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CONTENTS

Chairman: Mr. Vratislav PĚCHOTA (Czechoslovakia).

Expression of sympathy

1. The CHAIRMAN on behalf of all the members of the Committee expressed sympathy to the Peruvian delegation in connexion with the recent earthquake in Peru.

2. Mr. ALCIVAR (Ecuador), on behalf of the Latin American delegations, asked the representative of Peru to convey their sympathy to his Government.

3. Mr. BELAUNDE (Peru) thanked the Chairman, the representative of Ecuador and all the members of the Committee for their expressions of sympathy for which the Peruvian Government and people would be very grateful.

AGENDA ITEM 84

Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session (continued) (A/6309 and Add.1, A/6348 and Corr.1, A/C.6/371, A/C.6/L.594/Rev.1, A/C.6/L.596 and Corr.1 and Add.1, A/C.6/L.597, A/C.6/L.598)

4. Mr. AL-ANBARI (Iraq) expressed his delegation's satisfaction at the organization in Geneva of a second session of the Seminar on International Law (see A/6309), which had served to strengthen the bonds at both the theoretical and the practical levels between the International Law Commission and students representing different cultures. He therefore supported the recommendation that further seminars of the kind should be held in conjunction with future sessions of the Commission. His delegation was pleased also that the Commission continued to co-operate with the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Inter-American Council of Jurists.

5. With regard to the organization of the Commission's future work, it would be desirable to carry forward as quickly as possible the work on succession of States and Governments and on State responsibility, for both questions were of immediate importance to the international community, as well as the work on relations between States and inter-governmental organizations. He hoped also that in 1967 the International Law Commission would be able to submit its draft articles on special missions.

6. The Commission's most significant contribution to the codification of international law and its progressive development was its draft articles on the law of treaties (see A/6309). They were of particular importance at a time when the international community had taken into its ranks new members to which the conclusion of a multilateral convention would offer an opportunity to participate directly in the formulation of the law of treaties.

7. His delegation believed in the existence of certain overriding rules which were essential to safeguard the interests of the international community. In that connexion, the Commission's draft articles 50 and 61 were particularly important because they codified existing principles that were vital to a harmonious international legal order. His delegation welcomed also articles 47, 48 and 49 on defective consent. It regretted, however, that the draft articles did not make it clear that economic and political pressures also constituted coercion and, as such, vitiated consent, inasmuch as they were currently as frequent and as dangerous as the threat or use of force. Another serious omission in the draft articles was the failure to deal with the major problem of participation in general multilateral treaties. His delegation shared the opinion expressed by the representatives of Czechoslovakia (906th meeting) and the United Arab Republic (911th meeting), among others, that any multilateral treaty, particularly where the codification and progressive development of international law were involved, should be open to all States, because otherwise not only international co-operation but the very objectives of the treaty in question would be endangered.

8. Nevertheless, the draft as a whole was a very good basis for consideration by the proposed diplomatic conference which should be able to remedy those deficiencies. So far as the organization of the conference was concerned (see A/C.6/371), his delegation considered it advisable to organize two sessions in order to avoid a long conference, but it would support any practical suggestions to ensure that the conference was a success.

9. Mr. LACHS (Poland) said that throughout its almost twenty years of existence the International Law Commission had assumed increasing importance in the United Nations, and even outside the Organization its influence on the theory and practice of law was being felt in many countries. Those members whose

term of office expired at the end of the current session had had the good fortune to bring to fruition the Commission's great task of drafting, for the first time since States had begun concluding agreements with each other, a set of rules governing the elaboration and execution of treaties (see A/6309). It would have been a unique enterprise even if it had sought only to solve the considerable technical difficulties that had arisen from the lack of uniformity in State practice in such matters, for example, as verification of credentials, signature, registration and publication. Whereas statesmen might regard a treaty as a means of attaining desired ends and stabilizing the results obtained and historians might regard it as documentary proof of the evolution of relations between given States, of their reciprocal rights and obligations, for the jurist a treaty was much more than all that: it was the very source of international law. The International Law Commission, therefore, could not have undertaken to codify the law of treaties without having meditated on the very foundations of contemporary international law. In so doing, the Commission had isolated a number of principles which were the pillars of its codification structure. They included the principle of the equality of States before the law and its corollary, the trend towards universality of treaties; the recognition of the ever-changing conditions of life and of the need to adapt the law to them and therefore to construe instruments concluded between States in a manner conducive to international co-operation; recognition of the existence of peremptory norms of general international law; and finally, the principle of good faith, on which all legal relationships were founded.

10. The principle of equality was evident in draft article 5 and its implications were evident in articles 25, 30, 33, 48 and 49. It was reflected in the statement that every State possessed capacity to conclude treaties, that fraud and coercion invalidated the consent of a State and that any treaty was void if its conclusion had been procured by the threat or use of force in violation of the principle of the Charter of the United Nations. That last provision was a new element which had given rise to fears that it might encourage unjustified allegations of coercion or that the rule might be ineffective because the same threat or coercion by which the conclusion of the treaty had been procured might also help to procure its execution, whether or not the law considered it valid. Such fears, however, seemed to be unfounded. Equality before the law and the equality of the parties to a treaty were part and parcel of lex lata. The variety of circumstances in which treaties were concluded and the different motives of the parties must not, of course, be overlooked. But what was essential, at a time when big and small Powers existed side by side, was to prevent a treaty from legalizing gross differences between a party's obligations and its rights and thereby perpetuating an imbalance to the detriment of the sovereign equality of States. It had taken jurists a long time to condemn unequal treaties or even to recognize their existence and the International Law Commission had taken a great step forward in applying the principle of equality to the very conditions under which a treaty was concluded.

11. The principle of equality necessarily had certain effects with regard to the rights and obligations of so-called third States. If the basic premise that all interested parties should be represented at negotiations was accepted, the notion of third States would gradually lose its raison d'être.

12. Full equality implied universality. It was right that no State whose participation would serve the objectives and purposes of a treaty and whose interest in it was legitimate, should be barred from being a party to it. There was a growing trend towards opening all treaties to all interested States; that trend would ultimately prevail and would dispose of many practical and theoretical difficulties still remaining. Despite arguments to the contrary, the principle of universality in no way affected the freedom of States to select partners in international instruments that they concluded; nor did it prejudge the question of the recognition of States, which had no bearing on the subject. It was therefore regrettable that after having included an article affirming that principle in its 1962 draft [1] the Commission had later deleted it because of the impossibility of reaching agreement on the subject.

13. The Commission, nevertheless, had expressed itself indirectly in favour of the concept of universality by the manner in which it had settled the controversy on the subject of reservations between those who defended the integrity of the treaty and those who stressed the need to attract to it the greatest possible number of States (see articles 16-20 and commentaries). Where conferences drafting a treaty adopted their decisions unanimously the question of reservations did not arise, but inasmuch as international conferences had adopted the principle of the majority vote, it was only logical that States should be allowed to accede to a treaty, even if they rejected one or another of its provisions. By adopting that solution, the International Law Commission had taken a forward step.

14. Another factor which the Commission had recognized as important was the time factor in treaty relations. The situations on which law was based were anything but timeless and were constantly evolving. It was the need to take that inevitable evolution into account without destroying the confidence which the law should inspire that was reflected in the relationship clausula rebus sic stantibus versus pacta servanda sunt.

15. There were two aspects of the problem. First, what kind of changes could justify the termination of, or withdrawal from, a treaty by one of the parties without establishing a precedent which could undermine the stability of all treaties? According to article 59, there must be a fundamental change in an essential basis of the consent of the parties to be bound by the treaty; and even that change could not be invoked in the case of a treaty establishing boundaries or if it was the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty.

[1] See Official Records of the General Assembly, Seventeenth Session, Supplement No. 9.

16. It might also prove necessary, however, to change, not the attitude of the parties to the treaty, when a fundamental change in circumstances occurred, but the interpretation of the treaty itself. Treaties had to be living instruments and had to be adopted to the process of evolution; otherwise, they would eventually cease to be effective. A striking example of that dynamic approach was the interpretation of the principle of self-determination proclaimed in Article 1, paragraph 2, of the Charter, which was contained in the Declaration on the Granting of Independence to Colonial Countries and Peoples.

17. A third essential issue was recognition of the existence of peremptory norms of general international law, which constituted the frontiers within which States might move freely in determining their mutual relationships. To claim that such limits did not exist and that States were free to conclude international instruments in whatever way they wished would be to abandon international law to the caprice of the strongest. It had long been recognized that free though States were to change their mutual relations they could not, even ad casum or inter se, set aside principles that were binding on all States or raise to the level of a legal rule that which had been prohibited. Those rules of jus cogens, which had come to be part and parcel of the corpus juris gentium, did not derive from natural law or from the subjective concerns of States; they existed in the interest of the international community as a whole. By including them in article 50 of the draft, the International Law Commission had implicity recognized that they were part of lex lata, even though it had not made it sufficiently clear in the commentary exactly which rules were meant. What were involved were, essentially, principles concerning basic issues of peace and war: the use of force, elementary rights of States, the principle of non-intervention and the principle of self-determination. Furthermore, ever new principles would be added to them as the evolution of law continued.

18. Lastly, the concept of good faith, which was perhaps the most important of all, ran through the whole text of the draft articles, from the obligation of a State not to frustrate the object of a treaty prior to its entry into force through the application of the principle pacta sunt servanda to the methods of interpretation. All jurists agreed that at each stage of its life, a treaty should be applied in accordance with its purposes and objectives.

19. It was now up to the United Nations and to each of its Member States to transform the draft articles into a binding international instrument. It was essential that a conference should be convened in 1968 to put the finishing touches on the International Law Commission's draft and pave the way for universal acceptance of the law of treaties. The adoption of a convention on the law of treaties, by the very fact of establishing certain principles, would shape and give direction to future events. By outlawing what was contrary to the interest of man and by encouraging what served his progress, the United Nations could help law to play its proper role in international relations; but the law would have the necessary strength only if it kept pace with scientific progress on the one hand, and social and national progress on the other. A law of treaties strong enough and flexible enough to be adapted to a variety of possible solutions would help to make States increasingly aware of the fact that violation of treaties did not pay and that the best safeguard of their own rights and interests was the performance of their treaty obligations in good faith.

20. Mr. YANGO (Philippines) joined other delegations which had congratulated the International Law Commission on its successful completion of such a long and difficult task as the preparation of its draft articles on the law of treaties (see A/6309). He hoped that the Commission would be equally successful in its work on special missions, a topic of particular importance at a time when contacts and ties between members of the international community were multiplying. The question of the form which the draft articles on special missions should take—whether an additional protocol to the 1961 Vienna Convention on Diplomatic Relations or a separate convention—was not a matter of concern at the current stage.

21. His delegation was glad to note that in the performance of its work the Commission had been able to maintain contacts with regional legal organizations, such as the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Inter-American Juridical Committee, which would no doubt serve to strengthen the stability and universality of the principles of international law. The United Nations Office at Geneva, also, was to be congratulated on its efforts in support of the organization of the Seminar on International Law, which fulfilled the hope expressed by his delegation at the previous session of the General Assembly. The example set by the Governments of Israel and Sweden, which had offered fellowships to enable nationals of developing countries to take part in the seminar, was worthy of emulation; for the role that such seminars could play in the training of students and jurists from all parts of the world and, ultimately, in the codification and progressive development of international law should not be underestimated.

22. His delegation also wished to express its appreciation of the memorandum submitted by the Secretary-General (A/C.6/371) on the procedural and organizational problems involved in a possible diplomatic conference on the law of treaties, particularly its excellent analysis of all aspects of the question. The Philippines favoured such a conference because it would place the law of treaties on a more stable foundation and because it was in keeping with the general desire of the international community. With regard to the organizational details of the conference, it was the view of his delegation that 1968, which was the date favoured by most delegations, would allow sufficient time for the necessary preparations. As the Secretary-General had suggested in his memorandum, previous experience could be turned to advantage by adopting the rules of procedure of the 1963 Vienna Conference on Consular Relations and establishing two main committees instead of one committee of the whole, in order to expedite the work and ensure the necessary co-ordination. It might be somewhat premature to decide at once whether the conference should be in two parts; the matter was

better left to be decided by the conference itself. Obviously, the Philippine delegation favoured arrangements involving the least cost to the participants without sacrificing effective results, and it eagerly awaited the results of the study made by the Secretary-General on the financial implications of the conference.

23. His delegation had expressed the opinion at previous sessions that the draft articles on the law of treaties were progressive and challenging. That applied particularly to articles 50, 61 and 67, and by accepting the principles underlying those articles, the conference participants would demonstrate their profound desire that the rule of law should govern relations among sovereign States and their faith in the development of international law. The International Law Commission had refrained from giving examples of peremptory norms of international law in its draft articles; but the conference participants could discuss that thought-provoking question at the appropriate time. The Philippines delegation intended to give more careful study to the draft articles and reserved the right to speak again on those it considered of particular interest.

24. Mr. FARTASH (Iran) said that his delegation fully recognized the importance of the work accomplished by the International Law Commission in preparing the draft articles on the law of treaties (see A/C.6/371) and wished to express its gratitude to the members of the Commission and to pay a special tribute to its Special Rapporteur, Sir Humphrey Waldock. The text before the Committee marked an unprecedented advance towards the codification and progressive development of international law. Nevertheless, it could not be regarded as a perfect instrument, and the Commission itself, in the section of its report relating to the scope of the articles, enumerated the omissions that it had been unable or unwilling to remedy. The Commission's decision to deal only with treaties concluded between States, to the exclusion of those concluded between States and other subjects of international law, and not to deal with international agreements that were not in written form was understandable. It was in conformity with the principles of international law and the established practice of the International Court of Justice, since an agreement could not constitute a treaty for the purposes of Article 36 of the Statute of the Court and of the declarations of acceptance of the Court's jurisdiction unless it was in written form, it created a commitment, namely, a new obligation governing public international relations, and it was registered in accordance with Article 102 of the Charter.

25. On the other hand, the omission from the draft articles of provisions relating to the succession of States and State responsibility with respect to failure to perform a treaty obligation was regrettable, for those two questions were closely bound up with the general concept of contractual obligations between States. His delegation was glad that at least they were included in the proposed provisional agenda for the next session of the International Law Commission. He noted, in that connexion, the Commission's decision that a Special Rapporteur who was re-elected should continue his work on his topic (see A/6309, paras. 72-74).

26. Although the question of rights and obligations created for third States was dealt with in the draft (articles 30-33), the most-favoured-nation clause had been omitted, for the reasons given by the International Law Commission in its 1964 report.[2] That clause was of great importance to his country, which had frequently had to contend with it in its treaty relations and had even had to protect itself before the International Court of Justice in 1952 in the case of the Anglo-Iranian Oil Co. against the United Kingdom's request for its application.[3]

27. In that particular case, Iran had raised an objection ratione temporis to the Court's jurisdiction, because in order to terminate the previous capitulary treaties it had so drafted its declaration of acceptance of the jurisdiction of the Permanent Court of Justice in 1932 as to exclude from that jurisdiction treaties signed before that date. The United Kingdom had then argued that the Treaty of Friendship, Establishment and Commerce, and Final Protocol, concluded in 1934 between Iran and Denmark,[4] provided a basis for the Court's jurisdiction. That treaty was res inter alios acta with respect to the United Kingdom, but the latter invoked it by virtue of the most-favoured-nation clause contained in the 1857 and 1903 treaties concluded between Iran and Great Britain. The Court did not uphold the United Kingdom's plea. In its judgement of 22 July 1952, it stated: "A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is res inter alios acta". It had added: "If the United Kingdom is not entitled to invoke its own Treaty of 1857 or 1903 with Iran, it cannot rely upon the Iranian-Danish Treaty, irrespective of whether the facts of the dispute are directly or indirectly related to the latter treaty".[5]

28. His delegation greatly appreciated the useful information provided by the Secretariat in document A/C.6/371 concerning the convening of a plenipotentiary conference on the codification of the law of treaties, as recommended by the International Law Commission. He endorsed the reasons set out in support of the suggestion that the conference should not be held until 1968 and that it should be divided into two parts. The question of the distribution of the draft articles to two main committees should be approached with caution in order to avoid any arbitrary decisions. The International Law Commission, if necessary, could be asked to give its opinion on which parts of the draft should be assigned to each committee.

29. His delegation was pleased to note the information given in paragraph 10 of document A/C.6/371 concerning the preparatory work for the conference to be undertaken by the Secretariat. It had two comments to make on the rules of procedure of the proposed conference. First, all substantive decisions should be taken by a two-thirds majority of those present and

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2/ See Official Records of the General Assembly, Nineteenth Session, Supplement No. 9.

3/ See I.C.J. Pleadings, Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), Judgment of July 22nd, 1952.

4/ See League of Nations, Treaty Series, vol. CLVIII (1935-1936), No. 3640.

5/ See Anglo-Iranian Oil Co. Case (jurisdiction), Judgment of July 22nd, 1952, I.C.J. Reports, 1952, pp. 109-110.

voting, in accordance with the practice established at previous codification conferences. Second, the limitation placed on the number of speakers on a motion for division by rule 91 of the rules of procedure of the General Assembly had certain drawbacks in the case of a codification conference, and it would thus be wiser not to include such a provision in the rules of procedure of the proposed conference.

30. Mr. ABDULLA (Sudan) observed that under the rules of international law prevailing before the United Nations era the consent of dependent countries, which were to become new States in the future, could not be accepted. Those countries had found themselves committed to treaties and conventions concluded without regard to their will or interests. His delegation believed that the draft articles or additional articles should provide means of wiping out all vestiges of the treaties imposed upon the new States before independence and should create safeguards to prevent their recurrence. Otherwise a country whose economy had been crippled by the former dominating Power might continue to be bound by such treaties, to the detriment of its interests and development. The problem of State succession was thus of crucial importance, as was made clear by the report (see A/6309) before the Committee. His delegation hoped that a statement on the subject would be added to the draft articles, in keeping with the request of several delegations, including those of Cameroon (908th meeting), Ghana (905th meeting) and Nigeria (904th meeting), so as to protect the rights of the currently dependent peoples.

31. Although his delegation did not feel it necessary to comment at present on the substance of the draft articles, it wished to congratulate the authors—the members, Chairman and Special Rapporteur of the International Law Commission—for their remarkable work, which would be fundamental to the success of the proposed diplomatic conference. In that connexion, it joined in the request of other delegations that the invaluable help of Sir Humphrey Waldock, Special Rapporteur on the law of treaties, should be secured for the conference.

32. With regard to the organization of the conference, his delegation believed that its date and place should be decided by the majority of the General Assembly or suggested by the Secretary-General. He could already state, however, that his delegation would not object to holding the conference in the spring of 1968. It would be advantageous to have a wide representation of States at the conference. The conference itself should be free to establish its own rules and procedure, after taking into account the valuable suggestions contained in the Secretary-General's memorandum (A/C.6/371). For financial reasons and because of the difficulty of recruiting specialists, particularly in the developing countries, the best arrangement seemed to be the holding of one continuous session.

33. Mr. MWENDWA (Kenya) paid tribute to the International Law Commission, particularly its Chairman and its Special Rapporteur, Sir Humphrey Waldock, for their admirable work on the law of treaties (see A/6309). As to the Commission's future work, his delegation believed that the order of priority of the subjects to be considered was primarily a matter for the Commission itself to decide; but it hoped that the Commission could examine without delay the question of the succession of States and Governments, which was of particular importance to Kenya and to all other States that had recently achieved independence.

34. His delegation supported the proposal to convene an international conference on the law of treaties at Geneva in February or March 1968 (see A/C.6/371). In deciding the question of participation in that conference, full account must be taken of the general application and special nature of the law of treaties, which required as broad a participation as possible. The question should receive a clear and precise answer from the General Assembly at its present session.

35. As a developing country with limited resources, Kenya favoured the establishment of a single committee of the whole and hoped that the more fortunate States would give consideration to the situation of the developing countries in that regard. Similarly, his delegation would prefer a conference held in two parts, because it was convinced that Governments must be allowed adequate time for reflection after thorough consideration of the draft articles; the proposed convention could be adopted at the second session, after an interval of not more than one year. The risk that States might reopen debate on issues already resolved was well worth taking in the interest of achieving more lasting results. The rules adopted for the conference could be those followed at earlier codification conferences; that would mean that decisions on matters of substance would be taken by a two-thirds majority, and other decisions would be taken by a simple majority, or by a two-thirds majority in the case of a reconsideration. It would be desirable to have rules for making a clear distinction between substantive and procedural matters, but on a subject as important as the law of treaties it was essential to ensure the broadest possible consensus on all matters of substance.

36. The draft articles were the result of the work of the most eminent jurists of the present day, and in that connexion he believed that it was desirable for the conference to secure the assistance of Sir Humphrey Waldock, the Special Rapporteur, and for the secretariat of the International Law Commission to be able to give all necessary explanations concerning the draft articles at the time of the conference. Those articles, which had been drafted after mature reflection and careful consideration of all views submitted by States, offered the proposed conference a good basis for discussion, but care must be taken not to subject them to hasty amendment. The participants in the conference of plenipotentiaries must, of course, be entirely free to propose amendments to the draft articles; but in view of the heavy responsibility of States on that issue, it was of the utmost importance that they should send highly qualified representatives and advisers to the conference. His delegation was well aware that political considerations were a primary factor in all human endeavour, but it hoped that the Sixth Committee's decisions in respect of the draft articles would be guided in the main by legal considerations. In any

event, it believed that the conclusion of a convention on the law of treaties would be the most outstanding event in international relations since the signing of the United Nations Charter.

37. Mr. BEN AISSA (Tunisia) expressed his delegation's gratitude to the Chairman and members of the International Law Commission for the long work that had produced the draft submitted to the Committee (see A/6309), and he especially thanked the Special Rapporteur for his contribution to that work. His delegation welcomed the co-operation that had been established between the International Law Commission and regional legal organizations, in particular the Asian-African Legal Consultative Committee. It also welcomed the holding of the second Seminar on International Law, in which many nationals of developing countries had participated, in pursuance of General Assembly resolution 2045 (XX) and in accordance with the wishes expressed by his delegation at the preceding session.

38. His delegation was gratified at the clarity, precision and excellent organization of the draft articles. Those were necessary qualities in a legal document that was to govern relations between States and would therefore be subject to interpretation. Some ideas which had been left fairly vague could, no doubt, have been better defined or supplemented, but that might have given rise to controversy. For example, the concept of a peremptory norm of general international law (jus cogens), mentioned in article 50, could have been stated more precisely. On the other hand, the scope of some other concepts had been limited, in particular that of coercion, which in article 49 had been reduced to the threat or use of force. The draft articles should have mentioned other cases of coercion that constituted grounds for the nullity of treaties.

39. His delegation welcomed the fact that the draft expressed the principles of the strict equality of States parties to a treaty, independent will, free and complete consent by parties and good faith in the execution of treaties; it had always believed that those principles were basic to the law of treaties. It would have preferred to have the draft include provisions on State succession and on the most-favoured-nation clause, the latter of which was of great importance in relations between States and helped to eliminate many instances of discrimination.

40. The conference recommended by the International Law Commission should constitute the final stage of the work on the law of treaties. However, its organization raised a number of problems, the solution of which would be greatly facilitated by the Secretary-General's memorandum (A/C.6/371). With regard to date, his delegation had no objection to the suggestion that the conference should be convened in the spring of 1968. However, it wished to ask the Secretariat whether the conference on the law of treaties fell within the category of conferences referred to in General Assembly resolution 2116 (XX), paragraph 5, which stated that "not more than one major special conference of the United Nations shall be scheduled in any one year". It was his delegation's understanding that two conferences had already been proposed for 1968: the International Conference on Human Rights and a conference of ministers responsible for social welfare. If any obstacle existed in that respect, it would be wise to give consideration immediately to a date other than the one suggested. As to the venue of the conference, his delegation would prefer Geneva; but the Committee should not dismiss the possibility of meeting elsewhere if any State should decide to extend an invitation to the conference. Even though the conference might be expected to last a rather long time, it would be better to avoid holding it in two sessions divided by an interval of about one year, in order to avoid the financial implications of such an arrangement. On the other hand, it seemed reasonable to divide the work of the conference between two main committees, with the possibility of forming working groups. As to rules of procedure, it was important that the rule of a two-thirds majority of representatives present and voting should apply to all decisions on substantive matters, as had been the case at the previous conferences on international law.

The meeting rose at 5.25 p.m.

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