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A/CN.4/SR.1023

Summary record of the 1023rd meeting

Topic:

Representation of States in their relations with international organizations

Extract from the Yearbook of the International Law Commission:-

1969, **vol. I**

diction sur ces membres et ces personnes . . .", while the English version read: "However, the host State must exercice its jurisdiction over those persons . . .". In drafting multilingual texts, it was surely unsound to adopt a phrase which in one language version had two objects and in another had only one.

54. Sir Humphrey WALDOCK suggested that the English version of the first sentence of paragraph 2 be amended to read: "Other members of the staff of the permanent mission and persons on the private staff . . ."; the second sentence of that paragraph could then be amended to read: "However, the host State must exercise its jurisdiction over those members and persons . . .".

55. Mr. BARTOŠ said that in any case there could be no question of reverting to the term "servant", which had been rejected in the new ILO terminology. Furthermore, the expression "private staff" was wider and could include a tutor, private chaplain, and so on.

56. The CHAIRMAN suggested that the Commission accept the amendment to the English version proposed by Sir Humphrey Waldock in order to bring it into line with the French.

It was so agreed.

57. Mr. CASTRÉN said he was a little concerned at the deletion of the words "or is, or has been, its representative". He did not particularly like that form of words, which he did not find very clear because he did not see how the fact of a person having been a representative of the host State could affect his legal status when he was no longer a representative of that State. But Mr. Tammes had pointed out that the words appeared in several treaties or conventions, so it might be better to hear the Special Rapporteur's opinion before deleting them.

58. Mr. ALBÓNICO said that the text of article 40 proposed by the Drafting Committee reflected present practice and was in conformity with the corresponding article 38 of the Vienna Convention on Diplomatic Relations.[11] He was therefore prepared to accept the Drafting Committee's proposal to delete the words "or is, or has been, its representative".

59. Mr. BARTOŠ said that the situation contemplated in the phrase deleted by the Drafting Committee might occur in consequence of a change of régime or a territorial change entailing a change in nationality, but such cases were relatively rare and it seemed unnecessary to complicate the article by alluding to them, particularly since they were always governed by special provisions.

60. The CHAIRMAN said that Mr. Castrén had suggested that the Special Rapporteur be asked for his opinion, but no member had formally proposed that the deleted phrase be restored. The Commission might therefore adopt the article in the Drafting Committee's version, the more so since the 1961 Vienna Convention did not contain the phrase, and at the same time ask the Special Rapporteur for his opinion.

61. Mr. CASTAÑEDA said that the Commission also had to decide whether the reference to permanent residence should be kept or deleted.

62. Mr. YASSEEN said he had stated his opposition to the reference to permanent residence as long ago as 1961, at the Vienna Conference on Diplomatic Intercourse and Immunities. Though status as a national of the host State might be a reason for restricting privileges and immunities, permanent residence in that State was not, especially if the person concerned had the nationality of the sending State. He was therefore against mentioning permanent residence in article 40, paragraph 1.

63. Mr. ALBÓNICO said that he supported the Drafting Committee's proposal to retain the words "or permanently resident in that State" in paragraph 1, since it was only logical that representatives who had their permanent residence in the host State should not enjoy the same privileges and immunities as those coming from the sending State.

64. Mr. CASTAÑEDA said that the situation contemplated in the phrase "or permanently resident in that State" often arose, especially in New York. There was no reason whatever to give such persons a lower status, since that would mean creating a separate of permanent representatives different from the others. Permanent residence did not create any special link with the host State that justified discriminatory treatment of permanent representatives who were also permanent residents.

65. If the host State considered that the person concerned ought not to enjoy the privileges and immunities of a permanent representative at the same time as the status of permanent resident, it should change its internal laws or regulations governing the status of permanent residents. He was in favour of deleting the phrase "or permanently resident in that State".

66. Mr. KEARNEY said he did not think that the host State should be placed under the burden of changing its legislation for the benefit of representatives who had their permanent residence in its territory. By electing to live permanently in the host State, the individual in question had already acquired certain privileges and immunities which were denied to temporary visitors, such as tourists, students, trainees and the like. If he subsequently became the permanent representative of a foreign State, it would be unreasonable for him to expect that he might thereby acquire an additional set of privileges and immunities, such as exemption from taxation and police jurisdiction and the right to import duty-free goods. He therefore favoured the retention of the words "or permanently resident in that State".

The meeting rose at 1 p.m.

1023rd MEETING

Friday, 18 July 1969, at 10.20 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Albónico, Mr. Bartoš, Mr Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Ignacio-

[11] United Nations, *Treaty Series*, vol. 500, p. 118.

Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218)

[Item 1 of the agenda]

(continued)

Draft articles proposed by the Drafting Committee

Article 40 (Nationals of the host State and persons permanently resident in the host State) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of the text proposed by the Drafting Committee for article 40. The Commission had been asked by the Drafting Committee to decide whether or not it intended to retain the reference in paragraph 1 to permanent residence.

2. Mr. BARTOŠ observed that it was in the Vienna Convention on Diplomatic Relations that permanent residence had been treated for the first time as a case for exclusion from privileges and immunities.[1] The exclusion did not, of course, relate to functional privileges and immunities, but it did lead, even in the present draft, to discrimination between permanent representatives who enjoyed full privileges and immunities and those who enjoyed them only for official acts performed in the exercise of their functions.

3. In the case of permanent residents, host States complained more about the privileges and immunities granted to members of their families than about those enjoyed by the permanent representatives themselves.

4. With regard to such permanent representatives themselves, various objections had been raised. The host State regarded them as something of a danger, because of their special knowledge of the customs of the country and because it was easier for them than for orther diplomats to gain access to government officials. Most permanent residents engaged in some commercial or professional activity in the host country, like nationals. If it were agreed that, in their capacity as permanent representatives, they were entitled to the same privileges and immunities as other permanent representatives, it would also have to be agreed that they must refrain from any commercial or professional activity. Mr. Kearney had made a discreet but plain enough allusion to persons who tried to take advantage of their position to obtain diplomatic privileges and immunities in order to evade taxes, dues or customs duties.[2] The matter must therefore be regulated very clearly.

5. It was in the case of members of the family that the problem was most delicate. If permanent representatives who were also permanent residents were granted full privileges and immunities, those privileges and immunities would also extend to their wives and children. He had been told that the sons of permanent representatives had often caused the local authorities of the host country far more trouble than their fathers. But since children, too, were generally covered by privileges and immunities, the host countries had had to request that adult sons, at least, should not enjoy them. In New York the question had been raised even in connexion with the adult daughters of persons enjoying privileges and immunities, but no exception had been made in that case.

6. Personally, he had no hard and fast views on the matter, but he did think that, before deleting the reference to residence from paragraph 1, the Commission should consider the consequences and decide whether it served any purpose. In most of the countries where there were headquarters of international organizations, there were numbers of aliens who enjoyed the status of permanent resident, which allowed them advantages not available to other aliens, including the right to engage in professional or commercial activity.

7. Presumably the Special Rapporteur had included that exception in the text of his draft not just in order to follow the precedents of the Vienna Conventions, but also for realistic reasons, which should at least be brought to the Commission's notice.

8. If the Commission decided to delete that exception, it should state the reason plainly in the commentary and explain that it had examined the possibility of restricting privileges and immunities in the case under consideration, but had concluded that to do so might impede the performance of the functions of permanent missions and permanent representatives.

9. Mr. YASSEEN said that the status of permanent representative or member of a permanent mission was an international status which must take precedence over that of permanent resident. The exception in respect of nationality of the host State was justified because of the bond of allegiance between the national and his State. The status of national thereby acquired an international scope.

10. The proviso in paragraph 1 was not based on the functional theory. It was more restrictive than that, for performance of the function was not limited to official acts. If the Commission decided in favour of such a limitation, it would be restricting the freedom of action and latitude of a permanent representative who was also a permanent resident and be placing him in an inferior position in relation to other permanent representatives.

11. The possibility of combining the advantages of the two kinds of status was another matter. He was not urging the desirability of any such plurality. The host State might take steps to prevent it. The Commission might provide that the status of permanent resident was suspended for such time as the person concerned enjoyed the status of permanent representative: he would then not be able to engage in any professional or commercial activity, for instance. But the privileges

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[1] United Nations, *Treaty Series*, vol. 500, p. 118, article 38.

[2] See previous meeting, para. 66.

and immunities of a permanent representative should not be restricted solely by reason of his permanent residence in the host State.

12. Mr. RAMANGASOAVINA said he was not in favour of deleting the restriction relating to permanent residence. It had been argued that it would entail discrimination as between permanent representatives, but the attempt to avoid such discrimination involved the risk of creating another and even more serious form of discrimination. There could be two classes of permanent resident in a country: residents who were nationals of the country and residents who were aliens. As a general rule, an effort was made to accord them complete equality both in civil life and in employment. Without the restriction in paragraph 1, a permanently resident alien, who was also a permanent representative, would enjoy unfair advantages in relation to a resident who was a national.

13. Article 40 as it stood gave adequate protection to the persons covered by it. First, they enjoyed privileges and immunities for official acts; secondly, the host State might grant them additional privileges and immunities; and thirdly, in the exercise of its jurisdiction the host State must not interfere unduly with the performance of the functions of the mission. Thus it was the functions of the permanent representative that were protected. So far as his private acts were concerned, a permanent representative who was also a permanent resident should be placed on an equal footing with nationals of the host State.

14. A comparison of the provisions of articles 39 and 40 seemed to disclose an anomaly. Article 39, paragraph 1, did not mention permanent residence in connexion with members of the family. It was, however, possible that a member of the family, an adult son, for example, might have become a permanent resident, in which case he would apparently be entitled to full privileges and immunities, whereas the permanent representative who was in the same position would be subject to the restriction in article 40.

15. With regard to the wording, the expression "*d'une manière excessive*" in the French version of article 40, paragraph 2, and in article 39, paragraph 4, was a bad translation of the English adverb "unduly". It would be better to say "*d'une manière abusive*". The expression "*d'une manière excessive*" could give the impression that the host State might interfere with the functions of the mission, provided that it did not do so excessively.

16. Sir Humphrey WALDOCK said he felt compelled to start from the premise that article 40 was based on a text which had already been carefully considered by governments in connexion with the 1961 Vienna Convention.

17. Moreover, it was impossible to overlook the fact that an individual's permanent residence in the host State prior to his appointment as a representative did distinguish him from an individual who had resided in the sending State prior to his appointment. To take only one example, he was in an exceptionally favourable position vis-à-vis his business creditors. His position was entirely different from what it would be in normal diplomatic relations, when the receiving State would not be obliged to accept his appointment and could refuse its *agrément*. That measure of protection was lacking in the case of a host State, whose position was therefore much less strong. Consequently, if the words "or permanently resident in that State" had been considered necessary in the Vienna Convention, they would, *a fortiori*, seem to be even more necessary in the present article.

18. For the same reasons as had already been given by Mr. Kearney, Mr. Bartoš and Mr. Ramanasoavina, therefore, he did not think that a case had been made out for departing from the Vienna text.

19. Mr. ELIAS said that, although powerful arguments had been advanced for the deletion of the phrase "or permanently resident in that State", it would be difficult to produce a new text which would cover the problems mentioned by Mr. Kearney and other members. In order not to disrupt the delicate formula adopted in article 38 of the 1961 Vienna Convention, the best solution would be to retain paragraph 1 in its present form.

20. The argument for deleting the phrase in question, however, should be fully stated in the commentary, in order to give governments an opportunity of suggesting alternative formulations if they wished.

21. Mr. ALBÓNICO said he was inclined to support the idea that permanent residence in the host State placed certain limitations on the privileges and immunities of a permanent representative. Under the law of many States, permanent residence created a new domicile, which extinguished any former domicile and in itself conferred a sort of second nationality. Permanent residence tended to forge a juridical and political link of great strength, and if that link gave rise to certain rights and privileges, it was only logical that it should also give rise to certain obligations towards the host State.

22. It was inconceivable that, by voluntarily taking a diplomatic appointment, a person already enjoying the rights and privileges of permanent residence should be able to place himself in a more favoured position than those who were, in that respect, his equals. To accept that interpretation would create serious problems of jurisdiction, for by virtue of his permanent residence in the host State such a person would enjoy immunity, in civil suits, from the jurisdiction of his home State, while by taking the post of permanent representative in the host State he would be immune from the jurisdiction of that State as well. Hence the present text of paragraph 1 should be retained.

23. He was beginning to be seriously concerned at the fact that the Commission in some cases seemed to regard the text of the Vienna Convention as something sacrosanct, from which no departure could be permitted, while in other cases it took precisely the opposite view.

24. Mr. IGNACIO-PINTO said he would be inclined to advocate the deletion of the reference to permanent residence in paragraph 1.

25. It had been convincingly argued that a permanent representative, or a member of a permanent mission, who was at the same time a permanent resident of the host State, was in a position of unjustified inferiority incompatible with his functions with an international organization. Combining the advantages of the status of permanent resident with those of the status of permanent representative would, however, mean placing a permanent representative who enjoyed that dual status in a more favourable position than other permanent representatives. Might not the best solution be that in such a case the permanent representative would waive his status as permanent resident, at least for the period during which he enjoyed privileges and immunities?

26. In view of the strength of the arguments advanced by those in favour of retaining the restriction, however, he would be prepared to approve its retention for the time being, provided that it was fully explained in the commentary that the question should be considered very closely since there was a danger of its undermining the very basis of the privileges and immunities of permanent representatives to international organizations. The Commission could take a final decision later, in the light of comments by Governments.

27. Mr. NAGENDRA SINGH said that, after listening to the views of his colleagues, he did not think that there was a sufficiently strong case for departing from the text of the Vienna Convention.

28. He agreed with Mr. Elias that a reference to the difference of opinion over paragraph 1 should be included in the commentary in order to attract comments by Governments.

29. The CHAIRMAN, speaking as a member of the Commission, said that there were three reasons for deleting the phrase. First, the interests of medium-sized and small countries needed to be protected, for they were the countries which appointed permanent residents as permanent representatives to an international organization or as members of the staff of their mission, because they did not have enough qualified civil servants available.

30. Secondly, article 39, paragraph 1, like article 37, paragraph 1 of the Vienna Convention on Diplomatic Relations, contained no exception relating to permanent residence. Mr. Ramangasoavina had pointed out that that would entail different treatment for a permanent representative and the members of his family, whereby the latter would have the advantage.

31. Thirdly, article 40, paragraph 1 referred to the functions of the permanent representative and the members of the diplomatic staff of a permanent mission to an international organization. While in relations between a sending State and a receiving State it was easy to decide whether an act fell within the diplomatic function or not, in relations between States and international organizations it was not for the host State to determine whether something did or did not fall within the functions of a permanent mission.

32. There were, however, also arguments for retaining the proviso. It was a rather delicate question for the Commission to decide.

33. Speaking as Chairman, he said that the Commission might consider replacing the word "*excessive*" by the word "*abusive*" in the French version of article 40, paragraph 2, as suggested by Mr. Ramangasoavina, on the understanding that it would be specified in the commentary that the intention was merely to provide a more accurate equivalent of the English term, not to change the meaning of the provision.

34. Mr. ROSENNE said that, since article 40 had been copied from a text which was already authentic in five languages, he doubted whether the Commission should try to improve one particular version at the present stage. Such an action would lay the text open to misinterpretations; it would be better only to refer to the matter in the commentary.

35. Sir Humphrey WALDOCK said he thought that the French word "*abusive*" went much further than the English word "unduly", which in his opinion was almost exactly right and offered greater protection to the sending State.

36. Mr. ALBÓNICO said that the French word "*abusive*" had an entirely different connotation from the Spanish word "*indebidamente*".

37. Mr. RAMANGASOAVINA said he thought it was the French word "*excessive*" which implied more than was meant. The verb "*entraver*" was in itself very strong. The expression "*de manière excessive*" meant exceeding certain limits. It would therefore imply that the host State was permitted to interfere with the performance of the functions of the mission within certain limits. The use of the word "*abusive*" would stress that what was to be prevented was misuse of authority by agents of the host State.

38. The CHAIRMAN, supported by Mr. USTOR, suggested that the Commission should decide not to amend the last sentence of paragraph 2, but instead, to explain the difficulty in the commentary.

It was so agreed.

39. The CHAIRMAN suggested that, in response to the Drafting Committee's request, the Commission take a decision on the question whether the words "or permanently resident in", in paragraph 1, should be deleted or not.

40. Mr. ALBÓNICO said he thought that the attention of Governments should be drawn tho the general problem involved rather than to the desirability of deleting a particular phrase.

41. The CHAIRMAN put to the vote the amendment deleting the words "or permanently resident in", in paragraph 1.

The amendment was rejected by 10 votes to 5, with 1 abstention.

42. Mr. ROSENNE said that he had voted against the amendment because he did not think that a sufficiently strong case had been made out for the deletion of the phrase in question.

43. Mr. RUDA said that he had voted against the amendment because he thought that it was better, for

the time being, to adhere to the language of article 38 of the 1961 Vienna Convention.

44. Mr. YASSEEN said he had voted for the amendment, despite his anxiety that the Commission should follow the text of the Vienna Conventions, because he believed that the retention of the exception might impair the free exercise of an international function, namely, that of permanent representative.

45. Mr. BARTOŠ said he had already explained his position on the amendment. He had abstained from voting because he believed that deletion of the limitation would require further changes in the text, which the Commission was not in a position to make at that stage.

46. The CHAIRMAN, speaking as a member of the Commission, said he had voted for the amendment with the interests of medium-sized and small countries particularly in mind.

47. Mr. RUDA said he agreed with the Chairman of the Drafting Committee that there were two distinct trends in the Commission concerning article 40 and that the arguments on both sides should be clearly reflected in the commentary and brought to the attention of Governments.

48. Mr. KEARNEY proposed that the commentary should also include a suggestion that an attempt be made to obtain some factual information about the practical aspects of the matter at issue: in other words, to ascertain to what extent, at the present time, permanent representatives to international organizations were, in fact, permanent residents of the host State.

49. Mr. ELIAS said he supported Mr. Kearney's proposal. The situation had arisen in his own country, and the Commission should make a direct request to Governments for the necessary information.

50. Mr. ROSENNE said that the Commission should not only request the views of Governments, but should also ask the Secretariat to what extent the problem existed in the main cities of the world where there were international organizations.

51. Mr. NAGENDRA SINGH said he supported Mr. Rosenne's suggestion.

52. The CHAIRMAN suggested that the Commission adopt the text proposed by the Drafting Committee for article 40, with the amendments to the English version of paragraph 2 made at the previous meeting, on the understanding that the commentary would be drafted on the basis of the discussion concerning the question of permanent residents.

Article 40, as amended, was adopted.

ARTICLE 41 (Duration of privileges and immunities) [3]

53. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 41.

54. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 41

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, but shall subsist until that time, even in case of armed conflict. 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 of or 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 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.

55. The Drafting Committee had made only one change of importance in the text. The final part of paragraph 1 dealt with the position of a person who was appointed a member of a permanent mission when he was already in the territory of the host State. The Committee had noted that article 17, paragraph 3 [4] provided that the organization should transmit to the host State certain notifications received from the sending State, in particular notifications concerning the engagement of persons resident in the host State as members of a permanent mission. Article 17, paragraph 4, provided in addition that the sending State might also transmit the notifications in question direct to the host State. In order to take those provisions into account the Committee had added at the end of article 41, paragraph 1, after the words "when his appointment is notified to the host State", the words "by the Organization or by the sending State".

56. The Committee had replaced the expression "permanent resident of" in the English version of paragraph 4 by the expression "permanently resident in", and in the Spanish version the phrase "*ni residente permanente en él*" by the phrase "*o tenga en él resi-*

[3] For previous discussion, see 996th meeting, para. 64.

[4] See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

dencia permanente". The same changes had been made in article 40, paragraph 1.

57. Mr. RUDA said he favoured the text proposed by the Drafting Committee; the additional words at the end of paragraph 1 were appropriate. He also fully supported the changes made in the Spanish version.

58. The CHAIRMAN suggested that the Commission adopt the text proposed by the Drafting Committee for article 41.

Article 41 was adopted.[5]

ARTICLE 42 (Transit through the territory of a third State) [6]

59. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 42.

60. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 42

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*.

61. The Special Rapporteur had entitled article 42 "Duties of third States"; for the sake of uniformity the Drafting Committee had substituted the title of article 43 of the draft on special missions, namely, "Transit through the territory of a third State".

62. All the other changes were purely drafting amendments. In the French version, in the first sentence of paragraph 1 the Committee had put the verb "*accorder*", which had been in the future in the Special Rapporteur's text and in article 40 of the 1961 Vienna Convention, into the present tense. It had also considered that the phrase "*Il fera de même pour les membres de sa famille*", at the beginning of the second sentence of paragraph 1, needed amending. The words "*Il*" and "*sa*" seemed to refer to the same person, whereas in fact "*Il*" referred to the third State and "*sa*" to the permanent representative or member of the diplomatic staff mentioned a little earlier in the text. The Committee had therefore amended the phrase to read "*L'Etat tiers fait de même pour les membres de la famille*". The English version was not affected by that change. In the Spanish version, the words "*su familia*" had been replaced by the words "*la familia*".

63. In paragraphs 3 and 4, in order to bring the wording into line with that of article 28,[7] the Committee had replaced the expression "diplomatic couriers" by "couriers of the permanent mission" and "diplomatic bags" by "bags of the permanent mission".

64. At the first reading, the Commission had discussed at length the question whether third States were obliged to allow members of permanent missions free passage. The discussion had turned mainly on the phrase "which has granted him a passport visa if such visa was necessary". The Committee had not changed that phrase at all, but had expressed the hope that the Special Rapporteur would record the Commission's discussion in the commentary in order to elicit comments from Governments.

65. The CHAIRMAN, speaking as a member of the Commission, referring to the change in language made by the Drafting Committee in the second sentence of paragraph 3, said that a diplomatic courier and a courier of a permanent mission were sometimes the same person. If a distinction had to be made, either the wording proposed by the Drafting Committee should be retained and the requisite explanation given in the commentary, or the Commission should go back to the Special Rapporteur's wording.

66. Mr. ROSENNE said he asssociated himself with the Chairman's comments.

67. There was also another question he wished to raise with regard to paragraphs 1 and 3. Those paragraphs were couched in terms drawn from the 1961 Vienna Convention which suggested that recognition of the status of the permanent representative or other person concerned was dependent on the fact that the third State had "granted him a passport visa if such visa was necessary". Thus they did not cover the case in which no visa was required; no obligation was specified for the third State in that case. Since 1961, the abolition of the visa requirement had become much more widespread, especially for diplomatic passports. It was therefore necessary to specify that the third State should also accord the necessary immunities, where no visa was required.

[5] For resumption of the discussion of paragraph 2, see 1036th meeting, para. 1.

[6] For previous discussion, see 997th meeting, para. 1.

[7] See 1017th meeting, paras. 52 and 70.

68. Mr. ALBÓNICO said that paragraph 1 dealt only with the case of a permanent representative or a member of the diplomatic staff of the permanent mission, and members of their families, proceeding to take up or to return to their posts or returning to their own country. Paragraph 4 dealt with the case in which the presence of such persons in the territory of the third State was "due to *force majeure*". No provision was made, however, for other journeys by such persons to third States. The 1928 Havana Convention regarding Diplomatic Officers specified that the third State should grant privileges and immunities in such cases.[8]

69. Mr. CASTAÑEDA (Chairman of the Drafting Committee), replying to Mr. Rosenne, said that paragraph 1 dealt with the case in which a visa was required and was granted by a third State. In such a case, the third State must grant inviolability and any other necessary immunities, but it was obvious that the same applied when no visa was required.

70. With regard to the question raised by Mr. Albónico, the first three paragraphs of article 42 dealt only with the transit of persons proceeding to take up or to return to their post or returning to their own country. Paragraph 4 dealt with the exceptional case of *force majeure*. There was *force majeure,* for example, when an aircraft had to make a forced landing in the territory of a State outside its normal route. The case of a permanent representative who already lived in the host State and was travelling to another country, no matter what was the object of the journey, was not covered by article 42.

71. Sir Humphrey WALDOCK said he associated himself with the interpretation placed on paragraph 1 by the Chairman of the Drafting Committee. Admittedly the form of words used in that paragraph, which had been taken from the corresponding provision of the 1961 Vienna Convention on Diplomatic Relations,[9] was not very felicitous. Nevertheless, the intention could only have been to indicate that, whether a passport visa was necessary or not, the privileges and immunities should be accorded to the person to whom the necessary visa had been granted or who was dispensed from the visa requirement. Any other interpretation would deprive paragraph 1 of all useful effect and would be contrary to the normal rules of interpretation.

72. Mr. ROSENNE said that the interpretation placed on paragraph 1 by the Chairman of the Drafting Committee and by Sir Humphrey Waldock was eminently desirable. But unfortunately, it was possible for a State to adopt a different interpretation in good faith, especially as privileges and immunities were always construed restrictively.

73. If it were desired to ensure that privileges and immunities would be accorded by the third State even where a visa was not required, the language of paragraph 1 would have to be altered. The question was of practical importance because there had, in fact, been serious abuses of the privileges and immunities of permanent representatives in transit.

74. The CHAIRMAN, speaking as a member of the Commission, said that it was stipulated in article 43, paragraph 3, of the draft on special missions [10] that third States "shall accord to the couriers and bags of the special mission in transit the same inviolability and protection as the receiving State is bound to accord". He noted that the Drafting Committee had taken that provision as a model in amending paragraph 3 of article 42. Consequently, he would not press the point he had made earlier about the distinction between a diplomatic courier and the courier of a permanent mission.

75. The phrase " which had granted him a passport visa if such visa was necessary", which was in the two Vienna Conventions and had now been reproduced in article 42, had been omitted from article 43, paragraph 1, of the draft on special missions. The reason why it had been omitted was that a paragraph 4 had been added to the article, stipulating that a third State was bound to permit the persons referred to in the article to pass through its territory only if it had been informed in advance, either in the visa application or by notification, of the transit of those persons.

76. Mr. ROSENNE said he was grateful to the Chairman for having drawn attention to the different structure of the corresponding article 43 of the draft on special missions. It was true that paragraph 1 of that article did not contain the words "which has granted him a passport visa if such visa was necessary", but paragraph 4 made a clear distinction between cases in which a visa was necessary and other cases, and specified that the third State was bound to comply with its obligations "only if it has been informed in advance, either in the visa application or by notification, of the transit of those persons . . . and has raised no objection to it". A similar paragraph was not included in the article under discussion.

77. It was clear that paragraph 4 of article 43 of the draft on special missions provided a much better model for article 42 with regard to the point he had raised.

78. Mr. BARTOŠ observed that article 9 of the Vienna Convention on Diplomatic Relations provided that the receiving State might, without having to explain its decision, declare a person *non grata,* or not acceptable, even before that person arrived in its territory. Hence a third State had no obligation to grant a visa.

79. Sir Humphrey WALDOCK said that the use of the word "If" in the present article made it impossible for a third State acting in good faith to interpret the provision restrictively. The object of paragraph 1 was to leave the third State free to refuse passage to the persons concerned; the privileges and immunities were specified for the case in which it accorded passage, whether by granting a visa or by not requiring one.

80. Mr. CASTRÉN said he agreed with Mr. Castañeda's and Sir Humphrey Waldock's interpretation of

[8] League of Nations, *Treaty Series,* vol. CLV, p. 271, article 23.

[9] United Nations, *Treaty Series,* vol. 500, pp. 118-120, article 40.

[10] See *Yearbook of the International Law Commission, 1967,* vol. II, p. 365.

paragraph 1. In his opinion, Mr. Rosenne's restrictive construction was not logical. In practice, until a third State had received a visa application or advance notification, it would not know whether a journey was the official travel in transit covered by article 42.

81. Mr. KEARNEY said that the legislative history of the corresponding article of the 1961 Vienna Convention supported the construction placed on paragraph 1 by the Chairman of the Drafting Committee. The Commission's 1958 draft of article 39 [11] had not contained the words "which has granted him a passport visa if such visa was necessary"; they had been introduced at the 1961 Vienna Conference as an amendment.

82. The CHAIRMAN, speaking as a member of the Commission, said he concurred in the interpretation of paragraph 1 given by Mr. Castañeda and other members.

83. Mr. ROSENNE said he was opposed to article 42 as it stood. He could have supported the article if it had been drafted in the same form as article 43 of the draft on special missions.

84. The CHAIRMAN suggested that the Commission adopt article 42 in the form proposed by the Drafting Committee.

Article 42 was adopted.

ARTICLE 43 (Non-discrimination) [12]

85. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 43.

86. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 43

Non-discrimination

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

87. In order to bring the Spanish version of the article closer to the other language versions, the Committee had deleted the word "*ninguna*", although it appeared in the text of the Vienna Convention.

88. Mr. NAGENDRA SINGH suggested that the Commission adopt article 43 as proposed by the Drafting Committee.

Article 43 was adopted.

The meeting rose at 1 p.m.

[11] *Op. cit.*, 195, vol. II, p. 103.

[12] For previous discussion, see 997th meeting, para. 22.

1024th MEETING

Tuesday, 22 July 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218/Add.1)

[Item 1 of the agenda]
(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 44 (Obligation to respect the laws and regulations of the host State) [1]

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 44.

2. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 44

Obligation to respect 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. The premises of the permanent mission must not be used in any manner **incompatible with the functions** of the permanent mission [as laid down in the present articles or by other rules of general international law].

3. The Committee had unanimously decided that the words "or by special agreements in force between the sending and the host State", at the end of paragraph 2 (A/CN.4/218/Add.1), were unnecessary, because article 4 stated that "The provisions of the present articles are without prejudice to other international agreements in force between States or between States and international organizations". The Committee had therefore deleted those words.

4. Several members of the Committee had also considered the words "as laid down in the present articles or by other rules of general international law" to be unnecessary. As not all the members had been in favour

[1] For previous discussion, see 997th meeting, paras. 67-75, and 998th meeting.