

Document:-  
**A/CN.4/SR.1027**

**Summary record of the 1027th meeting**

Topic:  
**Representation of States in their relations with international organizations**

Extract from the Yearbook of the International Law Commission:-  
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of article 48 was inappropriate; it did not necessarily follow that property and archives had to be withdrawn.

66. Sir Humphrey WALDOCK said that, although article 44 of the Vienna Convention on Diplomatic Relations might be regarded as somewhat misleading, it was not correct to interpret it as implying that the sending State was obliged to remove its mission. The emphasis on armed conflict in that Convention was very understandable, because in the case of bilateral relations armed conflict was the one situation in which difficulties really arose in practice. In the past, when war had broken out, diplomats had sometimes been held by receiving States for the purpose of applying pressure on sending States, and it was that kind of experience which the Vienna Conference had had in mind when drafting article 44.

67. At the same time, it was an element which could not be entirely neglected in the present draft, and the reference to armed conflict should not be omitted altogether. A host State was just as likely to cause difficulties for a permanent mission as it was for diplomats. Nevertheless, the point raised by Mr. Yasseen regarding the need for the permanent mission to protect the interests of the sending State in the organization itself would have to be taken into account, although it was unlikely that those problems could be entirely solved at the present time.

68. He supported the suggestion by Mr. Elias that the reference to armed conflict be deleted from the first sentence of article 47 and that a new final sentence be added; that would remove the misunderstanding regarding the primary objective of article 47. The inclusion of the phrase "to leave at the earliest possible moment" was quite understandable in the Vienna Convention on Diplomatic Relations, but the same considerations did not apply in an ordinary case of departure and the phrase was therefore inappropriate.

69. He agreed with the Chairman's approach to article 48. The article should cover two cases parallel to those contemplated in the Vienna Convention on Diplomatic Relations: the permanent and the temporary recall of the permanent mission; sub-paragraphs (a) and (b) of article 45 of the Vienna Convention would then be appropriate to article 48.

70. He was not, however, convinced that paragraph 2 could be dispensed with altogether. The question of the fate of the archives might be of some importance, since they might well contain material of great political significance, as well as material which related only to the organization. He agreed with the suggestion by Mr. Bartoš that the organization might be added to the possible custodians in the provision corresponding to sub-paragraph (b) of article 45 of the Vienna Convention on Diplomatic Relations.

71. Lastly, he agreed that the Commission should not attempt to define the concept of family.

72. Mr. RAMANGASOAVINA said that he too found the wording of articles 47 and 48 unsatisfactory. Although the expression "even in case of armed conflict" was presented as an incidental situation and as

one case among others, the impression was given that that was the main object of concern.

73. It would be a mistake to follow the text of the Vienna Convention blindly when the situation was very different. In the case of article 47 the formulation suggested by the Chairman would not suffice, since there would still be the references to leaving "at the earliest possible moment" and to placing at their disposal "the necessary means of transport", and the requirement to withdraw the property, all of which seemed to relate to the extreme situation of armed conflict. Some other wording must therefore be found which would show that the article applied simply to the temporary or final closure of a permanent mission. In particular, provision must be made for the sending State to entrust the custody of its permanent mission's property and archives to another permanent mission, or even to place them under the protection of the international organization.

74. The Commission should not shirk the difficulties of defining the term "family". A rough definition had already been attempted by a reference to the persons forming part of the household, but even that approximation was debatable; it had not made possible any satisfactory regulation of the position of the husband of a female diplomat. It was for the Commission to seek a minimum definition, as it were, of the family, based on the modern western concept, that was to say, comprising the husband and wife, the children and perhaps even orphaned grandchildren for whom their grandparents were responsible. A definition which even covered certain exceptional cases would be preferable to compelling diplomats to resort to subterfuges such as engaging their grown-up daughter as a children's nurse in order to enable her to enjoy privileges and immunities.

75. Mr. USTOR 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. If armed conflict was to be referred to at all, it was not enough to mention it only in connexion with the departure of the permanent mission. The permanent mission might well need to go on functioning, in which case it was essential to ensure the continuation of other facilities, such as freedom of movement and communication. The considerations which arose in the case of a permanent mission to an international organization were quite different from those applying in the case of bilateral relations between States.

The meeting rose at 1.10 p.m.

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### 1027th MEETING

Friday, 25 July 1969, at 11.30 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney,

Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Ustor, Sir Humphrey Waldoock, 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 47 (Facilities for departure) and

ARTICLE 48 (Protection of premises and archives)  
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the texts of articles 47 and 48 proposed by the Drafting Committee.
2. Mr. ROSENNE said that the Commission would probably wish to request the Drafting Committee to reconsider the text of those two articles in the light of the discussion which had taken place. In response to an invitation conveyed to him by the Chairman the previous evening, he would like to suggest that the Drafting Committee consider the introduction of a new article, worded on the following lines:

“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.”

3. In drafting that suggested new article, he had drawn on the wording of article 74 of the Vienna Convention on the Law of Treaties<sup>1</sup> and of article 7 of the draft on special missions as adopted by the Sixth Committee of the General Assembly in 1968.<sup>2</sup> The new article, which was in general terms, might be placed either at the end of the group of articles under discussion or in the introductory part of the draft, but that was a matter for consideration by the Drafting Committee.
4. The introduction of the new article would involve some consequential changes in the texts of articles 47 and 48 proposed by the Drafting Committee. In article 47, the words “even in case of armed conflict” should be replaced by the words “whenever required”, and the words “to leave at the earliest possible moment” by the

words “to leave its territory”. The amended text would thus also be deliberately general in character. In article 48, the words “even in case of armed conflict”, in both paragraphs 1 and 2, would be replaced by the words “at all times”.

5. Mr. AGO said that the actual subject-matter of articles 47 and 48, namely, facilities for leaving the territory and the protection of the premises, property and archives of a permanent mission, raised problems that were comparatively easy to solve and were mainly a matter of drafting.

6. He entirely agreed that article 48 should be modelled on the Vienna Convention on Diplomatic Relations, with the few additions that were required.

7. The real difficulty lay in the reference, in both articles, 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,<sup>3</sup> 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.

8. The best solution would be to deal with that situation in a separate article; articles 47 and 48 could then be made more concise. He would, however, prefer to have time to study the proposal Mr. Rosenne had just made before giving a definite opinion on it.

9. 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.

10. Mr. JIMÉNEZ de ARÉCHAGA said he supported Mr. Rosenne's 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.

<sup>1</sup> *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, A/CONF.39/27.*

<sup>2</sup> *See Official Records of the General Assembly, Twenty-third session, Annexes, Agenda item 85, document A/7375, annex I.*

<sup>3</sup> *United Nations, Treaty Series, vol. 500, p. 122, articles 44 and 45.*

11. He was in favour of the Drafting Committee considering the new article proposed by Mr. Rosenne, 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. If the new article was referred to the Drafting Committee, the Special Rapporteur might himself make a proposal on the subject.

12. Mr. USTOR said articles 47 and 48 would lose some of their importance if a new article were introduced containing general provisions to deal with the situation of the permanent mission and its personnel in extraordinary circumstances.

13. On a first examination of the new article proposed by Mr. Rosenne, he thought it 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.

14. He agreed that articles 47 and 48, together with the proposed new article, should be referred to the Drafting Committee and that the views of the Special Rapporteur should be sought.

15. Sir Humphrey WALDOCK said that a text on the lines of the proposed new article was necessary, but it would be quite independent of articles 47 and 48.

16. Since the question of armed conflict was covered in a corresponding article of the Vienna Convention, there would be an obvious gap in the present draft if no provision were included on the subject. 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.

17. The CHAIRMAN, said that, in the light of the various suggestions made during the discussion of articles 47 and 48, it should now be possible for the Commission to adopt a fairly clear position on those two articles.

18. Mr. ROSENNE suggested that the Commission should not adopt any position on the two articles at that stage, but should simply ask the Drafting Committee to redraft them and examine the proposed new article.

19. He recognized that there was a strong case for retaining the reference to armed conflict, but it was essential that that reference should be in very general terms. Care should be taken not to suggest that the text was confined to the case where the host State was involved in a conflict. It would not be incompatible with his own proposals to combine them with that reference. For example, the relevant passage in article 47 might read "whenever required and even in case of armed conflict".

20. Mr. RUDA said that when the Commission had

first considered articles 47 and 48 at its 999th meeting, it had not examined them at length. At that meeting, which had been the last one of the present session attended by the Special Rapporteur, the Commission had chiefly discussed article 49.

21. A very important discussion had now taken place on articles 47 and 48 and he, too, thought that the Commission should not adopt any position at that stage, but should refer those articles to the Drafting Committee, together with Mr. Rosenne's proposal. It was also likely that the Special Rapporteur, on being informed of the discussion, would have proposals of his own to make.

22. Mr. CASTRÉN 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. On the other hand, he did not think a reference to the absence of relations or to the severance of diplomatic or consular relations would be sufficient.

23. The CHAIRMAN said he had not wished to suggest that the Commission should take a decision on the articles at that stage; indeed, it could not take an informed decision until it had a definitive text before it. He thought, however, that the Commission's views on article 47 were relatively clear and that it was mainly a question of finding the most satisfactory wording. He accordingly suggested that, since it was physically impossible to consult the Special Rapporteur, article 47 be referred back to the Drafting Committee.

*It was so agreed.*<sup>4</sup>

24. The CHAIRMAN, turning to article 48, said that the text before the Commission was based on article 47 of the draft on special missions.<sup>5</sup> The Commission would have to decide whether to approve that text or to request the Drafting Committee to prepare a new text based on article 45 of the 1961 Vienna Convention on Diplomatic Relations.

25. Speaking as a member of the Commission, he said he was in favour of the second alternative and hoped that the Drafting Committee would follow article 45, sub-paragraphs (a) and (b), of the 1961 Vienna Convention, *mutatis mutandis*.

26. Mr. CASTRÉN said that most members of the Commission were in favour of taking article 45 of the 1961 Vienna Convention as a model. He supported that view, particularly so far as the desirability of reproducing sub-paragraph (b) was concerned.

27. Mr. KEARNEY said he saw no basic problem in taking article 45 of the Vienna Convention on Diplomatic Relations as a general model for article 48; he still thought, however, that the latter ought to include some provision to the effect that the sending State should either withdraw its property and archives within a reasonable time or place them in the custody of a third State or of the organization. The situation was different from that of the severance of diplomatic relations in

<sup>4</sup> For resumption of the discussion, see 1032nd meeting, para. 13.

<sup>5</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, p. 366.

bilateral diplomacy; in the latter case it might be assumed that relations would at some time be resumed, but in the former case, as one or two speakers had pointed out, the sending State might decide that the benefits derived from maintaining the permanent mission were not worth what it cost. For that reason, there was some justification for basing article 48, at least in part, on the corresponding provision of the draft on special missions, although some reference should also be included to the custodial function of a third State, as mentioned in article 45, sub-paragraph (b), of the Vienna Convention on Diplomatic Relations.

28. Mr. JIMÉNEZ de ARÉCHAGA said that he doubted the need to include a reference to the custodial function to be performed by a third State, since that was a consequence of the protection by a third State provided for in article 45 sub-paragraph (c), of the Vienna Convention on Diplomatic Relations. From a practical point of view, the full application of that provision could be obtained by placing the archives of the permanent mission in the custody of the same State's permanent mission.

29. Mr. ROSENNE said he supported Mr. Kearney's suggestion concerning the custodial function of a third State. He proposed, however, that the Commission take no decision of principle on article 48 at the present stage, but refer it back to the Drafting Committee for further consideration.

30. The CHAIRMAN suggested that article 48 be referred back to the Drafting Committee.

*It was so agreed.*<sup>6</sup>

ARTICLE 49 (Consultations between the sending State, the host State and the Organization)<sup>7</sup>

31. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 49.

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

*Article 49*

*Consultations between the sending State, the host State and the Organization*

Consultations shall be held between the sending State, the host State and the Organization on any question arising out of the application of the present articles.

33. The Drafting Committee had simplified the article considerably. In the Special Rapporteur's draft it had been divided into two paragraphs, paragraph 1 consisting of two sentences and paragraph 2 of a single sentence. Of that text, the Committee had kept only the first sentence of paragraph 1, which stated the substantive rule. The second sentence of that paragraph had listed certain articles the application of which had to be the subject of consultations. For the reasons put forward

<sup>6</sup> For resumption of the discussion, see 1034th meeting, para. 48.

<sup>7</sup> For previous discussion see 999th meeting, para. 25.

in the Commission by Mr. Tammes,<sup>8</sup> whose observations had been supported by several members, the Committee had decided to delete that sentence.

34. Paragraph 2 had stipulated that the preceding paragraph was "without prejudice to provisions concerning settlement of disputes contained in the present articles or other international agreements in force between States or between States and international organizations or to any relevant rules of the Organization". The Committee had noted that the draft so far contained no provisions on the settlement of disputes. Such provisions as were embodied in other international agreements or in the rules of international organizations were formally safeguarded by articles 3 and 4, which the Commission had adopted at its twentieth session.<sup>9</sup> The Committee had accordingly deleted paragraph 2 *in toto*.

35. During the earlier discussion, some members had objected to the word "question", but there seemed to be no better term that could be substituted for it. It should be understood in the sense of "difficulty" or "problem", not of "subject", which was much too broad.

36. Mr. JIMÉNEZ de ARÉCHAGA said it should be made clear that the proposed text of article 49 was not designed to cover all cases of the settlement of disputes. That would not constitute progressive development when compared with the existing rules, such as article VIII, section 30, of the Convention on the Privileges and Immunities of the United Nations, which stated, *inter alia*: "If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."<sup>10</sup>

37. Mr. CASTRÉN said that, in his opinion, the Drafting Committee had considerably improved the Special Rapporteur's text. The second sentence of paragraph 1 had given an incomplete enumeration and had mentioned articles which were out of place in that provision, while paragraph 2 had not been really necessary. The remaining sentence might be recast; in particular, the word "disagreement" should be substituted for the word "question". He supported the suggestion made earlier by the Chairman that the phrase "at the request of one of the parties" should be added,<sup>11</sup> as that would give greater force to the idea of disagreement.

38. Mr. EUSTATHIADES said he agreed with Mr. Castrén. He suggested that the last phrase of article 49 be amended to read "on any disagreement . . . if necessary." Worded in that way, the article could not be interpreted as necessarily requiring tripartite consultations on any question.

<sup>8</sup> See 999th meeting, paras. 31-34.

<sup>9</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

<sup>10</sup> United Nations, *Treaty Series*, vol. I, p. 30.

<sup>11</sup> See 999th meeting, para. 40.

39. Mr. ROSENNE said that, like the previous speakers, he found the Drafting Committee's text for article 49 an improvement on the original text. However, it still caused him considerable uneasiness and he could not vote for it in its present form, since he regarded it as too loosely drafted.

40. Paragraph 3 of the Special Rapporteur's commentary to the original article 49 stated that "Paragraph 1 is drafted in such a flexible manner as to envisage the holding of consultations between the sending State and the host State or between either or both of them and the Organization concerned". In his opinion, the text of the article conveyed the idea that only tripartite consultations would be held. With regard to the discussion in the Sixth Committee following the incident involving Guinea and the Ivory Coast referred to in that same paragraph 3 of the commentary, the Chairman of the Sixth Committee had ruled that there was to be no debate on the Legal Counsel's statement at the 1016th meeting of that Committee, which was an *ex parte* statement, although that did not imply any stand on the part of the Committee members. In his view, therefore, the Commission should be extremely cautious about drawing from that isolated statement, which related exclusively to the United Nations, any broad conclusion that every international organization to which the draft article would apply had a general interest in such matters which entitled it to be consulted at all times, on the basis of a unilateral request and independently of the relevant treaty provisions.

41. He shared the doubts expressed by previous speakers about the words "on any question", since the word "question" was very broad and since there were at least two kinds of consultations which could be envisaged, namely, those designed to prevent difficulties from arising and those intended to resolve them once they had arisen.

42. Concerning the jurisdictional problem, he thought that while the Drafting Committee had been right to omit paragraph 2 of the Special Rapporteur's draft, that problem still remained. Mr. Jiménez de Aréchaga had referred to article VIII, section 30, of the Convention on the Privileges and Immunities of the United Nations, but in his opinion that provision was of little value. It had never been formally invoked, and the study by the Secretariat was extremely reticent in describing the experience that had been gained.<sup>12</sup>

43. The CHAIRMAN, speaking as a member of the Commission, proposed the following text for article 49: "If necessary, consultations shall be held on any question relating to the interpretation or application of the present articles, at the request of one of the parties".

44. Mr. RUDA said that he accepted the Drafting Committee's proposal to delete the second sentence of paragraph 1 of the Special Rapporteur's text.

45. He had his doubts, however, about the deletion of paragraph 2, which concerned the settlement of disputes. In introducing article 49, the Special Rapporteur

had said that, for formal disputes on the application or interpretation of the draft articles, "other means of settlement should be provided, possibly in the final clauses of the present draft, or should be worked out on an *ad hoc* basis for particular disputes".<sup>13</sup> Paragraph 2 seemed to be intended to serve that purpose, a view which Mr. Jiménez de Aréchaga appeared to share.

46. Thus, while he was prepared to accept the text of article 49 proposed by the Drafting Committee on a provisional basis, he thought the commentary should mention the possible future need for some such provision as paragraph 2, to deal with the problem of the settlement of disputes.

47. With regard to the text suggested by the Chairman, he had no objection to the insertion of the words "if necessary", but could not agree to the insertion of the word "interpretation", which would only complicate the problem.

48. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the words "interpretation or" would best be omitted.

49. Speaking as Chairman, he suggested that the Commission ask the Drafting Committee to consider the possibility of preparing a new article on the lines suggested by Mr. Rosenne earlier in the meeting. That article might deal with the cases of armed conflict and of the non-recognition of a government.

*It was so agreed.*

The meeting rose at 1.5 p.m.

<sup>13</sup> See 999th meeting, para. 27.

## 1028th MEETING

*Monday, 28 July, at 3.15 p.m.*

*Chairman:* Mr. Nikolai USHAKOV

*Present:* Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Ustor, Sir Humphrey Waldoock, 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 49 (Consultations between the sending State, the host State and the Organization) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Drafting Committee's text

<sup>12</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, pp. 296, paras. 388-391, and 321, paras. 175-181.