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Summary record of the 1032nd meeting

Topic:
Representation of States in their relations with international organizations

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61. The CHAIRMAN observed that a question of substance was involved. The best course would be to model the text either on article 22 of the Convention on Diplomatic Relations or on article 31 of the Convention on Consular Relations. It would be better not to try to draft a new text which might be open to different interpretations.

62. Mr. ROSENNE explained that he had not made any formal proposal concerning paragraph 3, but only a suggestion. The ensuing discussion had tended to obscure the meaning of the article. If the premises of a permanent mission were inviolable, how could they be subjected to search, requisition, attachment or execution? Surely the Commission's intention must be to confer inviolability on all property on the premises in order to deny the host State any pretext for violating the immunity of the premises on the ground that some non-immune property was on those premises. The Commission should perhaps leave the Drafting Committee's text as it stood, but during the second reading it might consider formulating an article dealing exclusively with the premises, including the residence of the head of the permanent mission, and a separate article on movable property, the most obvious example of which was means of transport. The French version of paragraph 3 had been framed in such terms as to make it plain that the provision could not possibly be confined to property on the premises.

63. Mr. RUDA said he agreed with Mr. Rosenne. For the time being the Drafting Committee's text should be left as it stood: it clearly dealt with inviolability of the premises as such. The problem of property and the use of that word in the English text had given rise to some confusion. The property of the mission, whether inside or outside the premises, should be dealt with in another article.

64. Mr. CASTRÉN said he did not think the text of paragraph 3 ought to be amended. In his opinion, it dealt not only with all property of the permanent mission, but with all property situated on its premises. The premises were inviolable and immune from requisition.

65. Mr. JIMÉNEZ DE ARÉCHAGA said that the scope of article 31, paragraph 4, of the Vienna Convention on Consular Relations was not as broad as that of paragraph 3 of the Drafting Committee's text for article 24, so that the analogy drawn between the two provisions was not valid. It might prove undesirable to grant excessively wide immunity to all property of a permanent mission, and the scope of the corresponding provision in the draft on special missions had deliberately been restricted. For that reason, he was opposed to changing the Drafting Committee's text.

66. Mr. ROSENNE pointed out that there was a discrepancy between the English and French versions of paragraph 3, which would at least be reduced by inserting a comma after the word "furnishings" in the English text. It would then be clear that the words "and other property" meant the same as the words "*et les autres biens*".

67. Sir Humphrey WALDOCK said that although he

had not interpreted the English version in the same way as Mr. Rosenne, the French version was undoubtedly clearer. Perhaps the difficulty was not as serious as might appear and the meaning would be correctly understood, since the object of the provision was plainly to prevent an investigation of the contents of the permanent mission's premises by agents of the host State; for unless that was prevented, the principle of inviolability would be destroyed.

68. Mr. EUSTATHIADES said that in view of the differences of opinion on paragraph 3, he would be in favour of approving the text proposed by the Drafting Committee. The matter warranted further study, however. It might perhaps be possible to replace the words "*ainsi que les moyens de transport*" by "*et les moyens de transport*" in the French text. The grammatical construction was bound up with the substantive issue.

69. Mr. TESLENKO (Deputy Secretary to the Commission) explained that the expression "*ainsi que les moyens de transport*" had been used in the French text to show that the means of transport were protected wherever they were situated, which was logical, since cars were not usually kept on the mission's own premises.

70. Mr. TSURUOKA said he was in favour of retaining the text proposed by the Drafting Committee.

71. The CHAIRMAN said he understood that the members of the Commission were in general agreement that the text prepared by the Drafting Committee should not be amended. He suggested that the Commission should vote separately, first on the first two sentences of paragraph 1 and then on the third sentence. He did not think it was necessary to vote on paragraphs 2 and 3.

The first and second sentences of paragraph 1 were adopted unanimously.

The third sentence of paragraph 1 was adopted by 10 votes to 2, with 1 abstention.

Paragraph 1 was adopted unanimously.

Article 24, as a whole, as adopted unanimously.

The meeting rose at 5.30 p.m.

1032nd MEETING

Thursday, 31 July 1969, at 10.10 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. Tsuruoka, Mr. Ustor, Sir Humphrey Waldoack, Mr. Yasseen.

Relations between States and international organizations

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

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 25 (Exemption of the premises of the permanent mission from taxation)¹

1. The CHAIRMAN invited Mr. Ustor to introduce the text proposed by the Drafting Committee for article 25, since that text had been considered by the Committee in the absence of its Chairman.

2. Mr. USTOR said that the text proposed by the Drafting Committee read as follows:

Article 25

Exemption of the premises of the permanent mission from taxation

1. The sending State, the permanent representative or another member of the permanent mission acting on behalf of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the permanent mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State, the permanent representative or another member of the permanent mission acting on behalf of the mission.

3. It would be noted that the Drafting Committee had inserted the words "or another member of the permanent mission acting on behalf of the mission" after the words "the permanent representative". That insertion was self-explanatory, since the owner of the premises might well be some other member of the permanent mission.

4. In the French version of paragraph 2, the Drafting Committee had replaced the phrase "*la personne qui traite*" by "*la personne qui a contracté*", which was closer to the English text.

5. During the Commission's previous discussion of the article, the question had been raised whether the text of paragraph 2, which closely followed the corresponding provision of the Vienna Convention on Diplomatic Relations,² should be allowed to stand or whether it should be deleted. The Drafting Committee had concluded that the best course would be to retain the text of the paragraph and to mention the problem in the commentary.

6. Lastly, as Mr. Jiménez de Aréchaga had pointed out at the previous meeting, article 1 (use of terms) did not define the word "premises", so that it might be

advisable for the Commission to adopt a definition of that word at some later stage.

7. Mr. ROSENNE suggested that the Commission should adopt the definition of the word "premises" given in article 1 (i) of the Vienna Convention on Diplomatic Relations,³ namely, "the 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission".

8. Mr. TSURUOKA said he thought it was grammatically incorrect, in French, to replace the word "*traite*" in paragraph 2 by the words "*a contracté*".

9. Mr. REUTER agreed. It would be better to keep the word "*traite*", which had the same substantive meaning.

10. Mr. ROSENNE thought that the French text of paragraph 2 should follow the French text of article 24 of the draft on special missions, which had already been adopted by the Sixth Committee.⁴

11. The CHAIRMAN explained that the verb "*traiter*" had been used in the corresponding provision of the Vienna Convention on Diplomatic Relations, the verb "*contracter*" in that of the Vienna Convention on Consular Relations and the verb "*traiter*" in that of the draft on special missions. He proposed that, in the text now before it, the Commission should use the expression "*la personne qui a traité avec l'Etat d'envoi*", which was more correct in French.

It was so agreed.

12. The CHAIRMAN suggested that the Commission should adopt article 25 with that amendment.

Article 25, as amended, was adopted.

ARTICLE 47 (Facilities for departure)⁵

13. The CHAIRMAN invited Mr. Ustor to introduce the text proposed by the Drafting Committee for article 47, since that text had also been considered by the Committee in the absence of its Chairman.

14. Mr. USTOR said that the text proposed by the Drafting Committee read as follows:

Article 47

Facilities for departure

The host State must, whenever requested, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave its territory. It must, in case of emergency, place at their disposal the necessary means of transport for themselves and their property.

15. The Drafting Committee proposed that the words "even in case of armed conflict", in the first sentence of

¹ For previous discussion, see 1016th meeting, paras. 42-58 and 1017th meeting.

² United Nations, *Treaty Series*, vol. 500, p. 108, article 23, para. 2.

³ *Ibid.*, p. 98.

⁴ See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 85, document A/7375, annex I.

⁵ For previous discussion, see 1026th and 1027th meetings.

its previous draft,⁶ should be replaced by the words "whenever requested". The Drafting Committee had also thought it inappropriate to use the words "to leave at the earliest possible moment", with reference to permanent missions to international organizations and therefore proposed the substitution of the words "to leave its territory". The words "in particular" in the previous text of the second sentence had been deleted and the words "in case of emergency" had been substituted for the words "in case of need".

16. During the Commission's discussion, it had been suggested that a special provision on freedom of entry for members of the permanent mission was perhaps unnecessary in view of the provisions of article 22 (general facilities) and article 27 (freedom of movement). The views of the Special Rapporteur had been obtained on that point and he had expressed the opinion that there was no need for a special provision on the matter, which he believed was already covered by article 22.

17. Mr. ROSENNE said that he himself had originally raised the question of the host State's obligation to facilitate the entry of the permanent mission. He was prepared to accept, on a provisional basis, the Special Rapporteur's reply that the issue was already covered by existing provisions of the draft, but he asked that the point should be adequately explained in the commentary on article 27.

18. Mr. KEARNEY proposed that, for purely stylistic reasons, the word "must", in articles 47 and 48, should be replaced by the word "shall".

It was so agreed.

19. Sir Humphrey WALDOCK said he doubted whether the French words "*en cas de circonstances exceptionnelles*" had the same meaning as the English words "in case of emergency".

20. Mr. RUDA said he had similar doubts about the Spanish version.

21. Mr. EUSTATHIADES suggested that the most suitable wording for the French text would be "*en cas de nécessité absolue*".

22. Mr. USTOR said he did not share the Special Rapporteur's view that it was unnecessary to include an article expressly confirming the host State's obligation to facilitate the entry of members of the permanent mission into its territory. On the contrary, it should be explicitly laid down in the draft, either in a provision to be inserted after article 22 or in a separate paragraph of article 27, that the host State could not refuse to grant visas to members of a permanent mission appointed by the sending State. He was not in favour of coupling such a provision with article 47, which was in the section of the draft dealing with the end of the functions of the permanent representative, as the problem also arose during the exercise of those functions.

23. The CHAIRMAN suggested that the Secretariat should be asked to prepare a text for inclusion in the commentary, dealing with the host State's obligation to

permit members of permanent missions to enter its territory to take up their posts. The Commission could take a decision on that text when it came to consider the commentary on article 47.

It was so agreed.

24. Mr. EUSTATHIADES said he reserved his position on the expression "*circonstances exceptionnelles*". Article 47 stated two rules: the first was a general rule requiring the host State to grant facilities for certain persons to leave its territory; the second was a special rule requiring the host State to place at the disposal of those persons the necessary means of transport for themselves and their property. The latter rule imposed, on a State acting as host to an international organization with a large membership, a burden that was justified only in exceptionally serious cases. Hence the use of the "*nécessité absolue*" was not merely a question of form, but also one of substance.

25. The CHAIRMAN suggested that the Commission should provisionally adopt article 47, the final wording of which would depend on that of the new article prepared by the Drafting Committee at the suggestion of Mr. Rosenne, to which Mr. Kearney had submitted an amendment.⁷

Article 47 was adopted provisionally.

ARTICLE 44 (Respect for the laws and regulations of the host State)⁸

26. The CHAIRMAN reminded the Commission that it had asked Mr. Ago, Mr. Kearney and Mr. Jiménez de Aréchaga to draw up a generally acceptable text for paragraph 3 of article 44.⁹ The text proposed was as follows:

"3. In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from criminal jurisdiction, the sending State shall, unless it waives this immunity, either recall the person concerned or terminate his functions with the mission, as appropriate. This provision shall not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission within either the Organization or the premises of a permanent mission."

27. Mr. REUTER asked whether the word "within" in the second sentence of the English text had an exclusively locative or both a locative and a functional connotation.

28. Mr. KEARNEY said that the three members of the Commission who had prepared the new text of the paragraph had agreed to substitute the word "manifest" for the word "flagrant" in the first sentence, because that seemed to make it clear that the requirement in question would not be applicable in cases involving a substantial degree of doubt. The new second sentence had been added with a view to reconciling certain diver-

⁶ See 1026th meeting, para. 2.

⁷ See 1035th meeting, paras. 9 and 13.

⁸ For previous discussion and text, see 1029th meeting, paras. 16-49.

⁹ See 1030th meeting, paras. 50-52.

gent aims. In particular, the drafters had tried to ensure that a member of the permanent mission would be guaranteed complete freedom of speech when he was engaged in activities directly connected with the mission's functions, as opposed to activities which were peripheral to those functions and which might result in the commission of a crime of the type connected with motor vehicle accidents.

29. The words "within either the Organization or the premises of a permanent mission" had been used because any expression such as "within the headquarters area of the organization or the premises of a permanent mission" would have been too restrictive; at a large international conference, for example, the organization might find it necessary to take accommodation outside the headquarters area. The words "the premises of a permanent mission" had been adopted to provide for the possibility that an official act performed by a member of one permanent mission might be carried out in the premises of another permanent mission.

30. The CHAIRMAN, speaking as a member of the Commission, said that the text was still unsatisfactory. The second sentence in particular was not clear; it was difficult to see what was meant by "carrying out the functions of the permanent mission within. . . the premises of a permanent mission" and by the phrase "*l'exercice des fonctions de la mission permanente à l'Organisation*" in the French text, where the words "*auprès de l'Organisation*" should be substituted for "*à l'Organisation*". He saw no objection to replacing the word "flagrant" in the first sentence by "manifest", but apart from that amendment, he was in favour of the text proposed by the Drafting Committee.

31. Mr. AGO observed that the text was a compromise proposal, the drafting of which could certainly be improved. The essential point was to reach agreement on the substance. The proposed text met two requirements: first, to express the idea that the obligation to recall, or terminate the functions of, a person guilty of an offence did not apply to acts performed by that person in the exercise of his functions, that was to say, to written or oral statements made within the organization or one of its organs or in the premises of a permanent mission, or to acts performed in defence of the permanent mission; secondly, to safeguard the interests of the host State and its nationals, especially in traffic accident cases. The compromise reached by the authors of the text was based on the idea that the provision applied only to what might happen between the headquarters of the organization and the premises of the permanent mission, when the representative was obviously not exercising his functions. In his opinion, therefore, although the compromise text was awkwardly worded, it could be accepted.

32. Mr. YASSEEN said he still found it difficult to accept the second sentence, which, in his view, should end with the words "in carrying out the functions of the permanent mission", the remainder being deleted.

33. Mr. CASTRÉN said he preferred the Drafting Committee's text, but, in a spirit of compromise, he was willing to accept the proposed new text in the light

of the explanations given by Mr. Kearney and Mr. Ago. It should, however, be remembered that, as Mr. Bartoš had pointed out, the text was not applicable to members of the families of members of permanent missions.¹⁰

34. Mr. ROSENNE said he was not sure that the proposed new text bore out the interpretations which had been given to it. In particular, he had been impressed by Mr. Reuter's question as to whether the word "within", in the second sentence, had a locative or a functional connotation. He himself believed that its connotation must be considered to be functional in relation to the organization and locative in relation to the premises of the permanent mission. He suggested that the text of the second sentence might be made clearer by deleting the word "either" after the words "permanent mission within" and inserting the word "in" after the words "Organization or".

35. Mr. RUDA said that his first preference would be for Mr. Yasseen's suggestion that the words "within either the Organization or the premises of a permanent mission" should be deleted. His second preference would be for the Chairman's suggestion. If neither of those suggestions were adopted, he would be obliged to abstain from voting on the paragraph.

36. Mr. EUSTATHIADES commended the authors of the proposed text on the spirit of compromise they had shown. He was, however, still opposed to any explicit statement of the kind contained in the second sentence, the debate having revealed all the difficulties to which that gave rise. Moreover, it might well be asked why the immunity referred to in the first sentence of paragraph 3 should not apply to acts performed in the exercise of official functions outside the premises of the organization or the premises of the permanent mission. The compromise went too far. It would be advisable to delete the last sentence altogether.

37. The main idea of article 44, as expressed in paragraph 1, was that privileges and immunities were inviolable. The second idea, which was expressed in all the previous conventions, was the obligation to respect the laws and regulations of the host State, but so far, that obligation had never been accompanied by sanctions. It was the first time that the gap was to be filled by providing, in paragraph 3, that in case of grave and manifest violation of the criminal law of the host State, the sending State must either waive the immunity of the person in question, recall him, or terminate his functions. Once the value of such a provision was accepted, its effectiveness should not be negated by immediately adding a reservation which deprived it of all its meaning. The second sentence of the compromise text was a retrograde step. It would be contrary to the spirit of paragraph 3 to provide exemption from punishment for grave violations on the ground that they had been committed in the exercise of functions and in a particular place. In such a case, the only solution open to the sending State would be to agree to waive immunity. The choice of punishment was necessary for the protection of the host State's interests, for the proper working

¹⁰ See 1029th meeting, para. 38.

of the international organization and for the efficient performance of the mission's functions. The proposed compromise was praiseworthy but unacceptable. The Commission must choose between drafting article 44 on the same lines as the corresponding provisions of the other conventions and introducing the idea of sanction, without attaching a reservation which would make it difficult to apply.

38. Mr. REUTER said he was in favour of the compromise submitted to the Commission. In determining the cases to which paragraph 3 did not apply, the authors had been guided by two ideas. First, they had postulated a functional connexion, but without defining it too closely. Secondly, they had adopted the new idea that a connexion between the act committed and the premises had some bearing on the situation. It was useful to introduce that second idea in a text designed to elicit comments from governments.

39. Specific difficulties could not, of course, be overcome with any certainty by that text, but the uncertainty was not necessarily undesirable. He was prepared to accept drafting amendments to the French text, which was perhaps too precise as compared with the English; he was also prepared to accept Mr. Rosenne's amendments. But he did not think the Commission should try to define the ideas underlying the text more precisely. It was unlikely to succeed, and even if it did, the result would not be satisfactory, since it was quite evident from the relevant case-law that specific cases had been decided in many different ways.

40. Sir Humphrey WALDOCK said that he accepted the compromise text, which would provide a workable rule if applied in good faith and which attempted to deal with the real problems involved. It was an improvement on the Drafting Committee's text, which in effect imposed no obligation on the sending State to recall a person who had committed a serious offence, so long as it could be said that the act had occurred in the course of the performance of official functions. That text would leave unsolved the pressing problem of serious motoring offences and was therefore unacceptable.

41. The compromise text should be read in very close conjunction with the text of article 44, paragraph 1,¹¹ the opening words of which, "Without prejudice to their privileges and immunities", provided an element of protection for the sending State. If the act in question had clearly been performed in the course of official functions, it would be very difficult for the host State to assert in good faith that it was not covered by those words. That remark was particularly true of freedom of speech in the organization. Notwithstanding any provisions in the laws of the host State attributing a criminal character to statements against its public authorities, that State could not legitimately claim that an official statement made in the organization constituted a violation of the rule requiring respect for its laws.

42. The second sentence of the compromise text admittedly might fail to cover some kinds of acts which

were not committed either "within the Organization" or in "the premises of the permanent mission"; but it went far towards solving the main practical problems.

43. If the compromise text were not accepted, he would prefer a text containing no reference at all to the performance of functions. It must be remembered that the host State was in a weaker position than the sending State, because of the absence of any right to terminate the residence of the persons concerned under a *persona non grata* rule. The sending State, for its part, could always approach the executive head of the organization and request the discussion of any unreasonable demand by the host State for the recall of a member of a permanent mission.

44. If neither of those solutions was adopted, he would prefer to have no provision at all on the subject rather than fall back on the Drafting Committee's text.

45. Mr. JIMÉNEZ DE ARÉCHAGA said he fully agreed with the previous speaker. It was necessary to bear in mind not only the existing practice in the matter, but also the international instruments in force. Those instruments made provision for a practically unlimited right of expulsion. It was now proposed, in the Commission's draft, to abolish that right of expulsion; some compensation had therefore to be given to the host State.

46. The concern which had been expressed regarding freedom of opinion in international organizations was unfounded. That freedom was protected by much stronger provisions than any that could be included in the present draft.

47. The text under discussion did not cover grave crimes committed by members of permanent missions while in transit between the permanent mission and the organization. Experience showed that driving offences accounted for much of the current adverse reaction to diplomatic privilege. In practice, however, a diplomatic agent who committed a grave offence of that kind was transferred elsewhere, which was the most satisfactory solution for all concerned.

48. Lastly, he opposed the suggestion that the concluding words "within either the Organization or the premises of the permanent mission" should be deleted, because that would destroy the whole basis of the compromise proposal and would represent an unnecessary sacrifice of the rights of the host State.

49. Mr. TSURUOKA said he approved of the compromise text in principle. In diplomatic practice, the problems dealt with in article 44, paragraph 3, were solved by common sense, which was the conclusion reached by the authors of the compromise text. It would make little difference in practice whether paragraph 3 was included in the draft or not. Consequently, he was not opposed to adopting it as it stood.

50. The objections raised by Mr. Eustathiades were valid in theory, but the grave apprehensions of those who feared that the first sentence of paragraph 3 might lead to abuses should also be taken into account. The authors of the compromise text had succeeded in finding a happy mean between conflicting considerations.

¹¹ See 1024th meeting, para. 2.

51. Mr. YASSEEN said he was opposed to taking account of the place where a violation had been committed. Could the theory of extritoriality really be invoked to justify such a solution? In his opinion only the functional link should be considered. He therefore asked that the words "within either the Organization or the premises of a permanent mission" should be deleted.

52. Mr. RAMANGASOAVINA said he could accept the new text submitted to the Commission, subject to Mr. Rosenne's amendments. It was an improvement on the text proposed by the Drafting Committee. It was a compromise, and consequently, even though he still thought that the scope of the first sentence was greatly reduced by requiring the violation to be both grave and manifest, he supported the new text, which the Commission would find it hard to better.

53. Mr. USTOR pointed out that the obligation to respect the laws and regulations of the host State, which was the subject matter of article 44 (as indicated by its original title), had two meanings. It meant, first, an obligation on the part of persons enjoying privileges and immunities to observe those laws and regulations, and secondly, an obligation on the part of the sending State to ensure that its officials did in fact observe them. If that rule were broken, there was not only a breach by the offending individual of the laws and regulations of the host State, but also a violation by the sending State of a rule of international law.

54. In so far as a violation of international law was committed, the case would be one of State responsibility and the paragraph now under discussion attempted, in effect, to lay down sanctions for such a violation. In fact, the remedies mentioned in the paragraph—waiver of immunity, recall and termination of functions—by no means covered the whole range of possible sanctions. In particular, the injured State could claim damages in accordance with the principles of State responsibility.

55. Since the proposed paragraph 3 would not cover the whole ground, he was inclined to agree that it was preferable to drop it altogether. Its omission would leave the matter to be governed by the general rules of State responsibility. By virtue of those rules, the sending State would have either to waive immunity or to recall or dismiss the offending person.

56. The proposed paragraph 3 had the further disadvantage of restricting the freedom of the host State. A host State was entitled to demand the recall of a person whose presence was rendered undesirable by some act which did not constitute a criminal offence, but which could impair good relations between the States concerned.

57. For those reasons, he suggested that paragraph 3 should not be adopted, and that the matter should only be mentioned in the commentary.

58. Mr. REUTER explained that he had never intended to construe the new text as a revival of the principle of extritoriality. The premises of the organization and of the permanent mission were centres of an active functional life and it was not unreasonable to take that fact into account.

59. The CHAIRMAN, speaking as a member of the Commission, said that in principle he was opposed to the addition of paragraph 3 to article 44. But the text proposed by the Drafting Committee, with the substitution of the word "manifest" for "flagrant", could be accepted. He was even prepared to support the compromise text before the Commission, provided that the words "within either the Organization or the premises of a permanent mission" were deleted. If necessary, the last part of the second sentence might be worded: "in carrying out the functions of the permanent mission to the Organization".

60. Mr. BARTOŠ observed that any attempt at compromise involved some concessions on substance. The second sentence of the new text was a striking example. The wishes expressed by several members of the Commission that the application of paragraph 3 should be restricted to ordinary crimes had not been taken into account. He would like to emphasize that omission.

61. It was essential to keep the functional link as the ground for the non-application of paragraph 3, irrespective of the place where the unlawful act had been committed. The premises of the organization and of the permanent mission were protected by the principle of inviolability, which should not be confused with functional immunity. He was therefore in favour of deleting the reference to the place where the act was committed.

62. Lastly, it should not be forgotten that, in addition to the measures specified in paragraph 3, there was a diplomatic procedure, which was not even that embodied in article 49, concerning consultations. In cases such as those to which paragraph 3 might apply, it was customary for the host State discreetly to request the recall of the person concerned through the usual diplomatic channel. The recall was not based on any right of the host State, but on the diplomatic usage respected by States which wished to maintain good relations. In his view, the provision in the proposed paragraph 3 was without prejudice to that diplomatic practice.

63. Mr. KEARNEY said he could not accept the changes of wording suggested by Mr. Rosenne, because they involved more than drafting; they affected the substance in a way that would undo the difficult compromise solution reached.

64. Mr. ROSENNE said that his only purpose had been to clarify the text. It had not been his intention to disturb the compromise and he therefore withdrew his suggestion.

65. Mr. CASTRÉN formally proposed the substitution of the word "a member of the permanent mission" for "a person enjoying immunity from criminal jurisdiction" in the first sentence of paragraph 3, so that the expression would not cover members of the family.

66. Mr. USTOR supported Mr. Castrén's proposal, which was a logical one. Since the first sentence referred to the "recall" of the person concerned, it was appropriate to replace the broad reference to "a person enjoying immunity from criminal jurisdiction" by the narrower wording suggested by Mr. Castrén, which related only to persons who could be recalled.

67. Mr. KEARNEY asked Mr. Castrén how the provision, as amended by him, would apply to the son of a permanent representative who committed a grave offence.

68. Mr. CASTRÉN observed that there was no need to deal with members of the family in article 44. The sending State could always waive immunity in respect of them, since provision had been made for such action earlier in the draft.

69. Mr. BARTOŠ remarked that the question of violations committed by members of the family was not an academic hypothesis; it had arisen on several occasions in New York. Mr. Castrén's proposal was, however, a sound one. The simplest course in a situation of that kind was either to waive immunity or to require the person concerned to leave the country within a reasonable time.

70. Mr. ROSENNE stressed the need to bear in mind that the whole concept of *persona non grata* was inapplicable to permanent missions. It was because no such remedy was available to the host State in the circumstances under consideration that paragraph 3, as proposed by the Drafting Committee, was entirely appropriate.

71. Lastly, with reference to Mr. Ustor's earlier remarks, he reminded the Commission of its decision to replace the original title of article 44, "Obligation to respect the laws and regulations of the host State", by "Respect for the laws and regulations of the host State".¹²

72. Mr. JIMÉNEZ DE ARÉCHAGA said he was against the change proposed by Mr. Castrén. Paragraph 3 should be read in conjunction with article 44, paragraph 1. The provisions of that paragraph were very broad and covered "all persons enjoying such privileges and immunities", that was to say, not only the permanent representative and members of the diplomatic staff of the mission, but also members of the administrative and technical staff, who enjoyed immunity from criminal jurisdiction, and the families of members of the mission. It would defeat the whole purpose of article 44 to restrict the provisions of paragraph 3 in the manner proposed. In practice, most of the problems arose from offences committed not by members of permanent missions, but by the younger members of their families.

73. Mr. USTOR said that he had supported Mr. Castrén's proposal in the interests of logic; but logic could also be satisfied by making the alteration elsewhere. Bearing in mind the point raised by the previous speaker, the words "recall the person concerned" could be amended so as to refer not only to an official who could be recalled, but also to any "person enjoying immunity from criminal jurisdiction".

74. Mr. CASTRÉN said he thought the members of the Commission might support a simpler solution. The words "a person enjoying immunity from criminal jurisdiction" could be retained, but the words "unless

it" might be deleted. The latter part of the first sentence would then read: "the sending State shall waive this immunity, recall the person concerned or terminate his functions with the permanent mission, as appropriate". There would thus be three possible solutions; the first would be the only one that could be applied to members of families, but all three could, of course, be applied to members of the permanent mission.

The meeting rose at 1.25 p.m.

1033rd MEETING

Thursday, 31 July 1969, at 3.40 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoa-vina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsu-rooka, Mr. Ustor, Sir Humphrey Waldoek, 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 (Respect for the laws and regulations of the host State) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of the compromise text for article 44, paragraph 3, submitted at the previous meeting¹ by Mr. Ago, Mr. Jiménez de Aréchaga and Mr. Kearney.
2. Speaking as a member of the Commission, he said he could not accept the proposal made by Mr. Castrén at the end of the previous meeting that the last part of the first sentence be amended to read "the sending State shall waive this immunity, recall the person concerned or terminate his functions with the mission, as appropriate". There were in fact only two alternatives: the sending State could waive the immunity of a person who had committed a grave violation, or it could recall the person concerned or terminate his functions, depending on his nationality and type of function. He therefore preferred the compromise text or the originally submitted by the Drafting Committee.² In his view, Mr. Castrén's first proposal that the words "a member of the permanent mission" should be substi-

¹ See para. 27.

² See 1029th meeting, para. 16.

¹² See 1024th meeting, paras. 69 and 85-87.