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A/CN.4/L.170

Text of articles adopted by the Drafting Committee: Text of article 12 adopted on second reading by the Drafting Committee - reproduced in A/CN.4/SR.1114

Topic:
Representation of States in their relations with international organizations

Extract from the Yearbook of the International Law Commission:-
1971, vol. I

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stressing the link between the granting of immunities and the regular performances of the functions of the permanent mission. It did not impose an obligation on the sending State, but gave a directive which was quite consistent with the general system of immunities. If the Commission decided to delete article 34, it should reproduce the whole of it in the commentary to article 33.

83. Mr. NAGENDRA SINGH said that he had no very strong feelings about article 34, but considered that it made some positive contribution by stating, in the last sentence, that the sending State "shall use its best endeavours to bring about a just settlement of such claims".

84. After a procedural discussion in which the CHAIRMAN, Mr. BARTOŠ, Mr. USTOR, Mr. ALBÓNICO and Mr. USHAKOV took part, the CHAIRMAN noted that there were differences of opinion on the question whether article 34 should be retained. He suggested that the Drafting Committee should be requested to reconsider the article in the light of the opinions expressed during the discussion, and to take into consideration, in particular, the relationship between article 34 and article 32, paragraph 1 (d).

It was so agreed.²⁴

The meeting rose at 12.55 p.m.

²⁴ For resumption of the discussion see 1117th meeting, para. 20.

1114th MEETING

Monday, 7 June 1971, at 3.10 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, 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.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168 and Add.1; A/CN.4/L.170)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the draft articles proposed by the Drafting Committee, beginning with article 12, on the credentials of the permanent representative.

ARTICLE 12

2. Mr. AGO (Chairman of the Drafting Committee) reminded the Commission that on 2 June it had referred the text of the article back to the Drafting Committee for reconsideration.¹ The Committee had replaced the words "or by another competent minister" by the words "or by another competent authority". Most of the members of the Commission had appeared to prefer the latter phrase, which covered the former, but was broader and allowed for the fact that in some States credentials were issued by collegiate authorities which could not be classed as ministers.

3. The text proposed by the Drafting Committee for article 12 read:

Article 12

Credentials of the permanent representative

The credentials of the permanent representative 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 of the sending State if that is allowed by the practice followed in the Organization, and shall be transmitted to the competent organ of the Organization.

4. Mr. YASSEEN and Mr. BARTOŠ welcomed the change in wording.

5. Mr. NAGENDRA SINGH said he fully supported the Drafting Committee's text. The expression "another competent authority" was the appropriate one to use in the context. State practice showed that there were cases in which an authority other than a Minister was allowed to issue the credentials of the permanent representative.

6. Mr. USHAKOV said he could accept the text proposed by the Drafting Committee, but did not share the view held by the majority of the Commission.

7. The CHAIRMAN said that, if there were no objection, he would take it that the Commission provisionally approved article 12 in the new form proposed by the Drafting Committee.

It was so agreed.²

ARTICLE 35

8. Mr. AGO (Chairman of the Drafting Committee) said that the Drafting Committee had made no change in article 35, but considered that two observations on it should be included in the commentary.

9. The first related to paragraphs 1 and 3. As had been pointed out in the written observations (A/CN.4/239, section D.9, para. 6 [b]), there was nothing in paragraph 1 to exempt the sending State, in its capacity as

¹ See 1111th meeting, para. 60.

² For resumption of the discussion see 1132nd meeting, para. 84.

employer, from social security legislation. The Drafting Committee considered such a provision unnecessary in view of the rule of general international law on the immunity enjoyed by the State in diplomatic relations. If reference to the sending State was implied in paragraph 1, it must also be implied in paragraph 3.

10. The second observation related to paragraph 5. In 1969 the Commission had expressed its intention to consider, in the light of the comments to be received from governments, whether paragraph 5 was necessary in view of the provisions of articles 4 and 5 of the draft.³ Although few governments had commented on that point, their observations seemed conclusive: paragraph 5 unnecessary. The Special Rapporteur had therefore deleted it from the draft of article 35 proposed in his sixth report (A/CN.4/241/Add.3). The deletion did not seem to have met with any objection in the Commission, but in the Drafting Committee the Special Rapporteur had urged the restoration of paragraph 5 on the grounds that even if it was not necessary, it could do no harm. The Committee had accepted his view.

11. The text proposed for article 35 read:

Article 35

Exemption from social security legislation

1. Subject to the provisions of paragraph 3 of this article, the permanent representative and the members of the diplomatic staff of the permanent mission shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the host State.

2. The exemption provided for in paragraph 1 of this article shall also apply to persons who are in the sole private employ of the permanent representative or of a member of the diplomatic staff of the permanent mission, on condition:

(a) that such employed persons are not nationals of or permanently resident in the host State; and

(b) that they are covered by the social security provisions which may be in force in the sending State or a third State.

3. The permanent representative and the members of the diplomatic staff of the permanent mission who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the host State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the host State provided that such participation is permitted by that State.

5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

12. Mr. YASSEEN said that when the Commission was stating general rules it need not draw attention to one or other of their obvious consequences as it had done in paragraph 5. Nevertheless, it could approve that paragraph provisionally, pending a decision whether to include a general article on the relationship between

the convention it was preparing and subsequent agreements.

13. Sir Humphrey WALDOCK agreed with Mr. Yasseen. There were a number of other articles, such as that dealing with nationality, in which it was possible to introduce a similar provision. The question should, however, be left over until the Commission had decided on the general articles.

14. The CHAIRMAN suggested that, pending approval of the general articles, the Commission should provisionally approve article 35 as proposed by the Drafting Committee.

It was so agreed.⁴

ARTICLE 36

15. Mr. AGO (Chairman of the Drafting Committee) said that in article 36 the Drafting Committee had made only minor drafting changes to the Spanish text, but it wished to make two comments on the article.

16. First, in paragraph (5) of the commentary,⁵ the Commission had stated that sub-paragraph (f), which was based on the corresponding provision of the Vienna Convention on Diplomatic Relations, might give rise to difficulties of interpretation, mainly because it stayed an exception to a rule which was itself an exception. The Commission had therefore enquired of governments whether they had experienced any practical difficulties in applying that provision. As the Special Rapporteur had noted (A/CN.4/241/Add.3), governments had not indicated the existence of any such difficulties. The Drafting Committee had therefore retained sub-paragraph (f) as it stood, with the exception of a slight drafting change in the Spanish text.

17. Secondly, the Committee wished to point out that, in the light of the observations made by UNESCO (A/CN.4/239, section D.3, para. 11 and foot-note 23), the references to that organization in the commentary to article 36 should be carefully examined.

18. The text proposed for article 36 read:

Article 36

Exemption from dues and taxes

The permanent representative and the members of the diplomatic staff of the permanent mission 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 permanent mission;

(c) estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 42;

⁴ For resumption of the discussion see 1133rd meeting, para. 34.

⁵ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 214.

³ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 214, para. (3) of commentary to article 35.

(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, with respect to immovable property, subject to the provisions of article 26.

19. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved article 36 as proposed by the Drafting Committee.

It was so agreed.⁶

ARTICLE 37

20. Mr. AGO (Chairman of the Drafting Committee) said that the Drafting Committee had made no change in article 37, which read:

Article 37

Exemption from personal services

The host State shall exempt the permanent representative and the members of the diplomatic staff of the permanent mission from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

21. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved article 37 as proposed by the Drafting Committee.

It was so agreed.⁷

ARTICLE 38

22. Mr. AGO (Chairman of the Drafting Committee) said that, apart from minor drafting changes in the English and Spanish texts, the Drafting Committee had made only one change in article 38: it had deleted from paragraph 1, sub-paragraph (b), the phrase "or members of his family forming part of his household". That phrase was unnecessary because article 38 was referred to in article 40, paragraph 1, concerning the members of the family of the permanent representative and the members of the family of a member of the diplomatic staff of the permanent mission.

23. The text proposed for article 38 read:

Article 38

Exemption from customs duties and inspection

1. The host State shall, in accordance with such laws and regulations as it may adopt, 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 the permanent mission;

(b) articles for the personal use of the permanent repre-

sentative or a member of the diplomatic staff of the permanent mission, including articles intended for his establishment.

2. The personal baggage of the permanent representative or a member of the diplomatic staff of the permanent mission 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 enjoying the exemption or of his authorized representative.

24. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved article 38 as proposed by the Drafting Committee.

It was so agreed.⁸

25. Mr. AGO (Chairman of the Drafting Committee) said that the Drafting Committee was reconsidering article 39.

ARTICLE 40

26. Introducing article 40, he pointed out that in the text adopted by the Commission in 1969,⁹ the references to sequences of articles gave only the first and last numbers. The drafting Committee had thought it better to enumerate all the articles concerned, as the Commission had done in article 69, paragraph 1.

27. In the cross-reference, now made in full, at the end of paragraph 1, the Committee had not included articles 33 and 34: article 33 did not specify a privilege or an immunity, but concerned waiver of immunity, and the Committee had proposed the deletion of article 34. In addition the Committee had noted that article 38, paragraph 1 (a), referred to a customs exemption granted to the permanent mission itself, not to members of the family; it had therefore replaced the reference to article 38 by a more specific reference to "paragraphs 1 (b) and 2 of article 38". For the same reasons, the Drafting Committee had deleted articles 33 and 34 from the cross-reference in the first sentence of paragraph 2 and in the last sentence of that paragraph had replaced the reference to paragraph 1 of article 38 by a reference to paragraph 1 (b) of article 38.

28. The text proposed for article 40 read as follows:

Article 40

Privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff

1. The members of the family of the permanent representative forming part of his household and the members of the family of a member of the diplomatic staff of the permanent mission forming part of his household shall, if they are not nationals of the host State, enjoy the privileges and immunities specified in articles 30, 31, 32, 35, 36, 37 and paragraphs 1 (b), and 2 of article 38.

⁶ For resumption of the discussion see 1133rd meeting, para. 38.

⁷ For resumption of the discussion see 1133rd meeting, para. 41.

⁸ For resumption of the discussion see 1133rd meeting, para. 44.

⁹ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 216.

2. Members of the administrative and technical staff of the permanent mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 30, 31, 32, 35, 36 and 37, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 32 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1 (b) of article 38, in respect of articles imported at the time of first installation.

3. Members of the service staff of the permanent mission who are not nationals of or permanently resident in the host State shall enjoy immunity 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 the exemption provided for in article 35.

4. Private staff of members of the permanent mission shall, if they are not nationals of or permanently resident in the host State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted 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 permanent mission.

29. Mr. USHAKOV said that the Commission should explain, in the commentary to article 40, that in deleting the reference to article 33 it had corrected a mistake which had also been made in the Vienna Convention on Diplomatic Relations. For article 37, paragraph 1, of that Convention,¹⁰ which corresponded to article 40, paragraph 1, of the draft, referred to articles 29 to 36, but article 32 had no place in the enumeration because it dealt with waiver of immunity.

30. The CHAIRMAN said that, if there were no objections, he would take it that the Commission provisionally approved article 40 as proposed by the Drafting Committee.

*It was so agreed.*¹¹

ARTICLE 41

31. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made only a drafting change in article 41, which was based on article 38 of the Vienna Convention on Diplomatic Relations. In the French text of paragraph 1 of the latter article (the word “*que*” had been placed before the words “*pour les actes officiels*” instead of before the words “*de l’immunité de juridiction*”). In 1969 the Commission had reproduced in the French text of article 41¹² the erroneous wording of the Vienna Convention and had aligned the English text with it, thus also introducing the error into the English text.¹³ The Drafting Committee had restored the English

text as adopted at Vienna and aligned the French text with it. It should be noted that the General Assembly had done the same with article 40 of the Convention on Special Missions.¹⁴

32. The text proposed for article 41 read:

Article 41

Nationals of the host State and persons permanently resident in the host State

1. Except in so far as additional privileges and immunities may be granted by the host State, the permanent representative and any member of the diplomatic staff of the permanent mission who are nationals of or permanently resident in that State shall enjoy only immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of their functions.

2. Other members of the staff of the permanent mission and persons on the private staff who are nationals of or permanently resident in the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those members and persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

33. The CHAIRMAN said that, if there were no objections, he would take it that the Commission provisionally approved article 41 as proposed by the Drafting Committee.

*It was so agreed.*¹⁵

ARTICLE 42

34. Mr. AGO (Chairman of the Drafting Committee) said that no change worth mentioning had been made in article 42, the text of which read:

Article 42

Duration of privileges and immunities

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the host State by the Organization or by the sending State.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the permanent mission, immunity shall continue to subsist.

3. In case of the death of a member of the permanent mission, 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 country.

4. In the event of the death of a member of the permanent mission not a national or of permanently resident in the host State or of a member of his family forming part of his household, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property

¹⁰ United Nations, *Treaty Series*, vol. 500, p. 116.

¹¹ For resumption of the discussion see 1133rd meeting, para. 47.

¹² See *Annuaire de la Commission du droit international*, 1969, vol. II, p. 225.

¹³ See *Yearbook of the International Law Commission*, 1969, vol. II, p. 217.

¹⁴ See General Assembly resolution 2530 (XXIV), Annex.

¹⁵ For resumption of the discussion see 1133rd meeting, para. 50.

acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the host State was due solely to the presence there of the deceased as a member of the permanent mission or as a member of the family of a member of the permanent mission.

35. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved article 42 as proposed by the Drafting Committee.

*It was so agreed.*¹⁶

ARTICLE 43

36. Mr. AGO (Chairman of the Drafting Committee) said that no change worth mentioning had been made in article 43, the text of which read:

Article 43

Transit through the territory of a third State

1. If the permanent representative or a member of the diplomatic staff of the permanent mission passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, 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 the members of his family enjoying privileges or immunities who are accompanying the permanent representative or member of the diplomatic staff of the permanent mission 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 passage of members of the administrative and technical or service staff of the permanent mission, and 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 is accorded by the host State. They shall accord to the couriers of the permanent mission who have been granted a passport visa if such visa was necessary, and to the bags of the permanent mission in transit the same inviolability and protection as the host State is bound to accord.

4. 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 bags of the permanent mission, whose presence in the territory of the third State is due to *force majeure*.

37. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved article 43 as proposed by the Drafting Committee.

*It was so agreed.*¹⁷

¹⁶ For resumption of the discussion see 1133rd meeting, para. 53.

¹⁷ For resumption of the discussion see 1135th meeting, para. 70.

ARTICLE 44

38. Mr. AGO (Chairman of the Drafting Committee) said that the French text of article 44 had been redrafted on the model of article 49, paragraph 1, of the Convention on Special Missions. Since the article was of a general character, the Commission would have to decide later where it should be placed in the draft and whether it should perhaps be made applicable to all the articles.

39. The text proposed for article 44 read:

Article 44

Non-discrimination

In the application of the provisions of the present articles, no discrimination shall be made as between States.

40. Mr. EUSTATHIADES observed that, if the provision was to apply not only to permanent missions but also to permanent observer missions, the word "*Etats*", in the French text should not be preceded by the article "*les*". In the case of permanent missions, it was clear that the States referred to were the members of the organization, but in the case of permanent observer missions it was not known in advance which States would be involved. That amendment would also bring the French text closer to the English.

41. Mr. REUTER said it was preferable, wherever possible, to follow the English text.

42. The CHAIRMAN pointed out that, in article 49, paragraph 1, of the Convention on Special Missions, the French text contained the expression "*entre les Etats*" where the English had "as between States".

43. Mr. USHAKOV added that the expression "*entre les Etats*" was also used in the French text of article 47, paragraph 1, of the Vienna Convention on Diplomatic Relations.

44. Mr. ALCÍVAR said that the phrase "*entre los Estados*", which had appeared in the original text of article 44 and remained in the text proposed by the Drafting Committee, was correct in Spanish.

45. Mr. EUSTATHIADES said that, in view of the precedents cited, the wording proposed by the Drafting Committee could be retained.

46. The CHAIRMAN said that, if there were no objections, he could take it that the Commission provisionally approved article 44 as proposed by the Drafting Committee.

*It was so agreed.*¹⁸

ARTICLE 45

47. Mr. AGO (Chairman of the Drafting Committee) said that article 45 had been the subject of long discussions and that the Drafting Committee had made great efforts to arrive at a generally acceptable text.

¹⁸ For resumption of the discussion see 1135th meeting, para. 78.

48. Paragraph 1 remained unchanged, but major changes had been made in paragraph 2, to protect the interests of both the host State and the sending State. The first sentence of paragraph 2 had been retained, but the word "criminal" before the word "jurisdiction" had been deleted. The following sentence had then been added:

"The sending State shall take the same action in case of grave and manifest interference in the internal affairs of the host State".

That sentence had been considered necessary because some kinds of interference in the internal affairs of the host State did not necessarily come under its criminal law. In the last sentence of paragraph 2 the words "within either the Organization or the premises of a permanent mission", had been deleted.

49. It would be necessary to explain in the commentary that paragraph 2 must not be interpreted as derogating from the principle stated in paragraph 1. Paragraph 2 provided for certain specific measures in case of grave and manifest violation of the criminal law of the host State, but that in no way detracted from the general obligation to respect the laws and regulations of the host State, whether criminal or non-criminal. The obligation to recall, imposed by paragraph 2, related to violation of the criminal law. Violations of the civil law could give rise to consultations between the sending State, the host State and the organization under article 50.

50. The Drafting Committee considered that repeated minor violations of the criminal law could constitute a "grave and manifest violation" within the meaning of paragraph 2.

51. The text proposed for article 45 read:

Article 45

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 jurisdiction, the sending State shall, unless it waives the immunity of the person concerned, recall him, terminate his functions with the mission or secure his departure, as appropriate. The sending State shall take the same action in case of grave and manifest interference in the internal affairs of the host State. This provision shall not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission.

3. The premises of the permanent mission shall not be used in any manner incompatible with the exercise of the functions of the permanent mission.

52. Mr. ALBÓNICO said he could not support the Drafting Committee's text of paragraph 2. The first sentence referred to the case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from jurisdiction. That formula was unnecessarily restrictive; some remedy should also be open to the host State in case of grave and manifest violation of its law in an administrative, fiscal or social security matter.

53. The second sentence of paragraph 2 referred to the case of grave and manifest interference in the internal affairs of the host State. He could not accept the qualification; all interferences in the internal affairs of the host State were grave. The principle of non-intervention did not admit of any exceptions; the General Assembly had made that perfectly clear by adopting resolution 2131 (XX), embodying the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty.

54. Furthermore, he considered that the second sentence of paragraph 2 should constitute a separate paragraph.

55. He could not agree to the exception made in the last sentence of paragraph 2 in so far as it related to the second sentence of that paragraph. Any interference in the internal affairs of the host State should lead to the recall of the person concerned, whether it was committed in carrying out the functions of the permanent mission or not.

56. Mr. AGO explained that the Drafting Committee had not intended paragraph 2 to limit paragraph 1 in any way, but to provide for an extreme measure in case of grave and manifest violation, namely, the recall of the person concerned. In other cases, the obligation to recall would not come into effect immediately, but the host State could request recall through the consultation procedure.

57. As to the last sentence of paragraph 2, it seemed to apply to both the possibilities mentioned by Mr. Albónico: for example, if an international labour conference met in a country where trade union law was not respected or in a country where the policy of *apartheid* was practised, those situations could be criticized by representatives at the conference in carrying out their functions.

58. Mr. CASTAÑEDA said he could support the Drafting Committee's text: it was not perfect, but it was the best that could be achieved in the circumstances. In particular, he preferred the proposed paragraph 2, with the new second sentence, to any suggestion to dilute the provision laid down in the first sentence. It was important to retain the reference to the case of grave and manifest violation of the criminal law of the host State.

59. Applying the principle of non-interference in the internal affairs of the host State involved grave difficulties. The scope of the prohibition of interference was not the same in bilateral and in multilateral relations. In bilateral relations, the sending State had to try to maintain cordial, or at least acceptable, relations with the receiving State. As to multilateral relations, the Chairman of the Drafting Committee had mentioned two extreme cases. It was possible to mention other less extreme, but much more frequent cases: for example, at international meetings it was not at all uncommon for a sending State's representative to make critical remarks about the economic policies of the host State. That type of remark would be unacceptable in bilateral relations, but might be perfectly normal in debate in an international organization. However, a difficult situation could arise if such critical statements were made elsewhere,

in a speech delivered by a representative in his official capacity.

60. In dealing with all those difficulties it would perhaps be advisable to draw inspiration from the concept of "clear and present danger" enunciated by Oliver Wendell Holmes. The problem was to determine whether the statement made by the representative had had a serious impact on the public affairs of the host State—something which could only be assessed subjectively.

61. He suggested that the commentary should make it clear that the second and third sentences of paragraph 2 were to be interpreted liberally so as not to hamper the freedom of action of the permanent representative.

62. Mr. USHAKOV said that he too could accept paragraph 2 as proposed by the Drafting Committee, though he did not consider it entirely satisfactory either as to form or as to substance. It was obvious that the facilities, privileges and immunities enumerated in Part II, section 2, of the draft could be violated by the host State. In such a case the sending State's only recourse was to invoke article 50, even if violations were repeated. On the other hand, article 45, paragraph 1, provided for obligations which the sending State had to assume through its representatives and the members of its missions. In case of grave violation of those obligations, the host State could not only invoke article 50, but could demand the recall of the person concerned. It was because of that lack of balance between the situations of the sending State and the host State that he had reservations regarding the substance of article 45, paragraph 2.

63. Mr. YASSEEN noted that two main changes had been made in article 45. First, it no longer mentioned the place where the violation was committed. For the reason he had stated previously,¹⁹ he welcomed that deletion. Secondly, the notion of grave and manifest interference in the internal affairs of the host State had been introduced into paragraph 2. He could accept that addition if it was clearly understood that the host State would not have final authority to determine whether a violation of its criminal law or an interference in its internal affairs was "grave and manifest". It should always be possible to submit that question to the consultation procedure provided for in article 50 or to the other traditional means of settling international disputes.

64. Sir Humphrey WALDOCK said he shared the concern of those speakers who did not consider article 45 a wholly satisfactory compromise. In particular, he feared that paragraph 2, ostensibly designed to strengthen the position of the host State, would have the effect of weakening it. Paragraph 2 was designed to place an obligation on the sending State to recall a representative in specified circumstances; but there was a danger that it might be interpreted as setting a standard for cases of recall, inasmuch as it not only defined the obligation of the sending State, but also defined the cases in which the host State could ask it to recall a representative. If a dispute should arise between them, and if they

entered into consultations under article 50, the sending State could always say that the alleged violation was not "grave and manifest", and contest the host State's right to insist on recall. In such a case, paragraph 2 would not be limited to its real purpose, but could be regarded as setting a standard for cases of recall in general. In his opinion, therefore, the real purpose of paragraph 2 should be explained in the commentary, which should also make it clear that the obligations set forth in paragraphs 1 and 3 remained.

65. He likewise shared the concern of some members with regard to the last sentence of paragraph 2. The important thing to be borne in mind, however, was that that sentence referred, not to official acts, but to acts performed in carrying out the functions of the permanent mission. If interference in the internal affairs of the host State took the form of publishing material aimed at encouraging disaffection in the host State, that interference would not fall within the scope of acts performed in carrying out the functions of the permanent mission.

66. He was reluctant to accept article 45, although it seemed to be the best text the Drafting Committee could produce. If the article was adopted, it was essential that its underlying purpose should be explained in the commentary and that the position of the host State should be left intact.

67. Mr. KEARNEY said that, like other members of the Commission, he considered the present text of article 45 imperfect, but was prepared to accept it for the reasons given by the Chairman of the Drafting Committee and Sir Humphrey Waldock; he thanked the former for his excellent summary of the points that needed to be made in the commentary in order to ensure that the full meaning and purpose of the article were known to all.

68. He did not think there was any likelihood that the host State would take advantage of the provisions relating to grave and manifest violation of its criminal law or grave and manifest interference in its internal affairs. The Headquarters Agreement between the United Nations and the United States of America,²⁰ which had been in operation for almost twenty-five years, was in some respects more restrictive than the proposed article 45, but it had never given rise to any particular difficulties. For example, section 13 (b) provided that:

"... In case of abuse of such privileges of residence by any such person in activities in the United States outside his official capacity, it is understood that the privileges referred to in Section 11 shall not be construed to grant him exemption from the laws and regulations of the United States regarding the continued residence of aliens..."

It had never been alleged that the United States had abused that provision; on the contrary, it had always gone out of its way to avoid limiting the right of representatives to speak as they saw fit. Both in and outside the United Nations, representatives had been known to suggest that United States tax revenues should be used

¹⁹ See 1098th meeting, para. 9.

²⁰ United Nations, *Treaty Series*, vol. 11, p. 12.

for the benefit of the international community—a suggestion which might be considered unreasonable interference in his country's domestic affairs. The concern expressed that article 45, paragraph 2, might lead to abuses by the host State was unwarranted and exaggerated. If such concern did exist in the Commission, that only reinforced the argument that some more elaborate system for the settlement of disputes should be provided for under article 50.

69. Mr. REUTER said that he had no enthusiasm for article 45, but had resigned himself to accepting it provisionally, for three reasons. First, as previous speakers had implied, a bad text was perhaps better than no text at all. Secondly, it must be recognized that the practice of permanent missions, though it went back a good many years, had not yet produced any dramatic incidents. Thirdly, neither the host State nor the sending State could be granted the right of final decision, but if a dispute arose it would always be possible to invoke article 50.

70. Nevertheless, the fact remained that the text of article 45 was obscure; it was one of those compromises which were open to any and every interpretation. Paragraph 1 stated a very general obligation without specifying the sanction for its breach, while paragraph 2 mentioned a possible sanction for grave cases. But the members of the Commission themselves disagreed on the interpretation of those provisions: some believed that paragraph 2 applied automatically—an opinion he did not share, since it would always be possible to invoke article 50—and others that in the case of minor violations, paragraph 2 would also be applicable, though less strictly. In any event, the article raised a more serious problem of ordinary international law, namely, the meaning of the words "Without prejudice to their privileges and immunities" in paragraph 1.

71. The last sentence of paragraph 2 was not clear either; it was impossible to imagine what criminal offence could be committed in carrying out the functions of the permanent mission as enumerated in article 7. The same applied to interference in the internal affairs of the host State, the only example which came to mind being that of delegations to organs and conferences, whose freedom of speech no one contested. He could not imagine a single instance in which the sentence in question could have any practical application to permanent missions.

72. A tribute was due to the Drafting Committee for its efforts to produce a satisfactory text, but as matters stood, and if article 50 remained in its present form, article 45 would be open to every possible interpretation.

73. Mr. EUSTATHIADES said that he too found the text lacking in clarity, particularly the last sentence of paragraph 2, which introduced an exception into a specific system of sanctions. Paragraph 1 stated a general rule, a breach of which might possibly entail sanctions, subject to article 50. Paragraph 2 went further by expressly providing for a specific sanction in cases of grave violation. The procedure provided for in article 50 would also be applied in such cases, but it would be

preceded by the application of the sanction; and that made the situation in paragraph 2 clearer. Next, as a second possibility, came interference in the internal affairs of the host State, and then the exception stated in the last sentence. The scope of that last sentence was very wide, since it referred to acts performed "in carrying out the functions of the permanent mission", which in the case of missions to international organizations with a wide range of activities, meant a great variety of acts. By virtue of that exception, the permanent representative would in most cases be exonerated if he interfered in the internal affairs of the host State. Logically speaking, since such interference could entail a sanction only if it was committed outside the exercise of the functions of the mission, there was no reason and no necessity to require that it should be "grave and manifest", like the violation of the criminal law, in order to produce the prescribed effect.

74. Like other members of the Commission, he could only approve article 45 provisionally. It would be necessary to draft a very clear commentary on the lines proposed by Sir Humphrey Waldock; but the Commission could not do that until it had considered article 50.

The meeting rose at 6 p.m.

1115th MEETING

Tuesday, 8 June 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, 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.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168 and Add.1; A/CN.4/L.169; A/CN.4/L.170)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of draft article 45 proposed by the Drafting Committee (A/CN.4/L.168/Add.1).