paragraph, the wording: "*Recalling also the Declaration on Universal Participation in the Vienna Convention on the Law of Treaties, adopted by the United Nations Conference on the Law of Treaties.*" The Commission would then confine itself to a simple statement.

72. Mr. AGO said that no substantive change need be made in the third preambular paragraph, but the draft resolution must be logically coherent, which in its present form it was not.

73. What the Commission wished to do was to draw attention to the fact that the many codification conventions resulting from its work should attract the largest possible number of accessions. It should therefore begin by recommending that those States which could do so should ratify or accede to those conventions as soon as possible.

74. The second point was to permit other States which had not yet been able to ratify or accede to the conventions to do so. It would therefore be appropriate to remind the General Assembly of the recommendation

adopted at Vienna, but that point was not brought out in the present wording of the draft resolution.

75. He agreed with Mr. Tabibi that, since the Commission's work was already mentioned in the second preambular paragraph, it need not be mentioned again in the operative part.

76. Mr. REUTER said that the whole resolution should be made more flexible, logical and modest. First, the International Law Commission was not the only body which drafted conventions dealing with codification and, secondly, some of the conventions whose ratification by as many States as possible was recommended in the operative part were not wholly suited to present circumstances.

77. It would therefore be better to refer only to the Commission's codification work as a whole and to couch the third preambular paragraph in more moderate terms, stating that the principle of universal participation had little meaning unless it led to effective participation.

78. Mr. CASTAÑEDA said that he fully supported the principle of universality, but he agreed with Sir Humphrey Waldock that there was no logical connexion between the third preambular and the operative paragraphs. He suggested that a clause be added to the operative paragraph, expressing the hope that the greatest possible number of States would become parties to codification conventions, as stated in the Vienna Declaration. States which had signed such conventions should be urged to ratify them as soon as possible.

79. Mr. USHAKOV said the situation could be summed up in a few words. Either the Commission took a stand as a body of independent experts acting in their personal capacity, and adopted the draft resolution without change, strong in its belief that international law was universally applicable, or it did not adopt the resolution because its members were servants of their Governments.

80. He himself was in favour of adopting the draft resolution, but thought that the word "*Recommends*" at the beginning of the operative part was too strong and should be replaced by the words "*Expresses the hope*".

81. Mr. NAGENDRA SINGH said that he fully agreed with Mr. Ustor, Mr. Yasseen and Mr. Tabibi concerning the principle of universality, since it was in the spirit of the age to obtain as many accessions to and ratifications of the conventions drafted by the Commission as possible.

82. The third paragraph should, however, be in conformity with the operative paragraph; it could be shortened considerably and amended to read as follows: "*Convinced that conventions dealing with the codification and progressive development of international law should have a universal applicability*".

83. Mr. ALCÍVAR said that he had always defended the principle of universality and therefore had no objection to the third preambular paragraph as it stood, although he was prepared to abide by the decision of the majority if it chose a milder form of words.

84. On the other hand, he had strong objections to the operative paragraph, in addition to those mentioned by

Mr. Ushakov and Mr. Reuter, since as an Ecuadorian he was unable to accept the four Conventions on the law of the sea, which did not meet the realities of the present time. If a vote were taken on the reference to those Conventions, therefore, he would have to abstain.

85. Mr. ROSENNE said he did not think that the principle of the universality of international law was in issue in the present case; the only real issue was the participation of States in certain conventions, and he would have thought that the Commission ought to have expressed its opinion on that matter before submitting draft articles to conferences.

86. With respect to the third preambular paragraph, he could accept the compromise formula proposed by Mr. Castrén.

87. Valid criticisms had been directed at the operative paragraph, but he thought that it would be a pity to exclude the references to all those conventions. He suggested that the words "such as" in that paragraph should be replaced by the word "including".

88. Mr. SETTE CÂMARA said that he had no difficulty in accepting the substance of the draft resolution, although he agreed with Mr. Ushakov concerning the language of the operative paragraph. The verb "*Recommends*" had a specific meaning in the United Nations and he did not think that the Commission could make recommendations to the General Assembly; perhaps it could be replaced by "*Requests*".

89. He agreed with Mr. Reuter that the operative paragraph should not include specific references to conventions, since that might give the impression that the Commission was the only body which prepared draft articles for conventions.

90. He had some doubts about the final phrase in the operative paragraph, since ratification had nothing to do with the final stage of the codification of international law. He proposed, therefore, that that phrase be replaced by the wording "in order to shorten the entry into force of treaties which were the result of codification".

91. Mr. TSURUOKA said that the Commission wished to see the largest possible number of States ratify or accede to the codification conventions in order to give its work practical meaning. The third preambular paragraph might therefore be redrafted in clearer, simpler and less controversial form, to read: "*Recalling also* that conventions dealing with the codification and progressive development of international law should have a wider participation than hitherto". That was a statement which no one disputed and which could appropriately be followed by the recommendation that the largest possible number of States should ratify or accede to the conventions.

92. Mr. THIAM proposed that either the draft resolution should be adopted without change, since it already represented a compromise and the principles enunciated in the preamble were not taken up in the operative part, or a small working group should be set up to draft a compromise text acceptable to everyone.

93. After a brief discussion, the CHAIRMAN suggested that the Commission appoint a small drafting committee to work out a new text for the third preambular paragraph and the operative paragraph of the draft resolution in the light of the various suggestions made during the debate. He further suggested that the committee be composed of Mr. Kearney, Mr. Ago, Mr. Castrén, Mr. Reuter, Mr. Ustor and Mr. Yasseen.

It was so agreed.

The meeting rose at 6.20 p.m.

1084th MEETING

Wednesday, 8 July 1970, at 10.15 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-second session

(A/CN.4/L.156-160 and Addenda)

(continued)

Chapter II

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS *(resumed from the previous meeting)*

PART IV. *Delegations of States to organs and to conferences* (continued)

1. The CHAIRMAN invited the Commission to consider the part of chapter II of the draft report contained in document A/CN.4/L.157/Add.2.

2. Mr. USHAKOV noted that the title of section 2 was "Facilities, privileges, immunities and obligations", whereas the title of section 2 of the draft articles on permanent missions was "Facilities, privileges and immunities". He proposed that the word "obligations" should be deleted.

It was so agreed.

3. Mr. AGO said he thought that the titles should not be changed at that stage. It should be understood, however, that the Commission intended to revise the title "Relations between States and international organizations" on second reading at the next session, as it was too broad in scope.

GENERAL COMMENTS

Paragraph (1)

4. Mr. KEARNEY said that the word "substantive" was a mistake; it should be "substantial".

Paragraph (1) was approved with that correction.

Paragraph (2)

5. Mr. ROSENNE, supported by Mr. ALCÍVAR, proposed that the first sentence of paragraph (2) should be deleted, since it was obviously unnecessary.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

6. Mr. USTOR proposed that the numbers of the resolutions mentioned should be given in a footnote.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

Paragraph (5) was approved.

Paragraph (6)

7. Mr. ROSENNE said that, as a matter of principle, the Commission did not generally include references to legal literature in its reports. He proposed, therefore, that footnote 30 should be deleted.

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph (7)

8. Mr. ROSENNE proposed, first, that references to the relevant passages in the United Nations *Treaty Series* should be included in a footnote, and secondly, that the first sentence should be amended to read: "In addition to the General Convention and the Specialized Agencies Convention, headquarters agreements have been concluded between the United Nations or the specialized agency concerned on the one hand, and the various States on whose territory headquarters are maintained on the other hand".

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraph (8)

Paragraph (8) was approved.

Paragraph (9)

9. Mr. ROSENNE proposed that the first sentence should read "Pursuant to Article 105 of the Charter and corresponding provisions applicable to the specialized agencies, the privileges and immunities . . .".

10. He also pointed out that the words "Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, of 1946" were redundant. He proposed that they should be replaced by the words "headquarters agreements referred to in paragraph (7) above".

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraphs (10) to (14)

Paragraphs (10) to (14) were approved.

Paragraphs (15) and (16)

11. Mr. KEARNEY asked whether, in view of Mr. Rosenne's comment on paragraph (6), it was necessary to cite the individual authors.

12. Mr. ROSENNE said that he would not object to deleting paragraph (15) altogether, though he felt that it was logical to include those quotations since they showed how the Commission had reached its conclusions.

13. Mr. TSURUOKA suggested that the first sentence of paragraph (15) should be retained and the rest deleted. It would then show the general trend in legal theory without going into detail.

14. Mr. ROSENNE proposed that paragraph (15) should be combined with paragraph (16) and that all the quotations in those two paragraphs should be deleted.

It was so agreed.

The combined paragraphs (15) and (16), as amended, were approved.

Paragraph (17)

Paragraph (17) was approved.

COMMENTARY TO ARTICLE 68 (Status of the Head of State and persons of high rank)

15. Mr. KEARNEY (Chairman of the Drafting Committee) said it had been found unnecessary to make any changes in article 68. Changes had been made in articles 69, 74 and 77, and the Drafting Committee was proposing new articles 76 *bis*, 77 *bis*, 81 *bis* and 82 *bis*.

16. Mr. ROSENNE proposed that the words "of the United Nations and corresponding general representative organs of the specialized agencies" should be added at the end of the fourth sentence, reading "For instance, such high level representation is quite common in delegations to the General Assembly". He further proposed that after that sentence the following passage should be added:

"also, Article 28, paragraph 2, of the Charter provides as follows:

"The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative."

It was so agreed.

The commentary to article 68, as amended, was approved.

COMMENTARY TO ARTICLE 69 (General facilities, assistance by the Organization and inviolability of archives and documents)

The commentary to article 69 was approved.

COMMENTARY TO ARTICLE 70 (Premises and accommodation)

The commentary to article 70 was approved.

COMMENTARY TO ARTICLE 70-B (Inviolability of the premises)

17. Mr. ROSENNE proposed that the words "A similar decision" in footnote 41 should be replaced by the words "Such a decision".

It was so agreed.

The commentary to article 70-B, as amended, was approved.

COMMENTARY TO ARTICLE 71 (Exemption of the premises of the delegation from taxation)

The commentary to article 71 was approved.

COMMENTARY TO ARTICLE 72 (Freedom of movement)

The commentary to article 72 was approved.

COMMENTARY TO ARTICLE 72 bis (Freedom of communication)

The commentary to article 72 bis was approved.

COMMENTARY TO ARTICLE 72 ter (Personal inviolability)

The commentary to article 72 ter was approved.

COMMENTARY TO ARTICLE 72 quater (Inviolability of the private accommodation)

The commentary to article 72 quater was approved.

COMMENTARY TO ARTICLE 73 (Immunity from jurisdiction)

The commentary to article 73 was approved.

COMMENTARY TO ARTICLE 74 (Waiver of immunity)

The commentary to article 74 was approved.

COMMENTARY TO ARTICLE 75 (Exemption from dues and taxes)

The commentary to article 75 was approved.

COMMENTARY TO ARTICLE 76 (Exemption from customs duties and inspection)

The commentary to article 76 was approved.

COMMENTARY TO ARTICLE 76 bis (Exemption from social security legislation, personal services and laws concerning acquisition of nationality)

The commentary to article 76 bis was approved.

COMMENTARY TO ARTICLE 77 (Privileges and immunities of other persons)

The commentary to article 77 was approved.

COMMENTARY TO ARTICLE Z (Privileges and immunities in case of multiple functions)

The commentary to article Z was approved.

COMMENTARY TO ARTICLE 78 (Duration of privileges and immunities)

The commentary to article 78 was approved.

COMMENTARY TO ARTICLE 78 bis (Property of a member of a delegation or of a member of his family in the event of death)

The commentary to article 78 bis was approved.

COMMENTARY TO ARTICLE 79 (Transit through the territory of a third State)

The commentary to article 79 was approved.

COMMENTARY TO ARTICLE 80 (Non-discrimination)

The commentary to article 80 was approved.

COMMENTARY TO ARTICLE 81 (Respect for the laws and regulations of the host State)

18. Mr. USHAKOV said he thought that the commentary to articles 81 and 81 bis should explain that the Commission intended to put those articles in a separate section when it considered them on second reading, because they did not concern privileges and immunities.

19. Mr. ROSENNE said that, in the interests of symmetry, Part II should be divided into four sections, in the same way as Part II of the draft articles on permanent missions. He therefore proposed that article 81 should be preceded by the heading "Section 3: Conduct of the delegation and its members".

It was so agreed.

The commentary to article 81 was approved.

COMMENTARY TO ARTICLE 81 bis (Professional activity)

The commentary to article 81 bis was approved.

COMMENTARY TO ARTICLE 82 (End of the functions of a member of a delegation)

The commentary to article 82 was approved.

COMMENTARY TO ARTICLE 82 bis (Facilities for departure)

20. Mr. ROSENNE proposed that a commentary to article 82 bis should be inserted, on the lines of paragraph 2 of the commentary to article 48. The commentary would read: "The Commission considered the possibility of including in the draft, as a counterpart to article 82 bis, a provision on the obligation of the host State to allow members of delegations to enter its territory to take up their posts. However, in view of the decision taken

at the twenty-first session,¹ the Commission postponed its decision on the matter, in the context of Part IV, until the second reading of the draft".

It was so agreed.

The commentary to article 82 bis proposed by Mr. Rosenne was approved.

COMMENTARY TO ARTICLE 83 (Protection of premises and archives)

The commentary to article 83 was approved.

Chapter IV

STATE RESPONSIBILITY

21. The CHAIRMAN invited the Commission to consider chapter IV of the draft report (A/CN.4/L.159).

22. Mr. AGO said that, throughout the English text, the expression "internationally wrongful act" would be used to render the French "*acte illicite international*".

Paragraphs 1 and 2

Paragraphs 1 and 2 were approved.

Paragraph 3

23. Mr. KEARNEY suggested that the last three sentences of sub-paragraph (c), beginning with the words "Consideration of the various kinds of obligation . . ." should be deleted.

24. Mr. AGO said that the passage was useful because it reiterated essential points of agreement.

25. The CHAIRMAN said that if there were no further comments he would assume that the Commission agreed to retain the passage.

It was so agreed.

26. Mr. ROSENNE said that sub-paragraph (a) needed to be expanded. It should say that the Commission intended to confine its study to the responsibility of States towards States. It was necessary to exclude not only the responsibility of organizations towards States, but also that of States towards organizations.

27. Mr. AGO said it was only for the time being that the Commission had excluded from its study the responsibility of subjects of international law other than States. To restrict the topic of State responsibility as Mr. Rosenne proposed would be to prejudge the Commission's future position on the possibility of a State which had committed an internationally wrongful act against another State being responsible, for example, to the United Nations.

28. Mr. ROSENNE said he had very strong reservations on the idea just suggested by Mr. Ago. The Commission could not consider the responsibility of States

towards organizations without also studying the responsibility of organizations towards States.

29. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve paragraph 3 without change.

Paragraph 3 was approved.

Paragraph 4

Paragraph 4 was approved.

Paragraph 5

30. Mr. NAGENDRA SINGH proposed that, in the third sentence, the word "actual" before the word "principle" should be deleted.

It was so agreed.

Paragraph 5, as amended, was approved.

Paragraphs 6 and 7

Paragraphs 6 and 7 were approved.

Paragraph 8

31. Mr. ROSENNE proposed that the last two sentences should become a separate paragraph.

It was so agreed.

Paragraph 8 was approved with that change.

Paragraph 9

32. Mr. REUTER proposed that, in the last sentence of paragraph 9, the words "It is accepted that" should be deleted, and the word "possibly" should be replaced by the word "perhaps". That was only a drafting amendment. The Commission had not ruled out the possibility of responsibility towards the international community as a whole, but it had not discussed that difficult subject, which it might study in detail later.

It was so agreed.

Paragraph 9, as amended, was approved.

Paragraph 10

Paragraph 10 was approved.

Paragraph 11

33. Mr. USHAKOV, noting that the first sentence of paragraph 11 stated the opinion of the majority of the Commission, requested that it should also mention the contrary opinion held by some members. He proposed that the following sentence be added at the end of paragraph 11: "However, some members expressed doubt about the existence of this concept in international law".

It was so agreed.

Paragraph 11, as amended, was approved.

Paragraph 12

34. Mr. ROSENNE made the following proposals: in the second sentence, the concluding words "the idea of an omission as well as of an act" should be replaced by the words "the idea of an act of commission as well as

¹ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 9*, p. 17, commentary to article 48, para. (2).

an act of omission"; in the penultimate sentence, the concluding words "that would be employed" should be replaced by "the Commission intends to employ"; in the last sentence, the words "were" and "was" should be replaced by "are" and "is" respectively and the words "it would be possible" should be replaced by "it will then be possible".

It was so agreed.

Paragraph 12, as amended, was approved.

Paragraph 13

35. The CHAIRMAN proposed that, in the first sentence, the word "both" should be introduced before the words "a subjective element".

It was so agreed.

36. Mr. REUTER proposed that the fourth sentence of the paragraph should be replaced by the following: "This will obviate the ambiguities inherent in the notions of imputation and imputability, which can have entirely different connotations in certain internal systems of criminal law".

It was so agreed.

37. Mr. ROSENNE proposed that, throughout the paragraph, the words "municipal law" should be replaced by "internal law".

It was so agreed.

Paragraph 13, as amended, was approved.

Paragraph 14

38. The CHAIRMAN proposed that paragraph 14 should be split up into three paragraphs: the first would consist of the first two sentences, the second of the third, fourth and fifth sentences and the third of the last two sentences.

It was so agreed.

39. Mr. ROSENNE proposed that, at the end of the second sentence, the words "under international law" should be introduced after the words "ought not to have done".

It was so agreed.

40. Mr. KEARNEY proposed that the opening words of the second sentence "It is this expression" should be replaced by the words "This idea".

It was so agreed.

Paragraph 14, as amended, was approved.

Paragraph 15

41. Mr. ROSENNE proposed that, in the last part of the second sentence, the words "was part and parcel of the law of aliens which" should be replaced by the words "might be part of the rule which", and that the word "express" before "obligation" should be deleted. In the third sentence, the words "the prerequisites for the affirmation that an internationally wrongful act has been committed" should be replaced by "a condition which is

indispensable for establishing the existence of an internationally wrongful act".

It was so agreed.

42. Mr. KEARNEY said that the meaning of the expression "subjective right", which was used in the third sentence, was not clear to him.

43. Mr. AGO replied that the word "subjective" was unnecessary in the English text, since the French expression "*un droit subjectif*" could be adequately rendered in English as "a right".

44. Mr. KEARNEY proposed that the word "subjective" be deleted from the English text.

45. He also proposed that in the last sentence the words "*inter alia*" should be inserted before the words "for the purpose" and that the concluding words "the existence of an internationally wrongful act" should be replaced by "the determination that an internationally wrongful act has been committed".

It was so agreed.

Paragraph 15, as amended, was approved.

Paragraph 16

46. The CHAIRMAN proposed that, in the first sentence, the word "entirely" before "agreed" should be deleted.

It was so agreed.

47. Mr. KEARNEY proposed that, in the second sentence, the words "a material rather than a legal capacity" should be replaced by "a physical ability rather than a legal capacity".

It was so agreed.

48. Mr. YASSEEN proposed that, in the third sentence of the French text, the words "*ont été perplexes quant à l'opportunité*" should be replaced by the words "*ont contesté l'opportunité*".

It was so agreed.

49. Mr. ROSENNE proposed that the last sentence, with its reference to the new concept of the "delictual capacity" of States, should be dropped.

50. Mr. AGO proposed that the words "what is termed the 'delictual capacity' of States" should be replaced by the words "the notion referred to here".

It was so agreed.

Paragraph 16, as amended, was approved.

Paragraph 17

51. Mr. ROSENNE proposed that, in the first sentence, the word "urged" should be replaced by "encouraged" and the concluding words "his work on the draft" by "the preparation of the draft articles".

It was so agreed.

Paragraph 17, as amended, was approved.

Chapter IV, as amended, was approved.

The meeting rose at 12.45 p.m.

1085th MEETING

Thursday, 9 July 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

**Draft report of the Commission on the work
of its twenty-second session**

(A/CN.4/L.156-160 and Addenda)

(continued)

Chapter III

SUCCESSION OF STATES AND GOVERNMENTS

(resumed from the 1083rd meeting)

B. Succession in respect of treaties

1. The CHAIRMAN invited the Commission to consider chapter III, section B, of the draft report (paragraphs 10-36) (A/CN.4/L.158/Add.1).
2. Mr. TABIBI said that the presentation of section B departed from the usual form of the Commission's reports on the work of its sessions. Those reports, which were prepared for submission to the General Assembly, were always drafted in such a way as to give due weight to the views of all members of the Commission. It seemed to him that, in the section under consideration, too large a place had been given to the views of the Special Rapporteur on succession of States in respect of treaties. Those views occupied the opening twelve paragraphs; the next twelve paragraphs set out the opinions of the members of the Commission and their comments on the reports, while the last four paragraphs summarized the discussion. In his view, the order should be the reverse and the views and comments of members of the Commission should be given before those of the Special Rapporteur.
3. The crucial problem involved in the topic of succession in respect of treaties related to article 6 of the draft. In that connexion, the draft report drawn up by the Special Rapporteur contained at least four references to the question of treaties dealing with frontiers, which were presented as an exception to the rule set out in article 6. On the other hand, the very important principle of self-determination was mentioned only once.
4. Sir Humphrey WALDOCK said that he had been asked to prepare the material for section B of chapter III in order to help the General Rapporteur. It had been intimated to him that it was desirable for that section to

contain a fairly full description of the manner in which the topic had been discussed in the Commission. For that purpose, he had found it necessary to begin by giving the substance of his own report and indicating the main points on which he had asked the members of the Commission to comment. That part of the report could, of course, only take the form of a statement of his own views; otherwise, readers might assume that those views were being attributed to the Commission itself. In the latter part of the section, he had summarized as fully as possible the points raised by members.

5. Where treaties dealing with frontiers were concerned, the references in the report were not to those treaties exclusively; they related to "dispositive", "territorial" or "localized" treaties in general, a category which included various types of treaties establishing régimes and not merely frontier treaties. He himself had had more hesitation than some members with regard to the treatment of "dispositive" treaties and he had therefore been impressed by the fact that many members had spoken of those treaties as an exception not only to article 6 but to other articles as well; he had therefore concluded that it was necessary for him to take that clear indication of the opinion of members into account when he dealt with that category of treaties. He could assure Mr. Tabibi that there had been no intention of over-emphasizing the question of frontier treaties, but equally it would be wrong to disregard the clear trend of opinion in the Commission, which was an objective fact.

6. Mr. ROSENNE said that, although he would not go so far as Mr. Tabibi, he did not think that section B did full justice either to the Special Rapporteur's report or to the debate which had taken place on it. One very important feature of the Special Rapporteur's report had been the meticulous attention paid to the resolutions adopted by the International Law Association at its fifty-third session at Buenos Aires in 1968. Many members of the Commission had commented on those resolutions during the discussion and had expressed the view that they did not constitute an appropriate framework for the Commission's work. He suggested that it might be advisable to mention the fact that the Commission had agreed to depart from the approach adopted by the International Law Association and to do so in the present introductory report rather than in connexion with the individual articles at a later stage.

7. Mr. BARTOŠ (Rapporteur) said that the draft report was his responsibility as General Rapporteur. The report was a summary of the discussion and obviously could not go into every detail. Since, however, it was only a draft, every member of the Commission was entitled to propose amendments if he considered that a point had been omitted or inadequately reported.

8. Mr. REUTER said he had a number of comments on minor translation problems. In order to save time, he proposed to transmit them direct to the Secretariat, which could take them into account in preparing the final text.

9. The CHAIRMAN invited the Commission to consider the section paragraph by paragraph.

Paragraph 10

10. Mr. USHAKOV suggested that it would be useful to include a note explaining what was meant by the term “new States” and, in particular, whether it meant decolonized States.

11. Mr. AGO said he thought that the term could not be confined to States formed as a result of decolonization. He asked the Special Rapporteur for his opinion on that point.

12. Sir Humphrey WALDOCK said that he would prepare a footnote explaining what was meant by “new State”. That point was covered both in his report and in a later paragraph of section B. The term was used as a term of art to denote the emergence of a new State in a pure form, namely, the separation of a piece of territory, whether by way of decolonization or otherwise. The Commission would review the matter when it had considered all the particular forms of succession, including federations and unions.

13. Mr. TABIBI said he had misgivings regarding the phrase “territory passing from one State to another” in the second sentence of paragraph 10, since it might give the impression that the intention was to legalize acts of occupation. He also had misgivings regarding the phrase “the so-called moving treaty-frontier principle” in the same sentence.

14. Sir Humphrey WALDOCK said that the passage related to cases where a piece of territory moved from one treaty régime to another. It was the “treaty-frontier” that moved, as was indicated by the hyphen between the words “treaty” and “frontier”. The reference to territory “passing from one State to another” was quite neutral. Territory could pass from one State to another as a result, for example, of a judicial decision relating to frontiers.

15. Mr. AGO emphasized that only cases of lawful passing of territory were envisaged in that context. There were many such cases, one example being the reciprocal ceding of territory by France and Switzerland at the time of the improvements to Cointrin airport at Geneva.

16. Mr. ROSENNE proposed that the words “the so-called moving treaty-frontier principle” within brackets in the second sentence should be replaced by “the so-called principle of moving treaty-frontiers”.

It was so agreed.

Paragraph 10, as amended, was approved.

Paragraph 11

17. Mr. TABIBI proposed that the words “He further stated that” should be inserted at the beginning of the third sentence so that the contents were clearly attributed to the Special Rapporteur.

It was so agreed.

Paragraph 11, as amended, was approved.

Paragraph 12

18. Mr. ROSENNE proposed that the words “municipal law” should be replaced by “internal law” in paragraph 12 and throughout the rest of section B.

It was so agreed.

19. Mr. USHAKOV said he thought that the expression “*la succession d'un Etat à un autre dans la souveraineté*” in the French text was incorrect. He therefore proposed that the word “*succession*” should be replaced by “*substitution*” in that text.

20. Sir Humphrey WALDOCK pointed out that the word used in the English version of that sentence was “replacement”, which should also be used in the following sentence.

Paragraph 12, as amended, was approved.

Paragraphs 13 to 16

Paragraphs 13 to 16 were approved.

Paragraph 17.

21. Sir Humphrey WALDOCK said that the words “was not bound” in the second sentence should be replaced by “was not to be considered as bound”.

22. Mr. TABIBI suggested that the latter part of the third sentence should be dropped. The Commission had agreed on the fundamental rule contained in article 6; the question of possible exceptions to that rule was being unduly emphasized by repetition in section B.

23. Sir Humphrey WALDOCK said he thought it was essential to retain the third sentence in full. The question of “dispositive” treaties was one which was very much discussed and it was not possible to avoid referring to it. In any case, the language he had used was particularly cautious. Many members had stressed the importance they attached to the matter and had laid much greater weight on it than he had done in his report.

24. Mr. ROSENNE said he was concerned at the misunderstanding which had already arisen and which was likely to be even more serious outside the Commission, in particular in the Sixth Committee. He accordingly proposed that section B should be divided into two subsections with separate sub-titles. The first, covering paragraphs 10 to 21, would be entitled “Summary of proposals by the Special Rapporteur” and the second, covering paragraphs 22 to 36, would be entitled “Summary of the Commission’s debate”.

25. Sir Humphrey WALDOCK said that he welcomed that proposal.

Mr. Rosenne’s proposal was adopted.

26. Mr. REUTER proposed that the word “etc.” should be added after the examples of treaties at the end of the third sentence and that the phrase “*les traités dits ‘de disposition’, ‘territoriaux’ ou ‘localisés’*” in the French text should be amended to read “*les traités ayant un caractère ‘dispositif’ ou des effets territoriaux ou localisés, etc. . .*”. It was necessary to make it clear that the list was not limitative. Moreover, since the term “*traité*”

dispositif" was unknown in French, it was preferable to put the word "*dispositif*" between inverted commas even in the formulation he had proposed.

The amendments proposed by Mr. Reuter were adopted.

Paragraph 17, as amended, was approved.

Paragraph 18

27. Mr. THIAM pointed out that the phrase in the sixth sentence of the French text should no doubt have read "*son intention de devenir partie*".

28. Mr. TESLENKO (Deputy Secretary to the Commission) said that the exact translation of the word "will" in the English text was "*volonté*".

29. The CHAIRMAN suggested that the words "*sa volonté*" should be used in the French text.

It was so agreed.

Paragraph 18 was approved with the amendment to the French text suggested by the Chairman.

Paragraph 19

30. Mr. REUTER said the reference to a new State's right to notify its succession in fact meant its right to notify its intention to exercise the faculty just described. The expression "notify its succession" was therefore not very appropriate.

31. Mr. BARTOŠ (Rapporteur) pointed out that it corresponded to the practice. The expression "exercise a faculty" would raise problems, since the very fact of succession was sometimes contested by other States.

32. Sir Humphrey WALDOCK said that his report contained a definition of "notification of succession", an expression which was used in the practice of the Secretary-General. If there were any objection to the words "notify its succession", they could be replaced by a formula such as "notify that it considers itself a party".

33. Mr. REUTER proposed that the word "succession" should be placed between inverted commas.

It was so agreed.

Paragraph 19, as amended, was approved.

Paragraph 20

34. Mr. TABIBI proposed that a reference should be included to the resolutions which had been adopted by the International Law Association at its fifty-third session at Buenos Aires in 1968 and of which some members had expressed approval.

35. Sir Humphrey WALDOCK suggested that since those resolutions were very long, a reference should be included to the passage of his own report in which they were reproduced.

It was so agreed.

Paragraph 20, as amended, was approved.

Paragraph 21

36. Mr. ROSENNE proposed that the words "having regard to the short time available for the consideration of

his report" in the first sentence should be replaced by the words "at this stage".

It was so agreed.

Paragraph 21, as amended, was approved.

Paragraph 22

37. Mr. REUTER proposed that the word "nineteen" before the word "members" at the beginning of the paragraph be omitted.

It was so agreed.

Paragraph 22, as amended, was approved.

Paragraph 23

38. Mr. AGO asked whether the particular forms of succession mentioned were those resulting from the establishment or from the cessation of the régime in question. In his view it was the latter situation which provided an example of succession.

39. Sir Humphrey WALDOCK said he would prefer to leave such matters open until the following year.

40. Mr. AGO said he would nevertheless like to emphasize that the use of the word "competence" in that context was questionable. In the case of protectorates and similar situations, some writers considered that the competence to conclude treaties passed to the protector State. Others believed, however, that there was only an obligation on the part of the protected State not to conclude treaties itself but to allow the protector State to act as its representative.

41. Mr. USHAKOV proposed that the words "one or two" before the word "members" in the last sentence of the paragraph should be replaced by the word "certain". It was not customary to specify the number of members expressing a particular point of view.

It was so agreed.

Paragraph 23, as amended, was approved.

Paragraph 24

42. Mr. AGO proposed that the words "competence to apply them" in the first sentence should be replaced by the words "practical possibility to apply them".

It was so agreed.

43. Mr. ROSENNE said that a problem of concordance between the English and French texts arose in that connexion. In the text of the articles themselves, where the English original used "competence" the term "*capacité*" was used in French.

44. Mr. AGO proposed that the word "competence" should be translated as "*pouvoir*" throughout the French text of section B.

It was so agreed.

Paragraph 24, as amended, was approved.

Paragraph 25

45. Mr. CASTRÉN said he had no objection to the report occasionally stating that only one member of the

Commission had expressed a certain opinion, if that had indeed been the case. That was current practice in the United Nations. In the last sentence of paragraph 25, however, the words "one or two" should be replaced by "certain", as at least two members of the Commission had expressed the view mentioned.

It was so agreed.

46. Mr. USHAKOV proposed that the phrase "as well as to the case in which several States arose from a single predecessor State" should be added to the end of the last sentence.

It was so agreed.

Paragraph 25, as amended, was approved.

Paragraph 26

Paragraph 26 was approved.

Paragraph 27

47. Sir Humphrey WALDOCK pointed out that the words "in State practice" in the last sentence should read "with State practice".

Paragraph 27 was approved.

Paragraph 28

48. Sir Humphrey WALDOCK suggested that, to meet the susceptibilities expressed by Mr. Tabibi earlier in the meeting, the last sentence should read: "The Commission, however, recognized that the whole question of so-called 'dispositive', 'territorial' or 'localized' treaties would fall to be examined by the Special Rapporteur in his next report."

It was so agreed.

Paragraph 28, as amended, was approved.

Paragraph 29

49. Mr. ROSENNE proposed that the second and third sentences, which described his own point of view, should be replaced by the following text:

"One member doubted whether a proper construction of the modern practice necessarily led to the conclusion that a new State had the right to consider itself a party to the multilateral treaties in question without the consent, express or implied, of the other parties to the treaty. He understood that practice as establishing that the formalities and temporal effect of participation laid down in the treaty could be supplemented by the new procedure of succession whenever the new State would be entitled to become a party to the treaty under its participation clause, and that participation by succession would have retroactive effect to the date of independence. That interpretation of the practice, he considered, would respect the principle of the autonomy of the parties. It would not attribute to depositaries larger powers than they normally possessed and it was, moreover, in conformity with the Vienna Convention on the Law of Treaties, particularly article 11, and, like the Vienna Convention itself, rendered un-

necessary a distinction of substance between bilateral and multilateral treaties."

It was so agreed.

50. The CHAIRMAN suggested that the words "Two members" at the beginning of the fourth sentence should be replaced by "Two other members".

It was so agreed.

Paragraph 29, as amended, was approved.

Paragraph 30

51. The CHAIRMAN suggested that the words "One or two members" at the beginning of the first sentence should be replaced by "Certain members".

It was so agreed.

Paragraph 30, as amended, was approved.

Paragraph 31

52. Sir Humphrey WALDOCK suggested that the words "to make it clear" in the second sentence of the English text should be replaced by "to make clear".

It was so agreed.

Paragraph 31, as amended, was approved.

Paragraph 32

53. Mr. ROSENNE said that, since the terms "one member" and "another member" had been used earlier in the report to introduce dissenting views, it would be preferable not to use them in the third and fourth sentences, since the views reported did not contradict those of the Special Rapporteur or of the Commission as a whole.

54. Sir Humphrey WALDOCK said that it would be possible to refer instead to the first point and the second point. He suggested that the Commission should allow him to recast the paragraph accordingly.

It was so agreed.

Paragraph 32 was approved on that understanding.

Paragraph 33

55. Sir Humphrey WALDOCK suggested that, in order to avoid any ambiguity, the words "deal with them" in the third sentence should be replaced by "examine the comments of members".

It was so agreed.

Paragraph 33, as amended, was approved.

Paragraph 34

Paragraph 34 was approved.

Paragraph 35

56. Sir Humphrey WALDOCK said that although, in his view, the last sentence described the situation correctly, it was not in fact necessary. In deference to the susceptibilities of Mr. Tabibi, he suggested that it could be deleted.

It was so agreed.

Paragraph 35, as amended, was approved.

Paragraph 36

Paragraph 36 was approved.

Chapter III as a whole, as amended, was approved.

*Chapter V*OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION
(resumed from the 1083rd meeting)

57. The CHAIRMAN invited the Commission to consider chapter V of its draft report (A/CN.4/L.160).

A. *Celebration of the twenty-fifth anniversary of the United Nations**Paragraph 1*

58. The CHAIRMAN said that when the Commission had last discussed the question of submitting a draft resolution to the General Assembly in connexion with the twenty-fifth anniversary of the United Nations,¹ it had decided to set up a small drafting committee to prepare an agreed text for the Commission's consideration. That text formed paragraph 1 of section A of document A/CN.4/L.160. It read:

"The International Law Commission,

"Recalling that under Article 13, paragraph 1 a, of the Charter of the United Nations the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification and that the Statute of the International Law Commission has been adopted in pursuance of that task of the General Assembly,

"Recalling further that a series of codification conferences has been convened by the General Assembly and that, on the basis of the Commission's drafts, a number of codification conventions have been adopted by those conferences,

"Convinced that conventions dealing with the codification and progressive development of international law, the object and purpose of which are of interest to the international community as a whole, should obtain the widest and, if possible, universal participation,

"Expresses the hope that the General Assembly appeal to States to expedite the process of ratification of or accession to the Vienna Convention on the Law of Treaties of 1969, the Convention on Special Missions of 1969 and other codification conventions previously adopted on the initiative of the United Nations, and take other appropriate measures in order to complete the process of codification and place international law upon the widest and most secure foundations."

59. Although the text was intended to represent a compromise solution, there were still strongly opposing views

with regard to the third paragraph of the preamble. Some members wished the words "if possible" to be deleted, while others would be unable to subscribe to the draft resolution unless those words were retained. Regrettable though it would be to abandon the idea of a draft resolution, he thought that if the disagreement could not be resolved, that might perhaps be the best course.

60. Mr. ROSENNE said that he too thought that if the Commission was not in a position to adopt a resolution without opposition, there was little point in its adopting one at all. He therefore appealed to the members of the Commission to facilitate the preparation of a text that could be proposed by the Chairman and adopted without a vote.

61. Sir Humphrey WALDOCK said that even if the Commission could not agree on the present text, he saw no reason why it should abandon the idea of making some statement on the question of expediting the ratification of the codification conventions it had prepared, since that was a matter on which there was no disagreement among its members. Such a statement might perhaps take a less ambitious form than that of a draft resolution.

62. Mr. USHAKOV said that Sir Humphrey Waldock's proposal was unacceptable to him.

63. Mr. REUTER said he was forced to conclude with regret that, in the circumstances, the wisest solution was to dispense with the draft resolution.

64. Mr. AGO said he agreed with Sir Humphrey Waldock that it would be unfortunate if the Commission did not express its views on the ratification of the codification conventions. As the summary records would show that it had considered adopting a resolution on the subject, it would seem all the more strange that it had been unable to agree on expressing the hope that the conventions prepared on the basis of its work would be ratified.

65. Mr. USTOR said that, while he sympathized with the views of Sir Humphrey Waldock and Mr. Ago, he and other members of the Commission felt very strongly that if the Commission adopted a resolution referring to the ratification of the Vienna Convention on the Law of Treaties, it should affirm the principle of universality which had been accepted in that Convention.

66. Mr. YASSEEN said he had always supported the principle of universality, in the belief that it was logical and natural for a text intended as a basis for international rules to be addressed to the entire international community. He was therefore prepared to support any draft resolution which enunciated that principle unconditionally. If, however, the Commission could not reach agreement on that concept, he would have no difficulty in supporting a draft resolution requesting that the ratification of codification conventions should be expedited and that such conventions should be open to the widest possible participation.

67. Mr. USHAKOV said that while Mr. Ago found it regrettable that the Commission could not agree to recommend the ratification of codification conventions, he personally found it even more regrettable that the

¹ See 1083rd meeting, paras. 63-92.

Commission's members were not unanimously willing to proclaim the principle of universality in regard to the ratification of those conventions.

68. Mr. CASTRÉN said he was in favour of the principle of universality in the case of conventions which concerned all States. He was therefore prepared to accept the draft resolution with or without the words "if possible". Those words might perhaps be replaced by the word "ultimately". Otherwise he believed, like Sir Humphrey Waldock, Mr. Ago and Mr. Yasseen, that a draft resolution confined to recommending speedier ratification of or accession to codification conventions would be preferable.

69. Mr. THIAM said he thought that some members objected to the principle of universality in that context for purely adventitious reasons and that the words "if possible" met the difficulty. It would, however, be best not to take the matter further if the Commission could not agree on an alternative solution.

70. Mr. KEARNEY said that he had agreed to the present wording of the third paragraph of the preamble with considerable reluctance, because, in his view, the problem need never have been introduced, since operative paragraph 17 of part A of General Assembly resolution 2499 (XXIV) referred specifically to Member States of the United Nations. He had agreed to accept the present wording as a compromise solution, and he felt that, if the Commission went any further, it would be taking a political stand that was not consonant with its role. Consequently, if agreement could not be reached on the basis of the present text, it would be better to abandon the idea of a draft resolution altogether.

71. Mr. TABIBI said that, since all members of the Commission agreed on the need to expedite the process of ratification, there was no need to abandon the whole idea of a draft resolution, even if unanimity could not be reached on the present wording. There was no reason why the Commission should not take a vote on the draft resolution; in the early days of its existence, it had often taken votes, even on individual articles. The position of certain members could then be recorded in a footnote.

72. Mr. TSURUOKA said he was afraid that a draft resolution not adopted unanimously by the Commission would carry little weight with the General Assembly as a whole. It would therefore be better to drop the idea if unanimity could not be achieved.

73. Sir Humphrey WALDOCK said that he personally had no difficulty with regard to the principle of universality. The problem was not the principle but its application. He was, however, extremely concerned that, for the first time in his experience, the Commission was unable to reach agreement on a question on which it was in fact unanimous, simply because an extraneous question on which there was disagreement had been introduced into the discussion.

74. The CHAIRMAN asked whether the Commission would prefer to postpone its decision on the question

until the following meeting, in the hope that a compromise solution could be reached.

75. Mr. USHAKOV said he was in favour of dispensing with the draft resolution.

76. Mr. CASTRÉN said that would be unfortunate. He would suggest rather that the third preambular paragraph should be deleted, since the principle of universality was enunciated, although less directly, at the end of the operative part.

77. Mr. USHAKOV said he could not agree to that suggestion. He would have to vote against the draft resolution if it was put to the vote with such an amendment.

78. Mr. USTOR said he agreed with Mr. Tsuruoka that there was little point in adopting the draft resolution if the Commission could not do so unanimously. He deeply regretted that there was apparently no way of reconciling the two extreme positions. In his view, if the Commission was agreed on the principle of universality, it should be possible to express it in a draft resolution, making it clear that the agreement related to the principle alone. If the Commission was unable to do so, it would be preferable not to adopt a resolution on a majority basis.

79. The CHAIRMAN pointed out that some response should be made to the letter from the Secretary-General (A/CN.4/231), drawing the Commission's attention to General Assembly resolution 2499A (XXIV) on the celebration of the twenty-fifth anniversary of the United Nations.

80. Mr. USHAKOV said that he did not regard a request to the General Assembly to appeal to States to expedite the process of ratification as an appropriate response to General Assembly resolution 2499A (XXIV). That resolution was also concerned with acceleration of the work of codification, and an appropriate reply from the Commission might be to inform the General Assembly that the Commission would try to finish certain items of its work.

81. Mr. AGO said it would be better to have no resolution at all than one adopted on a majority basis. He would, however, like to propose one last compromise formula that might prove acceptable to both sides, namely, that the third preambular paragraph should conclude with the words "should obtain the widest participation" and that the operative part of the draft resolution should conclude with the words "and place international law upon the most secure and universal foundations."

82. Mr. YASSEEN said that that suggestion warranted further consideration.

83. Mr. USHAKOV said that he was unable to accept Mr. Ago's suggestion. He was, however, quite prepared to vote on the text of the draft resolution.

84. Sir Humphrey WALDOCK said he agreed with Mr. Ago that a resolution adopted on the basis of a divided vote would serve no useful purpose.

85. The CHAIRMAN said that, regrettably, it would seem that the only course was to drop the whole question of the draft resolution.

Chapter II

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (resumed from the previous meeting)

86. The CHAIRMAN invited the Commission to resume consideration of chapter II of the draft report.

COMMENTARIES TO ARTICLES 0 AND 00

87. Mr. KEARNEY (Chairman of the Drafting Committee) reminded the Commission of Mr. Rosenne's proposal¹ that the relationship between the different series of definitions should be clarified, and introduced the following new versions of paragraph (1) of the commentary to article 0 and of paragraph (1) of the commentary to article 00:

Article 0 Commentary

(1) Since the article on the use of terms previously adopted by the Commission—article 1—cannot be applied to part III of the draft without modification, and certain additional terms used in this part require clarification, the Commission has placed at the beginning of the present part article 0 which states the meanings with which terms are used therein. Those terms in article 1 which are not repeated in article 0, such as "international organizations", are used in the same sense when they appear in part III. Any exceptions are noted in the commentary. Being aware of a certain amount of overlapping with article 1, the Commission will examine at the second reading whether and to what extent that overlapping can be eliminated. The Commission will also review what adjustments may be required in other articles in part I, such as article 2, in order to clarify their applicability to part III.

Article 00 Commentary

(1) Considerations similar to those stated in paragraph (1) of the commentary to article 0 above apply in the case of article 00. The Commission has, therefore, placed at the beginning of the present part article 00 which states the meanings with which terms are used therein. As is the case with article 0, there is a certain amount of overlapping with article 1. The Commission will also examine at the second reading whether and to what extent that overlapping can be eliminated.

88. Mr. USHAKOV said that he agreed with the proposed new versions. He would, however, like to propose that, in the third sentence of the commentary to article 0, the words "a certain amount of overlapping" should be replaced by "possible overlapping" and that the same change should be made in the third sentence of the commentary to article 00.

It was so agreed.

89. Mr. ROSENNE thanked the Chairman of the Drafting Committee and the Secretariat for meeting his

objections to the earlier versions. He proposed that the word "therein" at the end of the first sentence of the commentary to article 0 should be replaced by the words "in part III", and that the word "therein" at the end of the second sentence of the commentary to article 00 should be replaced by the words "in part IV".

It was so agreed.

The new versions of paragraph (1) of the commentary to article 0 and of paragraph (1) of the commentary to article 00, as amended, were approved.

The meeting rose at 12.55 p.m.

1086th MEETING

Friday, 10 July 1970, at 9.40 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-second session

(A/CN.4/L.156-160 and Addenda)
(continued)

Chapter V

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION (resumed from the previous meeting)

1. The CHAIRMAN invited the Commission to continue consideration of chapter V of its draft report (A/CN.4/L.160), beginning with paragraph 3 (section B).¹

B. *The question of treaties concluded between States and international organizations or between two or more international organizations*

Paragraph 3

Paragraph 3 was approved.

Paragraph 4

2. The CHAIRMAN informed the Commission that Mr. Nagendra Singh had indicated his desire to be a

¹ See 1082nd meeting, paras. 76 and 89.

¹ For the discussion of section A, see below, paras. 26-30.

member of the Sub-Committee and suggested that his name should be included in the list of members.

It was so agreed.

Paragraph 4, as amended, was approved.

Section B, as amended, was approved.

C. The most-favoured-nation clause

Paragraph 5

Paragraph 5 was approved.

Section C was approved.

D. Organization of future work

Paragraph 6

3. Mr. KEARNEY proposed that the words "before the end of the term of office of its present membership" in the first sentence should be replaced by "in 1971". He further proposed that the second sentence should begin with the words "In that session, it intends to complete the second reading".

It was so agreed.

Paragraph 6, as amended, was approved.

Section D, as amended, was approved.

E. Review of the Commission's programme of work

Paragraph 7

Paragraph 7 was approved.

Section E was approved.

F. Preparation of a new edition of the "Summary of the practice of the Secretary-General as depositary of multilateral agreements"

Paragraph 8

4. Mr. ROSENNE suggested that the word "publication" should be replaced by the word "document". He also wished it to be placed on record that the document in question should be included in the Commission's documentation.

It was so agreed.

Paragraph 8, as amended, was approved.

Section F, as amended, was approved.

G. Relations with the International Court of Justice

Paragraph 9

Paragraph 9 was approved.

Section G was approved.

H. Co-operation with other bodies

Paragraph 10

Paragraph 10 was approved.

Paragraph 11

5. Mr. CASTRÉN suggested that the word "Korea" in the seventh sentence should be replaced by "the Republic of Korea".

6. Mr. USHAKOV said that the Republic of Korea had been admitted as an associate member only. He suggested that the seventh sentence should read: "Thus, at the eleventh session, Nigeria had been admitted as a full member and the Republic of Korea as an associate member."

It was so agreed.

Paragraph 11, as amended, was approved.

Paragraph 12

Paragraph 12 was approved.

Paragraph 13

7. Mr. CASTRÉN requested that Mr. Golsong's official title be inserted in the first sentence.

It was so agreed.

8. Mr. ROSENNE proposed that the word "consideration" in the second sentence should be replaced by "information".

It was so agreed.

Paragraph 13, as amended, was approved.

Paragraph 14

9. Mr. ROSENNE requested the Secretariat to obtain fuller particulars of the treaty referred to in the fourth sentence and amend that sentence accordingly.

It was so agreed.

On that understanding, paragraph 14 was approved.

Paragraph 15

10. Mr. ROSENNE, referring to paragraphs 12, 15 and 20, said he wished to reiterate that, in his view, it was essential for the Commission to be represented at the three sessions in question by its Chairman or, if that was not possible, by another member of the Commission, who should submit a report on those sessions at the Commission's next session.

Paragraph 15 was approved.

Paragraphs 16 to 20

Paragraphs 16 to 20 were approved.

Section H was approved.

I. Attendance at the 54th Conference of the International Law Association

Paragraph 21

11. Mr. TESLENKO (Deputy Secretary to the Commission) informed the Commission that the financial implications of a stay of about one week at The Hague, including travel costs and *per diem*, were estimated at approximately \$250.

12. Mr. ROSENNE proposed that the paragraph be deleted. He was making that proposal on the basis of a decision which the Commission had taken in 1964.² On that occasion, the Commission had decided for various reasons, and in particular for financial reasons, that it did not seem possible to send a representative to a meeting of the International Law Association. It had been suggested, however, that Mr. Bartoš, who was attending the meeting in a personal capacity, should be asked to convey orally the Commission's best wishes for the success of the meeting of the International Law Association. He believed that the Commission should not change its policy without careful consideration of all implications, and that the correct course for the Commission to follow in the present instance was to ask Sir Humphrey Waldoek, if he was planning to attend the Conference of the International Law Association in a personal capacity, to convey the Commission's best wishes for the success of the Conference.

13. Mr. USHAKOV said he, too, thought that the paragraph should be deleted. The International Law Association was only one of many scientific organizations and the Commission could not maintain relations with them all. Moreover, several members of the Commission, including himself, attended the meetings of the International Law Association in their private capacity.

14. Mr. BARTOŠ agreed that the Commission should not treat the International Law Association differently from other legal bodies. He himself would be attending the Association's 54th Conference as a former President and present Vice-President.

15. Sir Humphrey WALDOCK said he agreed that paragraph 21 would create an undesirable precedent, having regard to the numerous bodies which might send a similar invitation to the Commission.

It was decided to delete section I.

J. Date and place of the twenty-third session

Paragraph 22

16. The CHAIRMAN announced that the tentative dates for the Commission's next session were 26 April to 30 July 1971.

Paragraph 22 was approved.

Section J was approved.

K. Representation at the twenty-fifth session of the General Assembly

Paragraph 23

Paragraph 23 was approved.

Section K was approved.

L. Seminar on International Law

Paragraph 24

17. Mr. ROSENNE said he wished to place on record his appreciation of the outstanding manner in which the director of the Seminar on International Law had carried out his task.

Paragraph 24 was approved.

Paragraph 25

18. Mr. CASTRÉN requested that Mr. Raton's exact title be inserted by the Secretariat.

It was so agreed.

Paragraph 25, as amended, was approved.

Paragraph 26

Paragraph 26 was approved.

Paragraph 27

19. Mr. ROSENNE suggested that the word "vital" in the second sentence should be replaced by "necessary" and that the final clause of that sentence should read "so as to ensure that the greatest benefit can be derived from their participation in the Seminar."

It was so agreed.

20. Mr. BARTOŠ suggested that the documentation should be made available to participants in the Seminar free of charge.

21. Mr. TESLENKO (Deputy Secretary to the Commission) said that the difficulty was that most of the Commission's *Yearbooks* were out of print. He suggested therefore that the words "free access to" should be inserted before the words "adequate documentation" in the second sentence.

It was so agreed.

Paragraph 27, as amended, was approved.

Paragraph 28

22. Mr. USTOR said that the corresponding paragraph in the Commission's previous report had referred specifically to Mr. Raton and suggested that the words "in particular to Mr. Raton" should be inserted after the word "appreciation".

It was so agreed.

23. Mr. CASTRÉN suggested that the second sentence should read: "The Commission recommended that seminars should continue to be held in conjunction with its sessions."

It was so agreed.

Paragraph 28, as amended, was approved.

Section L was approved.

M. Index of the Commission's documents

Paragraph 29

24. Mr. ROSENNE said he regarded the index as a reasonable innovation, although to his mind it still con-

² See *Yearbook of the International Law Commission, 1964*, vol. I, 772nd meeting, paras. 86-90.

tained some inaccuracies. He suggested that the Secretariat should examine the possibility of including the index in its final, accurate form in a volume of the *Yearbook* and of bringing out supplements for inclusion in the *Yearbook* every five years, to coincide with the new term of office of the Commission's members.

25. Mr. MOVCHAN (Secretary to the Commission) said that the matter had already been discussed with representatives of the United Nations Library and every effort would be made to comply with Mr. Rosenne's suggestion.

Paragraph 29 was approved.

Section M was approved.

A. Celebration of the twenty-fifth anniversary of the United Nations (continued)

26. The CHAIRMAN said that since, at the previous meeting, the Commission had not adopted the draft resolution reproduced in paragraph 1 of chapter V of the draft report, the concluding portion of that paragraph would have to be amended. One possibility was to combine it with paragraph 2. In any case, he would suggest that section D (Organization of future work) and section E (Review of the Commission's programme of work) should come immediately after section A.

27. Mr. ROSENNE suggested that paragraphs 1 and 2 should be kept separate. Paragraph 2 related to the comparatively secondary question of a new edition of the publication entitled *The Work of the International Law Commission*. Paragraph 1 should conclude with a statement about the Commission's contribution to the celebration of the twenty-fifth anniversary of the United Nations.

28. After a brief discussion in which Sir Humphrey WALDOCK, Mr. YASSEEN, Mr. KEARNEY, Mr. SETTE CÂMARA, Mr. ROSENNE, Mr. USHAKOV and the CHAIRMAN took part, Mr. AGO said it should be stated that the Commission had decided to associate itself with the celebration of the twenty-fifth anniversary in as constructive a manner as possible and, to that end, had decided to prolong its next session in order to complete its work on the codification and progressive development of the whole body of diplomatic and consular law, and to adopt for its future work a programme complying with the request made by the General Assembly in operative paragraph 18 of part A of its resolution 2499 (XXIV). He proposed that the meeting should be suspended so that a suitable text could be prepared.

It was so agreed.

The meeting was suspended at 10.30 a.m. and resumed at 11.05 a.m.

29. The CHAIRMAN announced that the informal discussions which had taken place during the suspension of the meeting had resulted in the following text for the concluding sentence of paragraph 1: "Wishing to asso-

ciate itself with this celebration in as constructive a manner as possible, the Commission completed its first reading of the set of draft articles on relations between States and international organizations so as to fulfil its task of codification and progressive development of the whole body of diplomatic and consular law. It also adopted a very intensive programme of work for its next session, as outlined below, having regard to the need to complete as early as possible the consideration of important drafts in accordance with paragraph 18 of the said resolution." Paragraph 2 would begin with the words: "The Commission further decided", the remainder of the text remaining unchanged. The present sections D and E would follow immediately after paragraph 2.

30. In the absence of any objection, he would take it that those changes were acceptable to the Commission.

It was so agreed.

Chapter V of the draft report as a whole, as amended, was approved.

The draft report of the Commission on the work of its twenty-second session as a whole, as amended, was adopted.

Relations between States and international organizations

[Item 2 of the agenda]

(resumed from the 1078th meeting)

31. The CHAIRMAN suggested that the Commission should ask the Secretariat to examine with regard to language and concordance the English, French, Spanish and Russian texts of the draft articles on representatives of States to international organizations, adopted at the twentieth, twenty-first and twenty-second sessions. To achieve the best results possible, that should be done with the assistance of the members of the language services who were already familiar with the draft articles. As a result of the examination, the Secretariat should submit its observations and suggestions in one or several working papers which would be circulated to the members of the Commission. An advance draft of those observations and suggestions should be given to the Special Rapporteur in time for the preparation of the report he would submit in 1971.

32. Those members who had been present at Vienna during the Conference on the Law of Treaties would no doubt remember that such working papers had been prepared by the Secretariat for the Drafting Committee and had proved most useful.

The Chairman's suggestion was adopted.

Closure of the session

33. Sir Humphrey WALDOCK said he wished to pay a tribute to the efficiency and courtesy with which the Chairman had conducted the Commission's proceedings and which had contributed to the successful completion of its work. He also wished to express his thanks to the other officers of the Commission, and in particular to the

first Vice-Chairman, who, as Chairman of the Drafting Committee, had been largely responsible for making possible the completion of the series of articles on relations between States and international organizations.

34. He congratulated the Commission on the election of its three new members and commended the Special Rapporteurs for their valuable work. Lastly, he thanked the members of the Secretariat, particularly the Secretary to the Commission, for their valuable assistance.

35. Mr. CASTAÑEDA, Mr. TSURUOKA, Mr. CASTRÉN, Mr. USHAKOV, Mr. ALCÍVAR, Mr. ROSENNE, Mr. TABIBI, Mr. THIAM, Mr. USTOR, Mr. YASSEEN, Mr. SETTE CÂMARA, Mr. REUTER, Mr. AGO, Mr. BARTOŠ and Mr. KEARNEY associated themselves with those tributes.

36. The CHAIRMAN thanked the members for their kind words. He expressed his gratitude to the other officers of the Commission and indeed to all its members for their co-operation, which had made it possible to complete the Commission's work. He expressed appreciation of the work of the Secretary to the Commission, the members of the Codification Division and the other members of the Secretariat who had assisted in the Commission's work.

37. He declared the twenty-second session of the International Law Commission closed.

The meeting rose at 12.45 p.m.

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