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Working paper prepared by Mr. Abdullah El-Erian, Special Rapporteur

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RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

[Agenda item 1]

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Consideration by the International Law Commission of the question of the possible effects of exceptional situations such as absence of recognition, absence or severance of diplomatic and consular relations, or armed conflict on the representation of States in international organizations: working paper prepared by Mr. Abdullah El-Erian, Special Rapporteur

[Original text: English]
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I. TWENTY-FIRST SESSION (1969)

1. The discussion on the above-mentioned question arose from the reference to armed conflict in draft articles 47 (Facilities for departure) and 48 (Protection of premises and archives), as prepared by the Drafting Committee.¹ The texts prepared by the Drafting Committee read as follows:

Article 47. Facilities for departure

The host State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the host State and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Article 48. Protection of premises and archives

1. When the functions of the permanent mission come to an end, the host State must, even in case of armed conflict, respect and protect the premises as well as the property and archives of the permanent mission. The sending State must withdraw that property and those archives within a reasonable time.

2. The host is required to grant the sending State, even in case of armed conflict, facilities for removing the archives of the permanent mission from the territory of the host State.

2. At the 1026th meeting of the Commission, the Chairman of the Drafting Committee suggested that the Commission consider the possibility of a separate article which would state that, in case of armed conflict, all the privileges and immunities accorded under the convention must be granted.

3. At the 1027th meeting of the Commission, one member suggested a possible text for the new article, drawing on the wording of article 74 of the Vienna

Convention on the Law of Treaties² and of article 7 of the Convention on Special Missions;³ that text read as follows:

The severance or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles. The establishment or continued existence of a permanent mission on the territory of the host State does not in itself affect the situation in regard to diplomatic or consular relations between the host State and the sending State.⁴

4. Comments on the substance of the question were made by a number of the members of the Commission. One member pointed out that the difficulty lay in the reference, in both articles 47 and 48, to the possibility of armed conflict. In bilateral relations, if a war broke out between the two countries concerned, diplomatic relations were automatically severed and the diplomats had to leave the receiving State. The position was quite different for members of permanent missions who were representatives of the sending State, not to the host State, but to an international organization. What was essential was to safeguard such representation even in case of armed conflict between the host State and the sending State. The mere fact that in articles 47 and 48, based on the Vienna Convention on Diplomatic Relations,⁵ the hypothesis of armed conflict was mentioned would entail a serious risk of implying that, in case of armed conflict between the host State and the sending State, members of the permanent mission of the sending State would have to leave the territory of the host State, whereas, quite obviously, any such implication must be avoided. The best solution would be to deal with that

² Article 74 of the Vienna Convention on the Law of Treaties reads as follows:

"Diplomatic and consular relations and the conclusion of treaties"

"The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations."

(*Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 299.)

³ Article 7 of the Convention on Special Missions reads as follows:

"Non-existence of diplomatic or consular relations"

"The existence of diplomatic or consular relations is not necessary for the sending or reception of a special mission." (General Assembly resolution 2530 (XXIV), annex.)

⁴ *Yearbook of the International Law Commission, 1969*, vol. I, p. 191, 1027th meeting, para. 2.

⁵ United Nations, *Treaty Series*, vol. 500, p. 95.

¹ In the draft articles adopted by the Commission in 1969 (*Yearbook of the International Law Commission, 1969*, vol. II, p. 207, document A/7610/Rev.1, chap. II, B), these two articles were numbered 48 and 49 respectively.

situation in a separate article; articles 47 and 48 could then be made more concise. One point to be decided was whether the article was to deal solely with the severance of diplomatic relations or whether it was to deal with armed conflict as well. In any event, great caution was required. The difficulty could not be evaded by arguing that the position of the permanent mission of the sending State to an international organization was in no way altered by the development of an abnormal situation such as war or the severance of diplomatic relations between the host State and the sending State. Even less could it be argued that its position was completely changed. That was the delicate question to be decided.⁶

5. Another member supported the suggestion that the phrase "even in case of armed conflict" be replaced in article 47 by the words "whenever required" and in article 48 by the words "at all times", because the retention of that phrase would make it necessary to take into account a great many situations, including the possibility of a conflict in which the organization itself was involved. He stated that he was in favour of the Drafting Committee considering the new proposed article, which stated two important points: first, that the absence of diplomatic or consular relations between the host State and the sending State did not affect the obligations of either State under the draft articles, and second, that the existence of a permanent mission on the territory of the host State did not imply the existence of diplomatic relations between the host State and the sending State.⁷

6. A third member said that articles 47 and 48 would lose some of their importance if a new article were introduced containing general provisions to deal with the permanent mission and its personnel in extraordinary circumstances. He thought the proposed new article might be interpreted as being inapplicable to cases other than the severance or absence of diplomatic or consular relations. In fact, an article of that kind was necessary to cover all cases, including armed conflict.⁸

7. A fourth member stated that a text on the lines of the proposed new article was necessary, but it would be quite independent of articles 47 and 48. He pointed out that since the question of armed conflict was covered in a corresponding article of the Vienna Convention on Diplomatic Relations, there would be an obvious gap in the present draft if no provision on the subject were included. It was, furthermore, the one case where really serious difficulties were likely to arise in connexion with the application of articles 47 and 48. The application of the proposed general article to such matters as freedom of communication would, of course, give rise to delicate problems, and the Drafting Committee should give careful consideration to the whole question.⁹

8. A fifth member said he was still convinced that reference should be made to the case of armed conflict, but had no strong views on the particular form it should take. He did not think, on the other hand, that a reference to the absence of relations or to the severance of diplomatic or consular relations would be sufficient.¹⁰

9. A sixth member stated that an important discussion had taken place on articles 47 and 48 and expressed the view that the Commission should not adopt any position at that stage, but should refer those articles to the Drafting Committee together with the proposed new article.¹¹

10. The question was then referred to the Drafting Committee which prepared the following text for the new article:

The severance, modification or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles, even in the case of armed conflict. The establishment or maintenance of a permanent mission on the territory of the host State does not in itself imply recognition or affect the situation in regard to diplomatic or consular relations between the host State and the sending State.¹²

11. When the text of the new article as prepared by the Drafting Committee was introduced to the Commission at the 1035th meeting, one member submitted an amendment which read as follows:

1. The termination, modification or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles. The establishment or maintenance of a permanent mission on the territory of the host State does not in itself imply recognition or affect the situation in regard to diplomatic or consular relations between the host State and the sending State. In the absence of diplomatic or consular relations, however, either the host State or the sending State may require that all communications with the other be carried on through the Organization and the host State may limit the freedom of movement of the members of the permanent mission on its territory to within fifty miles of the Headquarters of the Organization.

2. In the case of armed conflict between the host State and the sending State, the status of the permanent mission and the privileges and immunities of the members of the permanent mission shall be unimpaired except that the host State may impose the following limitations for the protection of the permanent mission and its own security:

(a) That the permanent mission and its members be housed within the Headquarters area of the Organization or, if this is not feasible, within specified areas immediately adjacent to the Headquarters of the Organization;

(b) That the movement of members of the permanent mission be limited to specified routes in the immediate vicinity of the Headquarters of the Organization;

(c) That the permanent mission cease using its own wireless transmission facilities;

(d) That the importation of articles for the personal use of members of the permanent mission be terminated;

(e) That a neutral members of the Organization be designated

⁶ *Yearbook of the International Law Commission, 1969*, vol. I, p. 191, 1027th meeting, paras. 7, 8 and 9.

⁷ *Ibid.*, pp. 191-192, paras. 10 and 11.

⁸ *Ibid.*, p. 192, paras. 12 and 13.

⁹ *Ibid.*, paras. 15 and 16.

¹⁰ *Ibid.*, para. 22.

¹¹ *Ibid.*, para. 21.

¹² *Ibid.*, p. 232, 1035th meeting, para. 9.

to inspect the bag of the mission in the presence of a member of the mission to insure that no prohibited or contraband articles are brought in, and that the bag be brought in at specified places and times;

(f) That members of the mission who leave its territory may not return;

(g) That there be no increase in the size of the permanent mission;

(h) That permanent residents of the host State may not be employed by the permanent mission.¹³

12. In support of this amendment, its author adduced the following considerations: the absence of diplomatic or consular relations between the two States did not necessarily indicate the existence of difficulties between them, but in many cases the breaking off of such relations did occur as a result of substantial disagreements. It was usually accompanied by rising tension in public opinion and by hostility, and these factors must be taken into account in devising provisions to cover cases of severance of diplomatic or consular relations. The same type of psychological difficulty might arise when one State refused to recognize either the government or the existence of another State. If such a situation persisted for any length of time, it was almost invariably in consequence of some profound political disagreement. The Commission could not ignore the possibility of such disagreements between the host State and the sending State and was bound to provide for certain limitations in such cases. The author of the amendment pointed out that in dealing with the possibility of armed conflict, the Commission was treading on dangerous ground. He added that provision must also be made for the protection of members of a permanent mission in the event of public opinion becoming so hostile that rioting and attacks on members of the mission might occur: to avoid such dangers, it was only reasonable to limit the freedom of movement of members of permanent missions. He lastly stressed that sub-paragraphs (a) to (c) of paragraph 2 were mainly designed to safeguard the security of the host State, but also in some measure the security of the permanent mission of the sending State.¹⁴

13. Another member submitted the following amendment:

The severance or absence of diplomatic or consular relations between the host State and the sending State shall not affect the rights or obligations of either State under the present articles, even in the case of armed conflict. The establishment or maintenance of a permanent mission by the sending State does not in itself imply recognition by that State or by the latter State of the sending State, nor does it affect the situation in regard to diplomatic or consular relations between the host State and the sending State.¹⁵

14. Several members of the Commission expressed views on the substance of the question. One member stated that, though he appreciated the practical reasons and the concern underlying the text reproduced in paragraph 11 above, he thought it went too far: for example, it was unnecessary to restrict the freedom of communica-

tion or any other privilege of a permanent mission or its members in the absence of diplomatic or consular relations between the sending State and the host State. That member noted that in cases of armed conflict, the problem was more serious, so the restrictions provided for in paragraph 2, sub-paragraphs (a), (b) and (h) might be accepted and possibly that in sub-paragraph (e), though it was more debatable because of the abuses to which the interpretation of the notion of contraband had given rise during the two world wars. Sub-paragraph (c) on the other hand was, in his opinion, not acceptable; the permanent mission should be permitted to use its own wireless transmission facilities even during an armed conflict. It was also hard to see why the importation of articles for the personal use of members of the permanent mission should be terminated during a conflict, especially if inspection by a neutral member of the organization was accepted, as provided in sub-paragraph (e). In the opinion of that same member, the prohibitions in sub-paragraphs (f) and (g) were the most difficult to accept, since a member of a mission might be called upon to leave the territory of the host State to engage in important negotiations for the re-establishment of normal relations between the belligerents and it might be necessary to increase the size of the permanent mission to enable the sending State to take more effective action in the organization with a view to putting an end to the conflict or obtaining the organization's assistance in overcoming difficulties caused by the conflict.¹⁶

15. Another member stated that the amendment reproduced in paragraph 13 above considerably improved the drafting of the article but that all the substantive questions were not settled. He still thought that in case of severance of diplomatic or consular relations, and even more so in that of armed conflict, a permanent mission should not be withdrawn; but neither could its situation remain absolutely unchanged. In his view, the Drafting Committee's text went too far in providing that the severance of diplomatic or consular relations did not affect the obligations of the host State and the sending State in any way. Although he did not wholly endorse the amendment quoted in paragraph 11 above, he thought it should be taken into account.¹⁷

16. A third member stated that it was quite right to try to safeguard the freedom of representatives to international organizations to perform their functions, but it should not be forgotten that in the event of armed conflict, the national defence of host States was of vital importance. In general, the Commission had tried to equate the position of representatives of States to international organizations with that of diplomatic agents, but in that particular instance, representatives to international organizations would be in the more favourable position.¹⁸

17. A fourth member thought that the article embraced too many different problems, including, as it did, the

¹³ *Ibid.*, p. 233, para. 13.

¹⁴ *Ibid.*, pp. 233-234, paras. 17-19, 20 and 24.

¹⁵ *Ibid.*, p. 233, para. 14.

¹⁶ *Ibid.*, p. 235, paras. 28, 29 and 30.

¹⁷ *Ibid.*, p. 236, paras. 46, 47 and 48.

¹⁸ *Ibid.*, para. 50.

severance of diplomatic or consular relations, the non-recognition of a government and the case of armed conflict. In his opinion, it was clear that the severance of diplomatic or consular relations should not affect the rights and obligations laid down in the draft. The absence of diplomatic relations, which was sometimes due to non-recognition of a government, had been little discussed by legal writers or illustrated by practices, so that it would be difficult to draft rules on the subject. The case of armed conflict had also been almost entirely neglected by writers and the Commission itself had reserved its position on the matter more than once. It had taken that line, for example, during the preparation of the Convention on the Law of Treaties. Consequently, the effects of an armed conflict between the host State and one of the sending States should be examined in detail, and it would take a long time to formulate them. It might be said that an armed conflict should not deprive the sending State of its mission or of everything the mission needed for performing its functions, but the privileges and immunities provided for in the draft articles were certainly not all based on the notion of function. In the case of armed conflict, therefore, certain restrictions might be accepted in the interests of the host State.¹⁹

18. A fifth member stated that the article raised three different types of problem and, when the time came, it would be more appropriate to deal with them in three separate articles. The first article would state that the establishment or maintenance of a permanent mission did not imply recognition. The second would state the rule that the severance or absence of diplomatic or consular relations between the host State and the sending State did not affect the rights and obligations of either State under the draft articles. The third article would deal with the problem of armed conflict. In the third article, it would be necessary to draw a distinction between two types of conflict: a conflict between a sending State and the host State, and a conflict between a member State and the organization resulting from measures of coercion taken against that State. The two situations were different and raised very delicate problems in regard to which it would be extremely difficult to strike a balance between the interests of the host State, the sending State and the organization. The same member added that when the time came to draft an article on the subject of armed conflict, he would himself favour a general formula rather than an attempt to deal with specific points as in the proposal quoted in paragraph 11 above. The method followed in that proposal raised a number of problems. For example, the limitation imposed in paragraph 2 (b) was already covered by the provisions of article 27 and that in paragraph 2 (c) by the last sentence of paragraph 1 of article 28; in addition, the measure provided for in paragraph 2 (d) could be applied in the same way as that in paragraph 2 (e).²⁰

19. A sixth member pointed out that all the members of the Commission seemed to agree that the severance

of diplomatic or consular relations should not in itself affect the rights and obligations of the host State and the sending State. But the severance of relations always implied some other situation which might justify certain steps. Armed conflict was not the only one; there were also states of tension, for example. The Commission should consider the problems involved at length. For instance, some armed conflicts were localized and bilateral, so that their consequences were not nearly so grave as those of major conflicts without recourse to arms. International organizations usually established their headquarters in countries which, in normal circumstances, were liberal in various respects; but when circumstances became abnormal, the organization suffered directly.²¹

20. A seventh member said that, where armed conflict was concerned it would be very difficult to formulate a general rule, because of the variety of cases which arose in practice. It might perhaps be best to adopt the course which had been followed in other drafts of the Commission and include an article simply stating that the draft related only to the law of peace and did not deal with the problem of armed conflict.²²

21. Several members expressed the opinion that consideration of the subject should be deferred until the following year. The Commission finally decided to include in its report the following statement:

“The Commission also briefly considered the desirability of dealing, in separate articles, with the possible effects of exceptional situations—such as absence of recognition, absence or severance of diplomatic relations or armed conflict—on the representation of States in international organizations. In view of the delicate and complex nature of those questions, the Commission decided to resume their examination at a future session and to postpone any decision on them for the time being.”²³

II. TWENTY-SECOND SESSION (1970)

22. At the twenty-second session, the question of exceptional situations was referred to in connexion with articles 60 and 61 as they appeared in part III, on permanent observer missions to international organizations, in the fifth report of the Special Rapporteur.²⁴ At the 1051st meeting of the Commission, one member recalled that 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. He suggested that it might be worth considering whether it would not be advisable to do likewise in regard to permanent observer missions by deferring consideration of the question until the second reading of the draft articles.²⁵

²¹ *Ibid.*, paras. 63 and 65.

²² *Ibid.*, para. 68.

²³ *Ibid.*, vol. II, p. 206, document A/7610/Rev.1, para. 18.

²⁴ *Ibid.*, 1970, vol. I, p. 45, 1051st meeting, para. 2.

²⁵ *Ibid.*, p. 46, para. 6.

¹⁹ *Ibid.*, pp. 236-237, paras. 52-55.

²⁰ *Ibid.*, p. 237, paras. 57-59.

23. The question was also referred to in connexion with part IV of the draft (Delegations of States to organs and conferences). Introducing at the 1078th meeting of the Commission the text prepared by the Drafting Committee for article 78 (which became article 108), the Chairman of the Drafting Committee stated that a reference would be made in the commentary to the possibility of an armed conflict; it would follow the same lines as the references in paragraph 1 of the commentary to article 48.²⁶

24. In its report on its twenty-second session (1970), the Commission stated:

The Commission also briefly considered the desirability of dealing, in separate articles within the present group, with the possible effects of exceptional situations—such as absence of recognition, absence or severance of diplomatic relations or armed conflict—on permanent observer missions and on delegations to organs of international organizations and to conferences convened by international organizations. In view of the decision taken at the twenty-first session, the Commission decided to examine at its second reading the question of the possible effects of exceptional situations on the representation of States in international organizations in general and to postpone for the time being any decision in the context of parts III and IV.²⁷

III. CONCLUSIONS

25. From the foregoing account of the discussion in the Commission, the following conclusions may be drawn.

26. The Commission does not consider it appropriate to deal with exceptional situations such as armed conflict in connexion with the articles on facilities of departure and protection of premises and archives. It is keen to avoid the risk of implying that in case of armed conflict between the host State and the sending State, members of the permanent mission of the sending State would have to leave the territory of the host State. The mention of the case of armed conflict in article 45 of the Convention on Diplomatic Relations is based on the assumption that in bilateral relations, if a war breaks out between two States, diplomatic relations are usually severed and the diplomats of the sending State have to leave the receiving State. The position is quite different for members of permanent missions who are representatives of the sending State, not to the host State, but to the organization.

27. There is general agreement in the Commission on the desirability of dealing in one or more articles with the implications of the severance or absence of diplomatic or consular relations between the host State and the sending State as well as the question of recognition.

28. As regards armed conflict, the discussion reveals that opinion in the Commission is divided and that the attempt to deal with the effects of armed conflict in the present draft articles would raise complex problems owing to the great variety of situations which may arise in the context of multilateral diplomacy. Several

members tend to consider that the Commission should not depart from the course which it has previously taken when it decided not to include provisions on the effects of armed conflict in its drafts on the law of the sea and the law of treaties.

29. The Special Rapporteur, therefore, submits to the consideration of the Commission the following new articles:

[For the text of articles 49 *bis*, 77 *bis* and 116 *bis*, see *Yearbook of the International Law Commission*, 1971, vol. I, p. 84, 1099th meeting, para. 12.]

30. The Commission may also wish to consider the possibility of consolidating the three new articles and merging them in one article to be placed in the part containing general provisions.

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Question of the inclusion in article 50 of a provision on the settlement of disputes: working paper prepared by Mr. Abdullah El-Erian, Special Rapporteur

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1. The discussion on the above-mentioned question at the 1100th, 1101st and 1102nd meetings of the Commission¹ arose from the reference in the commentary to article 50 that the Commission had "reserved the possibility of including at the end of the draft articles a provision concerning the settlement of disputes which might arise from the application of the articles".²

2. Some members suggested that article 50 be complemented by a provision for recourse to arbitration, judicial settlement or request for an advisory opinion of the International Court of Justice. References were made to similar provisions in the Convention on the Privileges and Immunities of the United Nations,³ the Convention on the Privileges and Immunities of the Specialized Agencies,⁴ the Headquarters Agreement of the United Nations,⁵ the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas⁶ and article 66 of the Vienna Convention on the Law of Treaties and the annex to that Convention.⁷

3. Other members were of the opinion that the question should be left to the General Assembly or the plenary conference.

4. A third group of members thought that article 50 did not go far enough and that it would be useful to

¹ See *Yearbook of the International Law Commission*, 1971, vol. I, pp. 89 *et seq.*

² *Ibid.*, 1969, vol. II, p. 222, document A/7610/Rev.1, chap. II, B.

³ United Nations, *Treaty Series*, vol. I, p. 15.

⁴ *Ibid.*, vol. 33, p. 261.

⁵ *Ibid.*, vol. 11, p. 11.

⁶ *Ibid.*, vol. 559, p. 285.

⁷ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), pp. 298 and 301 respectively.

²⁶ *Ibid.*, p. 203, 1078th meeting, para. 11.

²⁷ *Ibid.*, vol. II, p. 276, document A/8010/Rev.1, para. 22.