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Summary record of the 1035th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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present articles, consultations between the host State, the sending State and the Organization shall be held upon the request of either State or the Organization itself.”

94. Mr. BARTOŠ asked that it should be explained in the commentary that the provision also covered cases in which several sending States had a dispute with the host State.

95. Mr. ROSENNE said he would be unable to support either the Drafting Committee's text or the Chairman's amended version. Neither of those formulations made it clear that the article envisaged bilateral consultations between the two States concerned. The injection of the reference to the organization was contrary to existing practice and, he believed, contrary to the intention of the Special Rapporteur. He therefore requested a separate vote on the concluding words “or the Organization itself”.

The Commission decided by 8 votes to 1, with 4 abstentions, to retain the words “or the Organization itself”.

The text proposed by the Chairman for article 49 was adopted by 11 votes to none, with 3 abstentions.

96. Mr. RUDA explained that he had abstained from voting on article 49, because it was not yet known whether the draft would include a provision on the settlement of disputes and, if so, what the content of that provision would be. He reserved his decision on article 49 until that question was decided.

97. Mr. USTOR said that, before leaving the meeting, Mr. Tammes had requested him to place on record that he (Mr. Tammes) did not wish to press his proposal for the addition of a paragraph 2 to article 49.¹⁵

Article 1, new paragraph

98. The CHAIRMAN invited the Commission to consider the following proposal for a new sub-paragraph to be inserted after sub-paragraph (k) of article 1.¹⁶

“(l) The ‘premises of the permanent mission’ are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the permanent mission including the residence of the permanent representative.”

99. Mr. ROSENNE said he found the proposed new sub-paragraph completely acceptable, but he suggested that it should be numbered “(k bis)” so as to obviate any changes in the designation of the existing paragraphs of article 1 as adopted at the previous session.¹⁷ Article 1 had already been submitted to governments for their comments and any changes in the numbering would create confusion.

100. Mr. RUDA said he assumed that the Spanish text of the proposed new paragraph would be similar in

wording to article 1, paragraph (i), of the 1961 Vienna Convention on Diplomatic Relations,¹⁸ on which the proposal was modelled.

101. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to adopt the proposed new paragraph as paragraph (k bis) of article 1, on the understanding that the Spanish text would be as Mr. Ruda assumed.

It was so agreed.

New article

102. The CHAIRMAN said that the Commission still had to consider the new article proposed by the Drafting Committee. It also had before it an amendment to that new article proposed by Mr. Kearney.¹⁹

103. Mr. KEARNEY said that he had submitted his amendment because the Drafting Committee's proposed new article did not reflect any deep study of the problems arising out of the outbreak of hostilities. His purpose had been to provide the Commission with a list of the main problems. Clearly each one of them would require thorough discussion, for which the Commission had no time at the present session. He therefore suggested that at its next meeting the Commission should merely take an interim decision designed to draw the attention of governments to the matter and obtain their reactions.

The meeting rose at 1.25 p.m.

¹⁸ United Nations, *Treaty Series*, vol. 500, p. 98.

¹⁹ For texts of the new article and amendment, see next meeting, 4 paras. 9 and 13.

1035th MEETING

Monday, 4 August 1969, at 3.10 p.m.

Chairman : Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Ustor Sir Humphrey Waldoock, Mr. Yasseen.

Organization of Future Work

[Item 6 of the agenda]

and

Dates and places of the Commission's meetings in 1970

[Item 7 of the agenda]

1. The CHAIRMAN announced that the Commission had taken the following decisions at a private meeting.
2. With regard to the organization of future work,

¹⁵ See 1028th meeting, para. 7.

¹⁶ See 1032nd meeting, para. 7.

¹⁷ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

the Commission reaffirmed its view that it was desirable to complete the study of relations between States and international organizations before the expiry of the term of office of its present members. As it had already stated in paragraph 104 of the report on the work of its twentieth session,¹ the Commission aimed to conclude its work on that topic in 1971, at its twenty-third session, if the scope of the work allowed. In view of the stage which the work had now reached, and taking into account the time required for the receipt of comments from governments, the Commission considered that its needs would not be best served by asking the General Assembly to authorize a winter session in 1970, the possibility of which had been reserved in the report on the twentieth session. The Commission deemed it necessary, however, to reserve the possibility of an additional or extended session in 1971 in order to achieve its stated aim. It had agreed to record that decision in the report on the work of its twenty-first session, so that arrangements for budgetary appropriations could be made in time.

3. In 1970, at its twenty-second session, the Commission intended to conclude, as a matter of priority, the first reading of its draft on relations between States and international organizations and to undertake substantive consideration of State responsibility and succession of States in respect of treaties. At that session, the Commission also planned to carry on with its study of succession of States in economic and financial matters. During its term of office, the Commission would continue its study of the most-favoured-nation clause.

4. With regard to the review of its programme and methods of work, the Commission had referred to its opinion, expressed in paragraph 98 (a) of its report on the work of its twentieth session, that the term of office of its members should be extended in order to ensure the continuity of membership that was necessary in view of the method of work provided for in its Statute and the nature of the codification process, especially when the Commission was preparing legal texts for the codification of particularly large and important sectors of international law. In order to make its intention quite clear, the Commission wished to specify that, in its opinion and in the light of its experience, the term of office of its members should preferably be seven years and that that proposal related only to the future terms of office of members of the Commission.

5. The Commission had confirmed its intention of bringing its long-term programme of work up to date in 1970 or 1971 taking into account the General Assembly's recommendations and the needs of the international community, and its intention of removing from the 1949 list those topics which were no longer suitable for treatment. To that end, in accordance with article 18 of its Statute, the Commission would again survey the whole field of international law with a view to selecting topics for codification. It had asked the Secretary-General to submit a preparatory working paper to facilitate that task.

¹ *Yearbook of the International Law Commission, 1968*, vol. II.

6. Pursuant to the request made by Mr. Bedjaoui, the Special Rapporteur for State succession in respect of matters other than treaties, the Commission had decided to ask the Secretary-General to send a note to the Governments of Member States inviting them to transmit the texts of any treaties, laws, decrees, regulations or diplomatic correspondence which related to the procedure of succession for States that had achieved independence since the Second World War and which had not been transmitted in response to the Secretary-General's notes of 27 July 1962 and 15 July 1963, together with any additional documentation showing State practice in that matter. The Secretariat would assemble the information received and publish it in a volume of the United Nations Legislative Series. In addition, the Secretariat would bring up to date the digest of the decisions of international tribunals relating to State succession (A/CN.4/151) published in the 1962 *Yearbook*.

7. The Commission's next session would start on 4 May 1970.

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

NEW ARTICLE

8. The CHAIRMAN invited Mr. Ustor to introduce the Drafting Committee's text for a new article.

9. Mr. USTOR said that the Drafting Committee proposed the following text:

New article

The severance, modification 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, even in the case of armed conflict. The establishment or maintenance of a permanent mission on the territory of the host State does not in itself imply recognition or affect the situation in regard to diplomatic or consular relations between the host State and the sending State.

10. The Drafting Committee had prepared that text on the basis of the suggestion made by Mr. Rosenne.² It had largely followed Mr. Rosenne's suggestion, but had made a few changes in wording. For instance, it had added the word "modification" after the word "severance". That addition was intended to cover cases in which diplomatic relations were modified, as when two States, instead of exchanging ambassadors or ministers, exchanged *chargés d'affaires*.

11. The main departure from Mr. Rosenne's suggestion had been the inclusion of a reference to cases of

² See 1027th meeting, para. 2.

armed conflict. The Drafting Committee had thought it would be useful to have a general provision covering that possibility, so that the article would be applicable whatever the legal situation between the sending State and the host State.

12. The second sentence of the Drafting Committee's text also differed somewhat from the wording suggested by Mr. Rosenne.

13. The CHAIRMAN drew the Commission's attention to the amendment to the Drafting Committee's text submitted by Mr. Kearney, which was as follows:

"1. The termination, modification 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 maintenance of a permanent mission on the territory of the host State does not in itself imply recognition or affect the situation in regard to diplomatic or consular relations between the host State and the sending State. In the absence of diplomatic or consular relations, however, either the host State or the sending State may require that all communications with the other be carried on through the Organization and the host State may limit the freedom of movement of the members of the permanent mission on its territory to within fifty miles of the Headquarters of the Organization.

"2. In the case of armed conflict between the host State and the sending State, the status of the permanent mission and the privileges and immunities of the members of the permanent mission shall be unimpaired except that the host State may impose the following limitations for the protection of the permanent mission and its own security:

"(a) That the permanent mission and its members be housed within the Headquarters area of the Organization or, if this is not feasible, within specified areas immediately adjacent to the Headquarters of the Organization;

"(b) That the movement of members of the permanent mission be limited to specified routes in the immediate vicinity of the Headquarters of the Organization;

"(c) That the permanent mission cease using its own wireless transmission facilities;

"(d) That the importation of articles for the personal use of members of the permanent mission be terminated;

"(e) That a neutral member of the Organization be designated to inspect the bag of the mission in the presence of a member of the mission to insure that no prohibited or contraband articles are brought in, and that the bag be brought in at specified places and times;

"(f) That members of the mission who leave its territory may not return;

"(g) That there be no increase in the size of the permanent mission;

"(h) That permanent residents of the host State may not be employed by the permanent mission."

14. In his capacity as a member of the Commission, he himself proposed the following amendment:

"The severance or absence of diplomatic or consular relations between the host State and the sending State shall not affect the rights or obligations of either State under the present articles, even in the case of armed conflict. The establishment or maintenance of a permanent mission by the sending State does not in itself imply recognition by that State of the host State or by the latter State of the sending State, nor does it affect the situation in regard to diplomatic or consular relations between the host State and the sending State."

15. In addition to a few drafting changes designed mainly to clarify the Drafting Committee's text, he had added a reference to the rights of the States concerned in the first sentence. After listening to Mr. Ustor's explanations, he would not press for the omission of the word "modification" from the first sentence. The changes he was proposing applied both to Mr. Kearney's amendment and to the Drafting Committee's text.

16. Mr. KEARNEY, introducing his amendment, said that the problems raised in the new article affected the most fundamental aspects of the relationship between international organizations and member States and between member States *inter se*. An international organization had to exercise its functions without regard to geographical boundaries and its objectives transcended national sovereignty. It must, however, have a specific location and exercise its functions within a particular State, so it could not divorce itself completely from the problems of that State. Obviously, the more the vital interests of the host State were affected by certain aspects of the organization's functioning, the more difficult and complicated was the task of reconciling the interest of the two parties.

17. The proposals before the Commission dealt with the most serious possibility, namely, a conflict between the needs of an international organization and those of the host State. The absence of diplomatic or consular relations between two States did not necessarily indicate the existence of difficulties between them, but in many cases the breaking off of such relations did occur as a result of substantial disagreements. It was usually accompanied by rising tension in public opinion and by hostility, and those factors must be taken into account in devising provisions to cover cases of severance of diplomatic or consular relations.

18. The same type of psychological difficulty might arise when one State refused to recognize either the government or the existence of another State. If such a situation persisted for any length of time, it was almost invariably in consequence of some profound political disagreement. The Commission could not ignore the possibility of such disagreements between the host State and the sending State and was bound to provide for certain limitations in such cases.

19. In dealing with the possibility of armed conflict, the Commission was treading on dangerous ground, because the existence of a state of war between two countries usually resulted in a situation in which States

did not observe the niceties of diplomatic behaviour that were normal in times of peace. The Drafting Committee's text completely ignored all those difficult problems and laid down a general rule that seemed to have little connexion with reality. If the Commission wished the articles to be adequate to ensure the proper functioning of an international organization, it must include a provision dealing with the severance of diplomatic or consular relations and problems of recognition as between the host State and sending States. It should be provided that if either of the States concerned so desired, the organization should act as a channel for communications between them. That was particularly important if there were problems of non-recognition.

20. Provision must also be made for the protection of members of a permanent mission in the event of public opinion becoming so hostile that rioting and attacks on members of the mission might occur. To avoid such dangers, it was only reasonable to limit the freedom of movement of members of permanent missions, and some authors even argued that the movement of diplomatic agents might be restricted. There was an illuminating passage on the subject in Sen's Handbook, which read: "Again, if at a particular time there is a strong public feeling in the country or in any particular area against the home state of the envoy, the receiving state will be well within its rights to advise the envoy not to undertake tours at that time or in the specified places".³

21. In the case of a diplomatic envoy, of course, it was also open to the host State to declare him *persona non grata* if he persisted in disregarding its advice by entering troubled areas, and riots or other difficulties ensued. If it was reasonable to argue that provision might be made for restraints of that character in the case of diplomatic agents, there was all the more justification for proposing similar limitations on travel by members of permanent missions to international organizations, whose reasons for travel would be entirely different. That was particularly true when the diplomatic mission of the sending State had already left because of the severance of diplomatic relations with the host State. A number of writers strongly held that no functional basis could be claimed for the granting of absolute freedom of movement in the host State to members of permanent missions.

22. The provisions adopted by the Commission in article 27⁴ were, on the whole, sensible and represented the practice of host States. That, however, only held true where permanent missions were located in States which adopted a tolerant attitude towards freedom of movement, freedom of expression and the like. At the present juncture, that practice did not really represent customary international law, so that article 27 represented a progressive development of the law. Account must therefore be taken of exceptional cases where diplomatic or consular relations did not exist or where there were problems of non-recognition. The host State must not be placed in the disadvantageous position of

being unable to provide the protection it was required to provide under the terms of the draft articles.

23. In drafting paragraph 2 of his amendment, he had been influenced to some extent by his personal experience during the Second World War, when he had been stationed in areas where the civilian population had suffered heavy bombing. Their reaction had been such that a car flying the emblem of the country responsible for the bombing would not have been received with equanimity, and it seemed completely out of the question to expect that the permanent mission of an enemy State could operate in the territory of the host State with any degree of freedom of movement or of communication with the population.

24. He was not attempting to decry or oppose the theory that, if satisfactory arrangements could be worked out for the protection of the sending State's permanent mission, that mission ought to remain in the territory of the host State. As United Nations experience had demonstrated, that was obviously desirable. Extremely grave problems could be solved through the United Nations, which served as a channel of communication between two belligerent States. The most striking illustration—and there were others—was the Jessup-Malik Agreement, which had put an end to the Berlin blockade, though that was not an instance of a state of war, but of an extremely grave situation. When real hostilities broke out, stringent limitations must be placed on the movements of the permanent mission of the sending State in order to protect both that State and the host State. That was the reason for sub-paragraphs (a) and (b) of paragraph 2 of his text. The other sub-paragraphs were designed to deal with the general problem of espionage. An atomic bomb could be transported in a receptacle the size of a diplomatic bag and a State fighting for its very existence could not be expected to allow even a diplomatic bag to enter its territory from the territory of the other belligerent State without ensuring that the bag did not contain devices or material which might threaten its safety. In sub-paragraph (e) he had suggested that a neutral member of the organization be designated to carry out the inspection. The same procedure would also apply to diplomatic bags leaving the territory. All the sub-paragraphs were mainly designed to safeguard the security of the host State, but also in some measure the security of the permanent mission of the sending State.

25. Since submitting his text, he had realized that an additional clause was needed to enable the host State to require the permanent mission of the sending State not to fly its flag on its premises or display its emblems on its vehicles because of the danger of provoking riots.

26. At that late stage in the Commission's session, there was no time to work out a well-balanced and comprehensive article on the subject and he therefore hoped that the problem could be submitted to Member States for detailed comment. It was undesirable for the Commission to reach even a preliminary decision on the substance of the new article.

27. Mr. CASTRÉN said he was prepared to accept the Chairman's amendment as it did not affect the substance of the Drafting Committee's text and left the legal status

³ B. Sen, *A Diplomat's Handbook of International Law and Practice*, The Hague, 1965, pp. 100 and 101.

⁴ See 1022nd meeting, para. 36.

of the permanent mission and its members unchanged in case of the severance or absence of diplomatic or consular relations or even in case of armed conflict.

28. Though he appreciated the practical reasons and the concern underlying Mr. Kearney's amendment, he thought it went too far. For example, it was unnecessary to restrict the freedom of communication or movement or any other privilege of a permanent mission or its members in the absence of diplomatic or consular relations between the sending State and the host State.

29. In cases of armed conflict the problem was more serious, so the restrictions provided for in paragraph 2, sub-paragraphs (a), (b) and (h) might be accepted, and possibly that in sub-paragraph (e), though it was more debatable because of the abuses to which the interpretation of the notion of contraband had given rise during the two world wars. Sub-paragraph (c) on the other hand, was not acceptable; the permanent mission should be permitted to use its own wireless transmission facilities even during an armed conflict. It was also hard to see why the importation of articles for the personal use of members of the permanent mission should be terminated during a conflict, especially if inspection by a neutral member of the organization was accepted, as provided in sub-paragraph (e).

30. The prohibitions in sub-paragraphs (f) and (g) were the most difficult to accept, since a member of a mission might be called upon to leave the territory of the host State to engage in important negotiations for the re-establishment of normal relations between the belligerents and it might be necessary to increase the size of the permanent mission to enable the sending State to take more effective action in the organization with a view to putting an end to the conflict or obtaining the organization's assistance in overcoming difficulties caused by the conflict.

31. In view of the short time remaining, there seemed to be no possibility of reaching agreement on such complex matters, and it was questionable whether it was really necessary to go into so much detail. He therefore proposed that either the question of armed conflict should be left aside, as had been done in the Vienna Convention on the Law of Treaties, or the phrase "even in case of armed conflict" should be inserted in articles 47 and 48, which the Commission had provisionally adopted.⁵

32. Mr. ROSENNE said he wished to thank the Drafting Committee for the text of the new article it had prepared for the Commission's consideration on the basis of his own tentative suggestion. However, despite Mr. Ustor's explanation, he still had misgivings about the addition of a reference to the "modification" of diplomatic or consular relations, the purpose of which was not clear to him.

33. The reference in general terms to the case of armed conflict was not incompatible with his original suggestion.

34. He had no strong views on the question whether the provision should deal with the problem of recogni-

tion, but would have thought that no express mention was needed.

35. The crux of the matter was dealt with in Mr. Kearney's text, from the third sentence onwards. He doubted whether that text could be properly described as an amendment to the new article submitted by the Drafting Committee, because it went on to deal with an entirely new set of hypotheses. Mr. Kearney had made out a strong case for the approach he had adopted and the Commission should certainly not shirk the issues he had mentioned in his introductory statement and dealt with in paragraph 2 and its sub-paragraphs. The first two sentences of his text were acceptable and indeed were substantially the same as the Drafting Committee's text and that proposed by the Chairman. The remainder of Mr. Kearney's text was acceptable in principle, though he agreed with its author and Mr. Castrén that the subject needed very thorough study and should be approached with great caution by the Commission. Obviously no decision could be reached at that stage, but the General Assembly and Governments should be informed that the Commission had taken that set of problems under advisement; he therefore agreed with the procedure suggested by Mr. Kearney.

36. The Commission might deal with the problems raised either in a new article with three paragraphs or in a separate chapter containing three articles. The first article or paragraph should contain the general proposition set out in the Drafting Committee's text. In the contemporary world, the case which the new article was intended to cover was neither rare nor of minor importance.

37. The second paragraph or article should deal with the whole complex of issues arising out of the absence of diplomatic or consular relations between the host State and the sending State. In the third sentence of his text, Mr. Kearney had mentioned both the question of communications between those States and the separate issue of freedom of movement. There might be other specific matters which ought to be covered in the absence of diplomatic or consular relations or in cases in which the host State did not recognize the sending State. Such matters could arise without there necessarily being an armed conflict.

38. Finally, the third paragraph or article should deal with the question of armed conflict. Mr. Kearney had limited his clauses in paragraph 2 to the case of armed conflict between the host State and a sending State and something on those lines would probably be acceptable. But there might be other kinds of situation requiring careful study.

39. The provisions should also be made applicable to observer missions and delegations to international conferences, and they would probably need to be placed at the end of the draft articles. Before the Commission could make much progress, however, it would have to obtain the views of governments. The issues with which Mr. Kearney had faced the Commission raised in his own mind once again a question which had not been satisfactorily answered when asked at the fifteenth and sixteenth sessions, namely, what the Commission's

⁵ See 1032nd and 1034th meetings.

precise purpose was in dealing with the topic of relations between States and international organizations.

40. Sir Humphrey WALDOCK said that as the end of the session was approaching, he would confine his brief comments to the problem of armed conflict, which had come up in connexion with article 47 because of the existence of a similar provision in article 45 of the Vienna Convention on Diplomatic Relations.⁶ Obviously, the principle that every proper facility should be given to diplomats to leave a country on the outbreak of war between it and the country they represented was essential and the same rule should apply to members of a permanent mission to an international organization should the need arise for them to leave. But the position of members of permanent missions to international organizations was, of course, different from that of diplomatic agents. The outbreak of war involved a whole series of possibilities. A sending State or the host State might be the aggressor and it was necessary to consider how that would affect the position of permanent missions. It was also possible that the nature of the hostilities might make the position of the organization itself untenable. Armed conflict could take many forms, ranging from full-scale war to conflicts which could be kept within manageable proportions through United Nations action, for example.

41. It was extremely difficult to lay down detailed rules in draft articles of the kind under consideration and it was certainly impossible to devise a provision in the limited time available. The Commission should therefore reserve the whole question; but it should explain its reasons for not including a provision on the lines of article 45 of the Vienna Convention on Diplomatic Relations, for States would inevitably notice the omission. The problems involved were even more complex than appeared from Mr. Kearney's detailed proposal.

42. The CHAIRMAN, speaking as a member of the Commission, said that the first two sentences of paragraph 1 of Mr. Kearney's amendment were practically the same as the Drafting Committee's text and he was prepared to accept them subject to the changes he himself had proposed. However, in order to remove any ambiguity, it would be better to say "diplomatic and consular relations" rather than "diplomatic or consular relations".

43. With regard to the third sentence, the organization, which might be called upon to assist in settling the conflict, was not the appropriate body to serve as an intermediary, and it would be more correct to provide, as in article 45, sub-paragraph (c) of the Vienna Convention on Diplomatic Relations, that the States in conflict would communicate through a third State. Further, the limits which the host State could impose on the freedom of movement of the members of a permanent mission in its territory should not be specified, since that was a matter for the host State alone. The last part of the sentence, following the word "territory", should therefore be deleted.

44. Paragraph 2 was a statement of United States

practice rather than a rule for general application and the many details it contained were out of place in a convention of general scope. Moreover, the prohibition in sub-paragraph (c) was covered by article 28, paragraph 1,⁷ which the Commission had already adopted.

45. Speaking as Chairman, he suggested that the Commission should adopt a new article worded on the lines of the text proposed by the Drafting Committee and should explain in the commentary that one member of the Commission had proposed that the article be amplified by the addition of a third sentence and a second paragraph, for which it would quote the wording proposed by Mr. Kearney.

46. Mr. AGO said that the Chairman's amendment considerably improved the drafting of the article, but all the substantive questions were not settled.

47. He still thought that in case of severance of diplomatic or consular relations, and even more so in that of armed conflict, a permanent mission should not be withdrawn; but neither could its situation remain absolutely unchanged. The Drafting Committee's text went too far in providing that the severance of diplomatic or consular relations did not affect the obligations of the host State and the sending State in any way.

48. Although he did not wholly endorse Mr. Kearney's proposal, he thought it should be taken into account. However, it covered a great variety of matters and the Commission would not have time to examine them all. The reference to armed conflict might be omitted, and the Commission might explain that it had discussed that question without coming to any decision.

49. With regard to the severance of diplomatic or consular relations, he proposed that, in view of the diversity of the situations which might arise, the Commission should defer consideration of that subject until the following year.

50. Mr. TSURUOKA said he agreed with Mr. Ago. The problem was too serious to admit of a hasty solution. It was quite right to try to safeguard the freedom of representatives to international organizations to perform their functions, but it should not be forgotten that in the event of armed conflict the national defence of host States was of vital importance. In general, the Commission had tried to equate the position of representatives of States to international organizations with that of diplomatic agents, but, in that particular instance, representatives to international organizations would be in the more favourable position.

51. Like several previous speakers, he thought the Commission should mention the matter in its report or in its commentary and say that it had not found time to come to a decision on so serious a problem; that would probably induce governments to make studies.

52. Mr. YASSEEN thought that the article embraced too many different problems, including, as it did, the severance of diplomatic or consular relations, the non-recognition of a government and the case of armed conflict.

⁶ United Nations, *Treaty Series*, vol. 500, p. 122.

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

53. It was clear that the severance of diplomatic or consular relations should not affect the rights and obligations laid down in the draft. The absence of diplomatic relations, which was sometimes due to non-recognition of a government, had been little discussed by legal writers or illustrated by practice, so that it would be difficult to draft rules on the subject.

54. The case of armed conflict had also been almost entirely neglected by writers and the Commission itself had reserved its position on the matter more than once. It had taken that line, for example, during the preparation of the Convention on the Law of Treaties. Consequently, the effects of an armed conflict between the host State and one of the sending States should be examined in detail, and it would take a long time to formulate them.

55. It might be said that an armed conflict should not deprive the sending State of its mission or of everything the mission needed for performing its functions, but the privileges and immunities provided for in the draft articles were certainly not all based on the notion of function. In the case of armed conflict, therefore, certain restrictions might be accepted in the interests of the host State.

56. Mr. RUDA said he fully supported Mr. Ago's suggestion that no decision should be taken at the present stage and that the problems involved should simply be listed in the commentary.

57. The new article raised three different types of problem and, when the time came, it would be more appropriate to deal with them in three separate articles. The first article would state that the establishment or maintenance of a permanent mission did not imply recognition. The second would state the rule that the severance or absence of diplomatic or consular relations between the host State and the sending State did not affect the rights and obligations of either State under the draft articles. The third article would deal with the problem of armed conflict.

58. In the third article, it would be necessary to draw a distinction between two types of conflict: a conflict between a sending State and the host State, and a conflict between a member State and the organization resulting from measures of coercion taken against that State. The two situations were different and raised very delicate problems in regard to which it would be extremely difficult to strike a balance between the interests of the host State, the sending State and the organization.

59. When the time came to draft an article on the subject of armed conflict, he would himself favour a general formula rather than an attempt to deal with specific points as in Mr. Kearney's proposal. The method followed in that proposal raised a number of problems. For example, the limitation imposed in paragraph 2 (b) was already covered by the provisions of article 27 and that in paragraph 2 (c) by the last sentence of paragraph 1 of article 28; in addition, the measure provided for in paragraph 2 (d) could be applied in the same way as that in paragraph 2 (e).

60. Mr. USTOR said that, despite the differences of opinion on a number of issues, the Commission agreed

on the general rule that the host State had a duty to make it possible for the organization to function, even in the exceptional circumstances mentioned in the new article. The host State was under a duty not to impede the sending State from participating in the work of the organization, even in those grave circumstances. That participation was necessary in the interests of the world community and served the cause of peace.

61. Opinions in the Commission differed only on the detailed arrangements to be made in the exceptional circumstances in question, especially in the event of armed conflict. He thought that in such cases negotiations would take place, as provided for in article 49. The Commission could therefore adopt a positive approach to the whole question and state the general rule, rather than adopting a negative approach and specifying the kind of restrictions which could be legitimately imposed by the host State.

62. Mr. REUTER said he supported the Chairman's proposal.

63. All the members of the Commission seemed to agree that the severance of diplomatic or consular relations should not in itself affect the rights and obligations of the host State and the sending State. But the severance of relations always implied some other situation which might justify certain steps. Armed conflict was not the only one; there were also states of tension, for example.

64. With regard to the notion of armed conflict, the views expressed by Mr. Kearney might perhaps reflect the experience of a United States citizen. He himself was, of course, a Frenchman, but what he said did not necessarily reflect the point of view of his Government. He would like that statement to be included in the record.

65. The Commission should consider the problems involved at length. For instance, some armed conflicts were localized and bilateral, so that their consequences were not nearly so grave as those of major conflicts without recourse to arms. International organizations usually established their headquarters in countries which, in normal circumstances, were liberal in various respects; but when circumstances became abnormal, the organization suffered directly.

66. For those reasons, he was in favour of deferring consideration of the subject until the following year; meanwhile he would inform the French Government of the discussion.

67. Sir Humphrey WALDOCK said he was inclined to agree with Mr. Ago that the whole problem was very complex and that consideration of it should be deferred until a later stage, when the Commission would have the benefit of the Special Rapporteur's views.

68. Mr. CASTAÑEDA said that where armed conflict was concerned it would be very difficult to formulate a general rule, because of the variety of cases which arose in practice. It might perhaps be best to adopt the course which had been followed in other drafts of the Commission and include an article simply stating that the draft related only to the law of peace and did not deal with the problem of armed conflict.

69. It would, however, be unfortunate if the Commission's work was to end in a mere statement that the subject had been discussed. He suggested that, without taking any decision on the substance, the Commission should include in the commentary an outline of the various proposals it had discussed.

70. With regard to the problems of relations and recognition, he agreed that, in view of the complexity of the situations involved, the Commission should postpone a decision until the following session. The rules in the matter were well expressed in the text proposed by the Chairman and he would himself see no objection to their provisional approval. Final adoption, however, would have to await further consideration, for which the Commission should have the benefit of the Special Rapporteur's views.

71. The CHAIRMAN, summing up the discussion, noted that the Commission considered it advisable not to mention armed conflict for the time being, and to reserve that subject for later examination. Nearly all the members were in favour of the wording of the second sentence of his own proposal. That sentence could form a separate article, as Mr. Ruda had proposed.

72. The Commission might adopt the article provisionally in order to draw the attention of governments to the subject and to show that it had been considered. It could be stated in the commentary that the Commission had discussed the case of armed conflict but had not yet taken a final decision on it.

73. Mr. BARTOŠ said he was opposed to the Commission's taking a provisional decision on a question of general international law of such wide scope. He wished that statement to be included in the record. To illustrate his point, he referred to the problems raised in practice by the recognition of régimes such as those of China and Spain.

74. The subject dealt with in the new article should not be dropped, for it affected the interests of the whole international community, of international organizations and of individual States. The Special Rapporteur should be asked to consider it in detail and governments should be invited to comment.

75. Mr. AGO said he thought the only matter the Commission could agree on was recognition, as treated in the second sentence of the Chairman's proposal. But he doubted whether that provision exhausted the whole question. Should it not first be stated that the host State must not invoke non-recognition to prevent the establishment or maintenance of a permanent mission?

76. With regard to the severance of diplomatic or consular relations, he stressed that armed conflict was always a possibility and could not be excluded. But there were many different situations in which armed conflict might occur.

77. He proposed that the Commission should refrain not only from taking any decision on the question dealt with in the new article, but also from asking governments for their views on the matter, since it was not in a position to suggest a solution.

78. The CHAIRMAN asked whether the new article should be given a title and whether the Commission's position should be set out in the commentary or elsewhere.

79. Sir Humphrey WALDOCK said that the best course would be to deal with the matter in the introduction to the group of articles on privileges and immunities.⁸ It was the Commission's practice to preface each important group of articles with introductory comments and that would be the most suitable place to discuss the issues raised by the proposed new article.

80. A cross-reference to article 47, which had given rise to the whole discussion and had led to the introduction of the proposed new article would have to be inserted in the commentary. There was a marked difference between the text of article 47 as adopted by the Commission and the text of the corresponding article 44 of the 1961 Vienna Convention on Diplomatic Relations,⁹ which did refer to the case of armed conflict. Governments would not fail to note the difference and the Commission should, at that point, indicate that the introduction to the whole section contained a statement on the Commission's discussions on the subject.

81. Mr. RUDA said he wished to make it clear that he fully supported Mr. Ago's proposal that all three problems should be deferred until the following session. He had not proposed that any decision, even a provisional one, should be taken at the present stage.

82. As to the place at which the problem should be mentioned, he agreed with Sir Humphrey Waldock.

83. Mr. USTOR said that the best place for the explanation would be at the beginning of the section on facilities, privileges and immunities. The Commission would explain, at that point, that in bilateral diplomacy the severance resulting from armed conflict or from the rupture of diplomatic relations was complete, so that no problem of privileges and immunities arose, but that in the present draft a special problem arose because the organization must continue despite the conflict or breach between the host State and one of the member States of the organization.

84. Mr. YASSEEN said that the subjects under discussion might perhaps require new articles and the Commission could give the necessary explanations in the introduction to the section on facilities, privileges and immunities. Mr. Ago might be asked to transmit a draft to the Secretariat.

85. The CHAIRMAN suggested that the Commission should not adopt the new article, but should explain its position in the introduction to the section on facilities, privileges and immunities. It might ask Mr. Ago, Mr. Reuter and Sir Humphrey Waldock to prepare a draft for the Secretariat.¹⁰

It was so agreed.

⁸ Articles 22-43.

⁹ United Nations, *Treaty Series*, vol. 500, p. 122.

¹⁰ See 1038th meeting, para. 42.

ARTICLE 47 (Facilities for departure).¹¹

86. The CHAIRMAN reminded the Commission that it had deferred a final decision on the text of article 47, in particular on the expression "in case of emergency", pending its decision on the wording of the new article. He suggested that the Commission should now finally adopt article 47 and give the necessary explanations of the notion of "emergency" in the introduction to the section on facilities, privileges and immunities.

It was so decided.

87. Mr. BARTOŠ and Mr. YASSEEN said that they had not participated in that decision.

ARTICLE 48 (Protection of premises and archives)¹²

88. The CHAIRMAN reminded the Commission that article 48 had only been adopted provisionally. Though it contained no reference to emergency, he suggested that it be stated in the commentary that the Commission had reserved its position on the cases mentioned in the relevant paragraph of the introduction to the section on facilities, privileges and immunities.

89. In the English version of paragraph 1 of article 48 the word "finally" should be substituted for the word "definitely", to bring the text into conformity with article 46.¹³

90. The wording proposed by the Special Rapporteur for the second sentence of paragraph 1 (A/CN.4/218/Add.1) had been amended, and a consequential amendment to paragraph 2 was needed to show that it was at the request of the sending State that the host State must grant the latter facilities for removing the property and archives of the permanent mission.

91. After an exchange of views, he suggested that paragraph 2 be amended to read: "The host State, if requested by the sending State, shall grant the latter facilities for removing the property and archives of the permanent mission from the territory of the host State."

It was so agreed.

Article 48, thus amended, was adopted

The meeting rose at 6.40 p.m.

¹¹ For previous discussion and text, see 1032nd meeting, paras. 13-25.

¹² For previous discussion and text, see previous meeting, paras. 48-91.

¹³ See previous meeting, paras. 8-10 and 47.

1036th MEETING

Tuesday, 5 August 1969, at 10 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: M. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 41 (Duration of privileges and immunities)

1. The CHAIRMAN said he thought the Commission ought to reconsider the text of article 41, paragraph 2, which it had already adopted.¹ The wording of the first part of the first sentence was perhaps not entirely satisfactory, the last part of it did not specify who was to grant the reasonable period for leaving the country, and there was a reference at the end to the case of armed conflict. Since the Commission did not have time to discuss paragraph 2 again, he suggested that Mr. Ago, with the help of perhaps two other members, be asked to prepare better wording.

*It was so agreed.*²

State Responsibility

(A/CN.4/208; A/CN.4/209; A/CN.4/217)

[Item 3 of the agenda]

(resumed from the 1013th meeting)

2. The CHAIRMAN invited the Commission to resume consideration of the topic of State responsibility.

3. Mr. ROSENNE said that, as he had been absent when the Commission had last discussed that topic, he now wished to congratulate the Special Rapporteur on his extremely useful review of past work and to thank him for assembling a large quantity of relevant documentation in the annexes. He understood that some difficulties had arisen in the production of the annexes, as a result of which some parts of them had appeared in a language which was not one of the official languages of the United Nations — a fact which had considerably inconvenienced him in his examination of the documents. He urged the Commission to assert its authority and insist that its documents should be submitted to it in the form considered appropriate by the Special Rapporteur concerned, not by those responsible for the physical production of documents.

4. He concurred in the general view that the Commission should ask the Special Rapporteur to continue his work in the manner he proposed.³ That would be in accordance with the decision which the Commission had taken in 1963, in the light of the detailed examination of the topic made by its Sub-Committee on State Responsibility presided over by Mr. Ago,⁴ and had confirmed at its nineteenth session in 1967.⁵

¹ See 1023rd meeting, paras. 54 and 60.

² For resumption of the discussion, see 1038th meeting, para. 6.

³ See 1011th, 1012th and 1013th meetings.

⁴ See *Yearbook of the International Law Commission, 1963*, vol. II, p. 224, paras. 52-55.

⁵ *Op. cit.*, 1967, vol. II, p. 368, para. 42.