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Summary record of the 1029th meeting

Topic:

Cooperation with other bodies

Extract from the Yearbook of the International Law Commission:-

1969, **vol. I**

1029th MEETING

Tuesday, 29 July 1969, at 11.15 a.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 Waldock, Mr. Yasseen.

Co-operation with other bodies

[Item 5 of the agenda]
(resumed from the 1021st meeting)

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

1. The CHAIRMAN invited the observer for the European Committee on Legal Co-operation to address the Commission.

2. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said that the Council of Europe Committee which he represented was following with increasing interest the codification work being undertaken by the United Nations on the basis of texts prepared by the International Law Commission. The Committee particularly welcomed the successful outcome of the Vienna Conference on the Law of Treaties, which had adopted the text proposed by the International Law Commission almost unchanged. The law of treaties was of special interest to the Council of Europe, whose activities were mainly reflected in the conclusion of inter-State instruments, the total number of which had now reached sixty-seven. Certain practices had had to be developed before such a large number of conventions could be concluded, in particular, rules of procedure to govern the preparation of their texts and their opening for signature. The Committee of Ministers of the Council of Europe had referred to article 5 of the draft Vienna Convention [1]—it had not been adopted at the time—when confirming recently, as a rule of procedure governing the opening of conventions for signature by member States, what might be called the rule of "reverse unanimity", whereby a convention was opened for signature if no member State objected.

3. Since the Commission's last session, there had been opened for signature a European agreement concerning the immunity of persons invited to appear before the European Commission or Court of Human Rights. It was an instrument conferring immunity from jurisdiction for anything spoken or written by a petitioner, the representative of a petitioner or the representative of a Government before the European Commission or Court of Human Rights.

4. Two further documents of interest to the Commission had been virtually completed, the first being a convention on State immunity from jurisdiction, the main feature of which was a listing of the various situations in which a foreign State did not enjoy immunity from jurisdiction in the courts of another contracting State, and, the second, a report on the privileges and immunities of international organizations, a copy of which had been transmitted to the secretariat of the International Law Commission.

5. During the past year, the Committee of Ministers had adopted a resolution providing for the publication of a model plan for digests of national State practice in the field of public international law.[2] A copy of the model plan had already been sent to the Secretary-General of the United Nations in accordance with General Assembly resolution 2099 (XX) on technical assistance to promote the teaching, study, dissemination and wider appreciation of international law.

6. Another matter which might be of interest to the Commission was the number of signatures and ratifications of European conventions. Satisfactory progress was being made, especially since members of parliaments participating in the work of the European Committee for Legal Co-operation had been encouraging their own parliaments to ratify conventions.

7. The Council of Europe's current work included a draft on civil liability for motorists, the harmonization of processes for computerizing legal data in the western European countries, in particular the terminology of international treaties, and a draft convention on the international validity of judicial decisions in criminal cases, providing for the possibility of transferring proceedings from one State to another and for the possibility of the recognition and enforcement of foreign judicial decisions; those two principles were embodied in the convention on road traffic offences which had already been ratified by two States.

8. With regard to the work of the European Court of Human Rights, the Commission might be interested in the judgement in the Belgian languages case, which embodied certain novel elements relating to discrimination, and was based on article 14 of the European Convention on Human Rights.

9. The European Committee on Legal Co-operation highly appreciated the codification work performed by the United Nations and was encouraging its member States to ratify several universal conventions, in particular the Vienna Conventions on Diplomatic and Consular Relations and the International Convention on the Elimination of All Forms of Racial Discrimination.

10. There was every reason to hope that the tardiness of European countries in that respect would soon be overcome. At its session in June 1969, the Committee had considered holding more frequent exchanges of views between its member States on the draft conventions and other instruments prepared by the International Law Commission, before they were submitted to the Sixth Committee or to a diplomatic codification conference. It had held exchanges of views of that kind

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[1] See *Yearbook of the International Law Commission, 1966*, vol. II, p. 191.

[2] *Op. cit., 1968*, vol. I, p. 239, para. 3.

in the past on the draft convention on the law of treaties and the draft on special missions.

11. He would be glad to provide members of the Commission with any information or documentation they might wish on the subjects he had touched upon and hoped that an observer for the Commission would be able to attend the next meeting of the Committee which was due to be held from 1-4 December next.

12. The CHAIRMAN, thanking the Observer for the European Committee on Legal Co-operation for his interesting statement, said that during its consideration of the statements by the observers for the Inter-American Juridical Committee [3] and the Asian-African Legal Consultative Committee [4] the Commission had appreciated the great value of the work of such regional committees for the codification and progressive development of contemporary international law. The Commission was very glad to hear that the European Committee had moved from the stage of preparing drafts to that of preparing conventions, treaties and agreements. It had been most unfortunate that the Commission had been unable to be represented at the Committee's recent session because their sessions had overlapped. It was to be hoped that in future the two bodies would always be able to be represented at each other's sessions. He asked Mr. Golsong to convey to the European Committee the International Law Commission's congratulations on the work it had already done and good wishes for the work it proposed to undertake in the future.

13. Mr. EUSTATHIADES said he associated himself with the Chairman's congratulations. Two of the most important points mentioned by Mr. Golsong were the desirability of universal implementation of General Assembly resolution 2099 (XX) on technical assistance to promote the teaching, study, dissemination and wider appreciation of international law, and the very favourable reception accorded to the model plan for digests of national State practice in the field of public international law. The Commission had a twofold interest in the activities of regional organizations concerned with law; an indirect interest, because they promoted codification, and a direct interest, because certain studies and resolutions by regional organizations were directly useful for universal codification. That was true of the model plan for digests of national State practice in the field of public international law. Another example of the practical value of studies by a regional organization was the work on computerization codes carried out by the European Committee on Legal Co-operation. That was a new subject, on which the European States had worked in two stages, first, in the European Conference of Deans of Law Faculties and, secondly, in the European Committee for Legal Co-operation through the Committee of Experts for the Study of the Law of European States. The aim was to process data concerning European international treaties by computer. The data which it had been decided to process were very abundant and included legal statistics. Such work was carried out at the world level by the Secretariat of the United Nations, and it would not be long before the United Nations would have to consider recommending the general application of the method, which provided ready access to valuable material.

14. Mr. AGO said he had been particularly struck by the concise and factual nature of Mr. Golsong's statement. The increasingly practical nature of the relations between the Commission and the European Committee on Legal Co-operation was extremely gratifying and he welcomed the influence on the Committee of the Commission's ideas and preliminary work and of the results of United Nations conferences which it had been possible to convene solely as a result of the International Law Commission's work. The two bodies should be represented more actively and permanently at each other's sessions in order to draw the bonds between them even closer.

15. The CHAIRMAN thanked the Observer for the European Committee on Legal Co-operation for the great interest which his Committee had taken in the Commission's work on the law of treaties. The Commission highly appreciated the Committee's efforts to promote the entry into force of universal conventions, in particular the Convention on the Law of Treaties, the International Law Commission's greatest achievement, which was of the utmost importance for the codification and progressive development of contemporary international law.

Relations between States and international organizations

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

[Item 1 of the agenda]

(resumed from the previous meeting)

Draft articles proposed by the Drafting Committee

Article 44 (Respect for the laws and regulations of the host State)

16. The CHAIRMAN reminded the Commission that it had decided that the title of article 44 should be "Respect for the laws and regulations of the host State"[5] and had adopted paragraphs 1 and 2 of the article as proposed by the Drafting Committee.[6] It had also approved the new paragraph 3 in principle and had instructed the Drafting Committee to prepare a text.[7] The Drafting Committee now proposed the following wording for paragraph 3:

> "3. In case of grave and flagrant violation of the criminal law of the host State, committed outside the exercise of his functions by a person enjoying immunity from criminal jurisdiction, the sending State shall, unless it waives this immunity, either recall the

[3] See 999th meeting, paras. 63-80.

[4] See 1021st meeting, paras. 1-19.

[5] See 1024th meeting, paras. 69 and 87.

[6] *Ibid.*, paras. 88 and 90.

[7] *Ibid.*, paras. 6 and 91.

person concerned or terminate his functions with the mission, as appropriate."

17. Mr. ROSENNE said that, as he had only just received the document containing the new text, his comments would necessarily be of a preliminary character. He had some difficulty in understanding the first clause in the new paragraph 3 proposed by the Drafting Committee and, in particular, the meaning of the word "flagrant".

18. Mr. CASTRÉN said that although, in general, he found the new text very satisfactory, he, too, did not understand why the adjective "flagrant" had been introduced as a qualification of violation.

19. Sir Humphrey WALDOCK said there were two new elements in the proposed text for paragraph 3 which he hoped some member of the Drafting Committee would explain to him. One was the reference to "grave and flagrant violation of the criminal law of the host State", and the other was the expression "committed outside the exercise of his functions".

20. Mr. USTOR, speaking on behalf of the Drafting Committee, said that the problem confronting the Drafting Committee had been how to express in precise terms the duty of the sending State either to waive the immunity enjoyed by the person concerned, or to recall him or to terminate his functions. The question whether that person had, in fact, violated the criminal law of the host State was always a delicate one, since in most cases a violation could not be presumed until he had been duly convicted of the charge brought against him. Some members of the Drafting Committee had, indeed, pointed out that the Commission should take care not to run counter to the principle that a man was presumed innocent until proved guilty. Since, however, the Commission had already approved paragraph 3 in principle, the Drafting Committee had chosen to use the word "flagrant" in order to convey the idea that the obligation of the sending State arose only in cases where a violation was obvious and indisputable.

21. The expression "committed outside the exercise of his functions" was based on the idea that the representative in question might make statements in the organization, in one of its organs or outside it, which could be considered a grave violation of the criminal law of the host State. After lengthy deliberation, therefore, the Drafting Committee had decided to insert that phrase in order to make it clear that when such statements were made within the exercise of the representative's functions, they could not be regarded as constituting grounds for his recall.

22. Mr. AGO said that the commentary should be drafted with extreme care. Though the need to ensure respect for the laws of the host State must be taken into account, the way should not be opened to abuses.

23. The commentary should bring out clearly that the provision in paragraph 3 certainly did not mean the termination of an immunity which was perhaps the most important of all immunities. It must be emphasized that the sending State's obligation to recall the person concerned or terminate his functions, unless it waived that immunity, applied only to cases where a grave and flagrant violation had unquestionably been committed. It should also be specified that the violation must be a violation of the ordinary law, not an act performed in the exercise of the permanent representative's functions.

24. Mr. KEARNEY said he had serious doubts about the changes proposed by the Drafting Committee in paragraph 3. In particular, he felt that the word "flagrant" was susceptible of a variety of interpretations and that its use in conjunction with the word "grave" might give rise to disputes concerning its exact meaning. Even after hearing Mr. Ustor's explanation, he was still not convinced that it was desirable to introduce the word "flagrant" with the meaning of "indisputable", since he did not consider that it should be necessary to require the presentation of a case against which no defence was possible. That would seem to place a burden on the host State which, in most legal systems, went beyond the normal requirements in any criminal case, such as the requirement under the common law of "proof beyond reasonable doubt". After all, the worst that could happen to the person in question, even if he were guilty of manslaughter in a motor vehicle accident while driving under the influence of alcohol, was that he would be recalled from the permanent mission.

25. It was difficult to understand precisely what was meant by the phrase "outside the exercice of his functions", since nowhere in the draft were the functions of a member of a permanent mission, as distinct from those of the permanent mission itself, defined with exactitude. Indeed, as conceived by the sending State, his functions might even include espionage, which could hardly be invoked as a reason for immunity from jurisdiction. To revert to the example of manslaughter, if, in the exercise of his official duties, a driver of a permanent mission, while intoxicated, should run down and kill a pedestrian, he saw no reason why such a person should not have his immunity withdrawn or should not be recalled by the sending State. For those reasons, he thought that the word "flagrant" and the expression "outside the exercise of his functions" should be deleted from paragraph 3.

26. Mr. RAMANGASOAVINA said he appreciated the Drafting Committee's efforts to mitigate the threat to privileges and immunities which might be presented by the new paragraph 3. The text was, however, open to three objections. First, the title still contained the words "laws and regulations", whereas, in accordance with the Commission's wishes, "criminal law" had been substituted for those words in the body of the article. It was true that the title did not have the same force in law as the text of the article, but it was an element in its interpretation. The conclusion might be drawn that "criminal law" meant "laws and regulations", thus making the change in the text of the article pointless.

27. Secondly, the words "grave and flagrant", used to qualify the violation in order to restrict the scope of the paragraph, might entail some contradiction. The gravity might derive from the particularly heinous nature of the act or from the repetition of acts violating the criminal law. As a violation was flagrant when the

person concerned was caught in the act, the article could not be concerned with repeated acts. There were thus few cases in which violations could be classified as both grave and flagrant.

28. Thirdly, the violation must have been committed outside the exercise of the functions of the person concerned. He could not see what grave and flagrant violation could be committed in the exercise of those functions. Moreover, the violations of which the persons concerned were sometimes guilty outside the exercise of their functions were mainly of a minor character.

29. Those contradictions and ambiguities at least required very full treatment in the commentary.

30. Sir Humphrey WALDOCK said that, like Mr. Kearney, he had misgivings about the two new elements which the Drafting Committee had introduced into paragraph 3. The Drafting Committee's object was to try to prevent any abuse by the host State of the provision in that paragraph, but he questioned whether the danger of abuse was such as to justify the additions.

31. The clause dealt with the obligations of the sending State, rather than with the right of the host State to expel a person who had violated its criminal law. Someone had to determine whether or not the conditions existed for bringing the clause into operation, and that decision had to be made in the first instance by the sending State. If a complaint of a grave violation was made, the sending State would be faced with the question whether it gave rise to an obligation to recall the person concerned or to terminate his functions. Should a difference of view arise between the sending State and the host State, the procedure laid down in article 49 could be invoked and the organization might be brought into the consultations.

32. The additions suggested by the Drafting Committee might do more harm than good, because if it were assumed, as would be logical, that paragraph 3 was intended to deal only with grave violations, the insertion of the words "and flagrant" only made for uncertainty. In English, the word "flagrant" was susceptible of different meanings. It could be interpreted as meaning *in flagrante delicto* in the sense that the case was so evident that there was virtually no chance of the individual involved escaping conviction. On the other hand, it might be read as meaning that the event had aroused much public notice and had inflamed public opinion. The word "grave" seemed quite sufficient to cover what was intended. The question could not be decided unilaterally by the host State. In the first instance, it would be for the sending State to decide whether or not a grave violation of the criminal law had been established which would oblige it to recall the individual concerned.

33. He agreed with Mr. Kearney that, on the assumption that the paragraph was concerned with grave violations, the introduction of the phrase "outside the exercise of his functions" was illogical; many cases likely to arise in practice would not be covered by the paragraph. An obvious example that sprang to mind was that of a car driven by a chauffeur or even by a diplomatic member of the permanent mission under the influence of drink, becoming involved in an accident resulting in manslaughter on the way to or from an official function. It might be arguable whether or not the person driving the car had been doing so in the exercise of his functions, but under most systems of law, the answer would be in the affirmative and the crime would be regarded as a grave violation of the criminal law justifying a demand for the individual's recall. The addition suggested by the Drafting Committee in order to protect the host State would exclude such cases from the obligation to recall, but they were precisely the cases which arose most frequently in practice and which the Commission had previously said must be covered. Moreover, he doubted whether, in the case of a permanent mission to organizations, the sending State was in a weak position to resist an unreasonable request for the recall of a member of the mission. The host State had no right to declare him *persona non grata* and the sending State could bring the matter to the notice of the organization, when the other member States would be likely to support it in resisting any unreasonable request of which they might themselves be the victim on another occasion.

34. He accordingly thought it would be preferable to drop the two additions suggested by the Drafting Committee; the position of the sending State would not be unduly weakened as a result.

35. Mr. BARTOŠ said he would like to make it clear at the start that the Drafting Committee had unanimously considered that political offences were excluded from the scope of the new paragraph 3, that a statement to that effect should be made to the Commission and that the point should be mentioned in the commentary. The fact that they were so excluded was an essential condition for the unhampered exercise of the functions of members of a permanent mission. He wished those remarks to be included in the summary record of the meeting.

36. The Drafting Committee had considered that it ought to specify that the violations must have been committed outside the exercise of functions, because host States had been know to protest against criticism of them made by permanent representatives in the exercise of their functions. It was obvious that, even it such criticisms constituted a violation of the criminal law of the host State, they would not be grounds for the application of the new paragraph 3, if it were adopted.

37. It was true that in French law, the term "*flagrant délit*" was used to describe the case when a person was caught in the act. But neither the Drafting Committee nor he himself had had that specific meaning of the term in mind; they had rather been thinking of a violation which had indisputably been committed.

38. Another case which had not been considered by the Drafting Committee was that in which members of the family also enjoyed immunity from criminal jurisdiction. The sending State could, of course, waive their immunity, but it could neither recall them nor terminate their functions. The wording therefore needed amending.

39. Mr. RUDA said that the Drafting Committee's text for paragraph 3 was an improvement on the original text proposed by Mr. Kearney,[8] because it gave greater

[8] See 1024th meeting, para. 6.

protection to the host State's interests in the matter of immunity from criminal jurisdiction. He favoured the addition of the words "and flagrant", as it would make the clause easier to apply in practice. In many systems of law, elected members of legislative bodies lost their immunity in cases of flagrant violation of the criminal law; the addition was therefore appropriate and removed all ambiguity.

40. He still had doubts, however, about who was to determine whether a violation of the criminal law had been grave and flagrant. In order not to destroy the whole principle of immunity from criminal jurisdiction, the matter should be clearly explained in the commentary.

41. He shared Mr. Kearney's doubts about the phrase "outside the exercise of his functions", particularly since the functions of a member of a permanent mission necessarily had to be exercised legally and in accordance with the provisions of article 7. The phrase could only cause confusion and should be dropped.

42. Mr. ROSENNE said that the determination whether or not a violation of the criminal law of the host State had been a grave one could not be unilateral. The process was initiated by the host State and if the sending State concurred in its finding, that was the end of the matter; otherwise, the procedure provided for in article 49 would come into play. Clearly the sending State could not have the deciding voice or take a unilateral decision.

43. In his view, the words "and flagrant" should be deleted from the Drafting Committee's text for paragraph 3. He would prefer to use wording on the lines of Mr. Kearney's text and to say "in case of serious violation", because the Commission should avoid any terminology which might have a technical connotation in the criminal law of any State.

44. The reference to the functions of a person enjoying immunity should also be dropped, not only in paragraph 3 but elsewhere in the draft. He understood what the Drafting Committee had been trying to achieve and regarded its view as fundamentally correct, but some such wording as "outside the exercise of the functions of the permanent mission" would meet the point and would make a direct reference back to article 7. The wording of article 41, paragraph 2, which referred to the functions of a person coming to an end might also need to be reconsidered.

45. Article 33 provided for the waiving of immunity when that could be done "without impeding the performance of the functions of the permanent mission", but no one other than the officials of the sending State could really know what were the functions of any person in a permanent mission. Therefore the wording "or terminate his functions with the mission", in the Drafting Committee's text for paragraph 3, should be modified so as to refer not to the functions, but to the appointment of the member of the mission. Under article 17, the sending State had the obligation to notify the host State of the appointment of members of the permanent mission, but not of their functions, the former being an external and the latter an internal matter. A similar change should be made in all articles of the draft referring to the termination of a person's functions with a mission.

46. Mr. CASTAÑEDA said he had no criticism of the drafting, which he thought was as satisfactory as was possible. But with regard to the substance, the rule stated in paragraph 3 was both unnecessary for the protection of the basic interests of the host State and dangerous, because it might lead to abuse. The Special Rapporteur had gone into the matter and had not seen any need to include that rule in his draft article. The proposed rule was very categorical, since it contained a formal and restrictive statement of the steps to be taken by the sending State. He did not believe that reasons for going so far could be found in practice. Another objection was that the rule gave the host State an unusual right, since in practice it would be for the host State to request the sending State to recall the person concerned or terminate his functions.

47. The procedure for consultations provided for in article 49 should be adequate for the settlement of any problems that might arise out of the violation by a member of a permanent mission of the obligation to respect the laws and regulations of the host State. The existence of that procedure made the proposed rule superfluous and he was therefore opposed to the adoption of the new paragraph 3.

48. Mr. AGO said that the paragraph challenged a protective principle that was vital to individual security. A person could not be deemed guilty of a violation until he was convicted of it. Who was to say, under the terms of the new paragraph 3, that a grave violation had been committed? He had been willing to set his doubts aside with regard to flagrant violation, because in that case there was a sufficient presumption of violation, even if a court had not delivered its judgement. But, except in that case, neither the sending State nor the host State could express a well-grounded opinion as to whether a violation had or had not been committed. The international organization itself could not act in lieu of a court. Neither a procedure for tripartite consultations nor even a procedure within the organization could dispose of that objection.

49. With regard to the expression "outside the exercise of his functions", there was no point in dwelling on minor matters. The criminal law of the host State might contain rules under which opinions expressed by a permanent representative might constitute a criminal offence. If he had to be recalled for that reason, the exercise of his functions would be impossible. Immunity from criminal jurisdiction was so essential to the unhampered performance of the functions of a permanent mission that it should not be hastily jettisoned under cover of the article.

The meeting rose at 1.10 p.m.