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Summary record of the 1037th meeting

Topic:
Other topics

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the topic. For the time being, however, it would be difficult to go beyond the subject of most-favoured-nation clauses in the law of treaties, though he appreciated Mr. Reuter's view that the Commission might have to consider rules relating to non-discrimination. It would be unrealistic to enlarge the scope of the study before ascertaining whether that was feasible.

67. Where violations of the clause were concerned, there were at present practices which some parties considered to constitute violations of the clause, while other parties did not. That point could be illustrated by East-West trade. Eastern European countries believed that when western countries exercised discrimination against their trade, they were committing a violation of the most-favoured-nation clause, whereas the western countries contended that the so-called violations were inherent in the differences between the economic systems of the two groups. An important and complex problem was involved and he would consider how it could be handled.

68. Mr. Reuter had asked what the Commission was trying to do and what it expected of the study. That was still an open question and he had not yet made up his own mind.

69. The Chairman, speaking as a member of the Commission, had raised the issue of discrimination, which was a separate, but closely connected one. The obvious example that came to mind was that of Customs tariffs. For instance, the practice of the United States Government was to accord most-favoured treatment to nearly all the countries of the world with very few exceptions, and the countries excepted were inclined to regard that practice as discriminatory.

70. He agreed with Mr. Ago that the Commission should not attempt to solve economic problems or deal with trade policy. Nevertheless, it was a body of lawyers which could serve the practical needs of the international community and that consideration should always be borne in mind.

71. The CHAIRMAN suggested that the Commission should include, at the end of the section of its report on that item of the agenda, a paragraph thanking the Special Rapporteur for his first report and requesting him, before preparing any draft articles, to complete it on the lines set out in paragraph 9 of the introduction, giving an account of the decisions taken and the practice followed since the Second World War.

It was so decided.

The meeting rose at 1.10 p.m.

1037th MEETING

Tuesday, 5 August 1969, at 3.15 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Reu-

ter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-first session

(A/CN.4/L.143-148 and Addenda)

Chapter II

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

1. The CHAIRMAN invited the Commission to consider the part of Chapter II of its draft report contained in document A/CN.4/L.144/Add.1.

COMMENTARY TO ARTICLE 27 (Freedom of movement)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

2. Mr. ROSENNE suggested that the fourth, fifth and sixth sentences be deleted. They began with a reference to the effect which the inclusion in the article of a provision on members of the family might have on the interpretation of article 26 of the 1961 Vienna Convention. The problem of possible effects on the interpretation of that Convention was, however, a general one, which did not arise solely with respect to article 27, but also affected one or two other articles and was mentioned in the relevant commentaries. He would therefore suggest that the subject be dealt with in a paragraph of the introduction to the whole group of articles; in that paragraph, it would be explained that the 1961 Convention had been used in preparing the present draft and that where the Commission had departed from that model, it had done so because of the special character of permanent missions. The scattered references to the problem in the various commentaries would then be dropped.

3. Mr. TSURUOKA supported Mr. Rosenne's suggestion.

4. Mr. CASTRÉN said it was hardly possible to delete the whole passage suggested by Mr. Rosenne. Where the Commission's text departed from the system of the 1961 Vienna Convention, some explanation should be given in the commentary. He himself would like to suggest that the third sentence be deleted, because it was not correct to say that the right in question "probably went without saying".

It was so agreed.

5. The CHAIRMAN suggested that the passage which Mr. Rosenne wished to have deleted should be considerably shortened, so as to refer simply to the fact that the present liberal practice with regard to members

of the family constituted the expression of a customary rule of international law.

6. Mr. YASSEEN said he agreed with the Chairman that the present practice could be regarded as reflecting a customary rule. He did not believe that any question of interpretation of the 1961 Vienna Convention arose.

7. Sir Humphrey WALDOCK said that the point raised by Mr. Rosenne was generally valid but did not apply to the particular case under discussion. The position was in fact that, during its discussion of article 27, the Commission had discovered a gap in the system applicable to diplomatic agents. It had arrived at the conclusion that the omission from the Vienna Convention of a provision relating to members of the family was inadvertent. It had therefore decided to fill the gap so far as the present draft was concerned, perhaps especially because of the absence of reciprocity in the case of permanent missions.

8. He accordingly suggested that the beginning of the fourth sentence, with its reference to the interpretation of article 26 of the Vienna Convention, be deleted, together with the reference to "a broad interpretation of that Convention" in the latter part of the sentence. The sentence as a whole would then read: "The Commission agreed that the present liberal practice with regard to the members of the families of diplomatic agents could be regarded as an expression of a customary rule but that it was preferable to insert a specific provision to that effect in the present draft articles in view, in particular, of the lack of reciprocity in multi-lateral diplomacy". The last two sentences would be deleted.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

9. Mr. ROSENNE suggested that, in the last sentence but two, the concluding words "their temporary nature" be replaced by the words "the particular character of those missions", since the temporary nature of special missions was not the only factor involved. He also suggested that, in the last sentence but one, for the sake of clarity, the words "in the case of permanent missions" be inserted after the words "if difficulties arose".

It was so agreed.

Paragraph (4), as amended, was approved.

The commentary to article 27, as amended, was approved.

COMMENTARY TO ARTICLE 28 (Freedom of communication)

Paragraphs (1), (2) and (3)

Paragraphs (1), (2) and (3) were approved.

Paragraph (4)

10. Mr. ROSENNE suggested that the Secretariat be

requested to add a reference to communications between permanent missions.

It was so agreed.

Subject to that addition, paragraph (4) was approved.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved.

Paragraph (7)

11. Mr. KEARNEY said the statement in the second sentence that the arrangements were concluded "once and for all" was too sweeping. It would be better to use some such phrase as "as a general rule".

12. The CHAIRMAN said that the use of the word "concluded" was incorrect since the arrangements were, strictly speaking, not "concluded" but simply made.

13. Sir Humphrey WALDOCK suggested that both points could be met by replacing the words "which concluded such arrangements once and for all" by the words "for which such arrangements were made on a continuing basis".

It was so agreed.

14. Mr. USTOR, referring to the last sentence, said that the right "freely" to take possession of the bag would be negated if the member of the permanent mission concerned were required to observe the "normal regulations".

15. Mr. KEARNEY said it was because that point had been raised during the discussion on article 28 that the Commission had decided to include in the commentary an explanation that the omission of the phrase "by arrangement with the appropriate authorities", which appeared in the corresponding provision on special missions, did not imply that a member of the permanent mission could disregard safety regulations when moving towards aircraft to take possession of the bag.¹

16. The CHAIRMAN suggested that some of the difficulties could be overcome by omitting all reference to the interpretation of the 1961 Vienna Convention.

17. Mr. KEARNEY said he agreed and that he would accordingly suggest the deletion of the penultimate sentence which read: "It was noted that article 27 of the Vienna Convention on Diplomatic Relations did not contain the phrase."

It was so agreed.

18. Mr. YASSEEN suggested that the concluding words of the paragraph, "normal regulations", be replaced by the words "applicable regulations". The right of free access existed and the host State had the duty to respect it. The host State could, of course, enact regulations for such purposes as ensuring the security of aircraft and of persons in an airport, but it could not make regulations which would nullify the rights of the permanent mission in the matter.

The amendment proposed by Mr. Yasseen was adopted.

¹ See 995th meeting, paras. 30-40.

Paragraph (7), as amended, was approved.

The commentary to article 28, as amended, was approved.

COMMENTARY TO ARTICLE 29 (Personal inviolability) AND TO ARTICLE 30 (Inviolability of residence and property)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

19. Mr. KEARNEY suggested that, in the second sentence, the words "the provision of a special guard" be replaced by "police protection", which was the more usual formula.

20. The CHAIRMAN said that it would be for the host State to decide whether it could make police forces available or not. In a capital where there were a large number of embassies, experience showed that it was not possible to provide police protection for all of them. He would prefer that the sentence should be deleted altogether.

21. Mr. KEARNEY said that the term "police protection" had a much broader meaning than protection by uniformed municipal police; it covered whatever official protection happened to be required in the circumstances. In the United States, for example, police protection was normally a matter for the individual States of the Union, so that, as far as United Nations Headquarters was concerned, it was the New York State forces and the New York City Police which provided the necessary protection.

22. However, if other members preferred to retain the words "the provision of a special guard", he would not press the point.

23. The CHAIRMAN said that the opening words of the second sentence, "The host State must take all necessary measures. . .", were perhaps too strong. It might be more correct to say: "The host State may take all the necessary measures. . .", since while there was an obligation to ensure protection, there was none to provide a special guard.

24. Mr. BARTOŠ said that the host State undoubtedly had a duty to take security measures. In fact, it had a duty to do so regardless of the desires of the embassy or mission concerned. It would be better that the commentary should not go into detail, since it was for the host State to decide, according to the circumstances, how it would fulfil its obligations. Whether Federal, State or municipal police forces were employed was solely for the host State to decide.

25. Mr. CASTRÉN suggested that the last part of the sentence in question be dropped altogether.

26. Sir Humphrey WALDOCK said he thought it would not be sufficient merely to say "The host State must take all necessary measures to that end." Such a commentary would not add anything to the text of the article. He therefore proposed that the last part of the sentence be reworded to read: "which may include the provision of a special guard if circumstances so require".

27. Mr. YASSEEN said that the French version already conveyed that idea, because it did not imply that the provision of a special guard was included among the "necessary measures".

28. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission agreed to approve paragraph (3) with the amendment proposed by Sir Humphrey WaldoCK.

It was so agreed.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

The commentary to articles 29 and 30, as amended, was approved.

COMMENTARY TO ARTICLE 31 (Immunity from jurisdiction)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

29. Mr. ROSENNE suggested that, in the fourth sentence, the words "insurance laws" be replaced by the words "insurance laws and practices". The discussion had referred to both legislation and practices with regard to insurance.² He also suggested that, in the fifth sentence, the opening words "To the contrary" be replaced by the words "On the other hand".

It was so agreed.

30. Mr. KEARNEY said that another problem mentioned during the discussion had been that of the adequacy of insurance coverage; that problem involved such matters as the limits placed on compensation in case of death or serious injury. He accordingly suggested that the words "as well as the adequacy of the insurance coverage" be added to the end of the fourth sentence, as amended by Mr. Rosenne.

It was so agreed.

Paragraph (3), as amended, was approved.

The commentary to article 31, as amended, was approved.

COMMENTARY TO ARTICLE 32 (Waiver of immunity)

Paragraph (1)

31. Mr. ROSENNE suggested that the word "modelled" in the first sentence be replaced by the word "based". He further suggested that the Secretariat be requested to examine the commentaries to the other articles in order to ensure uniformity of wording.

It was so agreed.

32. Mr. REUTER said that the French text should be brought into line with the English by using the expression "à pour base".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

² *Ibid.*, paras. 49-71.

Paragraph (2) was approved.

Paragraph (3)

33. Mr. KEARNEY proposed the deletion of paragraph (3). The question of waiver of immunity, in so far as it might affect the obligation to give evidence, was a very complex one. A much longer commentary would be needed to deal with it adequately.

34. Mr. USTOR and Sir Humphrey WALDOCK supported Mr. Kearney's proposal.

Paragraph (3) was deleted.

The commentary to article 32, as amended, was approved.

COMMENTARY TO ARTICLE 33 (Settlement of civil claims)

The commentary to article 33 was approved.

COMMENTARY TO ARTICLE 34 (Exemption from social security legislation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

35. Mr. KEARNEY said that the first sentence was ambiguous. Permanent representatives were completely exempt from payment of employer's social security contributions. The sentence did not make it clear that what it was intended to refer to was contributions paid by the employer on behalf of the employee.

36. The CHAIRMAN suggested that paragraph (3) be deleted.

It was so agreed.

37. Mr. USTOR said that paragraph 5 of article 34, which had been taken from the corresponding provision of the 1961 Vienna Convention, was not necessary in the present draft because of the provisions of articles 4 and 5, which the Commission had adopted at the previous session.³ He would not propose, at that late stage, the deletion of paragraph 5, but he would suggest that the reasons for its retention, despite its apparent redundancy, be explained in the commentary.

38. Sir Humphrey WALDOCK said that he himself would be in favour of deleting paragraph 5 and explaining in the commentary that it had been dropped because the matter was already covered in articles 4 and 5.

39. Mr. ROSENNE suggested that the article itself be left as it stood but that a new paragraph be added to the commentary. The new paragraph, which would be numbered (3) in view of the deletion of the previous paragraph (3), would read: "The Commission intends to consider, in the light of the comments to be received from Governments, whether paragraph 5 is necessary in view of the provisions of articles 4 and 5 of the present draft."

It was so agreed.

³ See *Yearbook of the International Law Commission, 1968*, vol. I, 980th meeting, paras. 13-52.

The commentary to article 34, as amended, was approved.

COMMENTARY TO ARTICLE 35 (Exemption from dues and taxes)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were approved.

Paragraph (5)

40. Mr. KEARNEY proposed the deletion of the last sentence, which read: "The Commission draws a clear distinction between sub-paragraphs (e) and (f); the former applies only to dues and taxes granted for specific services rendered". It was not easy to draw a clear distinction between the two types of charges and the explanations given in paragraphs (5) were not of any great assistance in that respect.

Mr. Kearney's proposal was adopted.

Paragraph (5), as amended, was approved.

The commentary to article 35, as amended, was approved.

ARTICLE 35 (Exemption from dues and taxes) (*resumed from the 1020th meeting*).

Sub-paragraph (f)

41. The CHAIRMAN said that sub-paragraph (f) of article 35 had been approved provisionally at the 1020th meeting;⁴ it should now be adopted.

Sub-paragraph (f) of article 35 was adopted.

Article 35 as a whole was adopted

COMMENTARY TO ARTICLE 36 (Exemption from personal services)

The commentary to article 36 was approved.

COMMENTARY TO ARTICLE 37 (Exemption from customs duties and inspection)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

42. Mr. ROSENNE said that the reference at the end of the paragraph to "the system of taxation followed by the country in question" was not correct. At the international level, it was the relevant provisions of the headquarters agreements which were decisive in the matter, although those agreements might, of course, take local legislation into account.

43. Mr. BARTOŠ said that many important details were not settled in the international instruments but were, in fact, regulated by the legislation of the host country. The paragraph should therefore refer both to the headquarters agreements and to local taxation legislation.

44. Mr. KEARNEY said that it would be useful to retain a reference to the system of taxation in force in the host country. There might be a variety of taxation

⁴ See 1020th meeting, para. 39.

authorities in that country and the practices of the authority invested with taxation powers were highly relevant. He therefore proposed that the concluding words of the sentence be amended to read: "according to the headquarters agreements and to the system of taxation in force".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraphs (3) to (5)

45. Mr. ROSENNE said that the contents of paragraphs (3), (4) and (5) did not constitute a commentary on the text of article 37, but if the majority of the Commission wished to retain them, he would not press for their deletion.

46. Mr. BARTOŠ said that the differences explained in paragraphs (3) to (5) did exist in practice, so that the paragraphs served a useful purpose.

Paragraphs (3) to (5) were approved.

The commentary to article 37, as amended, was approved.

COMMENTARY TO ARTICLE 38 (Exemption from laws concerning acquisition of nationality)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

47. Mr. KEARNEY said that paragraph (2) reproduced the 1958 commentary to article 35 of the draft on diplomatic intercourse and immunities. But the language of the passage was ambiguous in parts and its last sentence purported to state, as an absolute legal rule, a proposition of doubtful validity. He therefore suggested that the reference to the 1958 commentary be dropped altogether.

48. The CHAIRMAN said that, at the close of the discussion on article 38, it had been decided to include in the commentary a reference to the 1958 commentary to article 35 of the draft on diplomatic intercourse and immunities.⁵

49. Mr. ROSENNE suggested that the difficulty might be overcome by a slight adjustment to the wording of the sentence which preceded the quotation. So as to emphasize that the quotation dated back to 1958, the sentence could be reworded to read: "At the time, the Commission gave the following explanation on the matter in its commentary to article 35:".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

50. Mr. KEARNEY proposed the deletion of paragraph (3). The fact that only twenty-seven States had become parties to the Optional Protocol on Acquisition of Nationality would not support the Commission's argument in favour of including article 38.

⁵ See 1021st meeting, para. 60.

51. Mr. BARTOŠ said that, when the Commission had first discussed the question, he had suggested that the commentary should say how many States had ratified the Optional Protocol.⁶ That information had now been given and showed that the Protocol had not obtained many ratifications. He therefore supported Mr. Kearney's proposal to delete paragraph (3).

52. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission agreed to delete paragraph (3).

It was so agreed.

Paragraph (4)

53. Mr. KEARNEY said he had some misgivings concerning the wording of the third and fourth sentences of paragraph (4). The Commission seemed to be saying that, because only a small number of States were involved, their point of view could be ignored.

54. Mr. YASSEEN suggested that the difficulty might be met by deleting the fourth sentence.

55. Mr. ROSENNE said he agreed. In addition, the third sentence might refer to "the limited number of States" rather than to "a small number of States".

56. Sir Humphrey WALDOCK said that the statement made in the third sentence was simply not true. In the case of the United Nations, for example, the article envisaged the nationality of persons who might be members of a mission from virtually any State in the international community. Since such persons were in the territory of the host State not to serve the interests of the host State but in connexion with the international organization, it was wrong that they should be subjected to the nationality laws of the State concerned. He therefore suggested that the third sentence be amended to read: "The provisions of article 38 of the present draft envisage the nationality of persons whose presence in the territory of the host State is due to the membership of their State in the organization and not to bilateral relations between the States concerned."

57. Mr. YASSEEN said that, although the interest of all States might be involved, the provision related to the imposition of the nationality of only a limited number of States. The rule had been opposed at the United Nations Conference on Diplomatic Intercourse and Immunities by certain States which wished to impose their nationality.⁷

58. Sir Humphrey WALDOCK said that the Commission was not entitled to assume that the number of host States would remain limited. The provision must therefore be a general one and should not be based on such an assumption. The essential point was the difference between diplomatic and permanent missions. It was possible for a State to have no diplomatic relations with the host State but yet have a permanent mission in the territory of that State. Membership of a permanent mission was, if anything, a more accidental factor, which

⁶ See 996th meeting, para. 43.

⁷ See *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vol. I, 31st meeting, paras. 88-110, and 34th meeting, paras. 1-40.

was all the more reason why members of missions should be exempted from the host State's nationality laws.

59. The CHAIRMAN suggested that Sir Humphrey Waldock be asked to prepare a revised draft to replace the third and fourth sentences of paragraph (4).⁸

It was so agreed.

On that understanding, the commentary to article 38 was approved.

The meeting rose at 6.5 p.m.

⁸ For the text, see *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10 (A/7610/Rev.1)*, paragraph (3) of the commentary to article 39.

1038th MEETING

Wednesday, 6 August 1969, at 9.55 a.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, Sir Humphrey Waldock, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-first session

(A/CN.4/L.143-148 and Addenda)

(continued)

Chapter II

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS *(continued)*

1. The CHAIRMAN invited the Commission to continue its consideration of the part of chapter II of its draft report contained in document A/CN.4/L.144/Add.1.

COMMENTARY TO ARTICLE 39 (Privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

2. Mr. KEARNEY said that the purpose of paragraph (4) was not clear. Was it the Commission's intention to obtain the views of Governments, particularly of host States, or merely to indicate that the suggestion referred to in the second sentence had been made? It seemed evident that not many host States would be in favour of extending the privileges and immunities of

permanent missions through bilateral arrangements. They were more likely to be anxious to curtail them.

3. The CHAIRMAN suggested that paragraph (4) be deleted.

Paragraph 4 was deleted.

The commentary to article 39, as amended, was approved.

COMMENTARY TO ARTICLE 40 (Nationals of the host State and persons permanently resident in the host State)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

4. Mr. CASTRÉN said he would remind the Commission that it had been decided at its 1023rd meeting to approve the proposal of the Drafting Committee to delete from paragraph 1 of the article the reference to persons who were, or had been, representatives of the host State.¹ The reasons for that decision should be explained in the commentary and the explanations given by the Chairman of the Drafting Committee² at the 1022nd meeting should be inserted after the first sentence of paragraph (2).

5. After an exchange of views, the CHAIRMAN suggested that the second sentence in paragraph (2) be deleted, together with the footnote thereto, and replaced by the following passage: "Since the case of permanent representatives who are nationals of the host State is covered in article 40, paragraph 1, the Commission did not deem it advisable to include in this paragraph a clause concerning permanent representatives who are, or have been, representatives of that State. It considered that any such clause would refer to such an exceptional situation that there was no need to mention it. Moreover, if a person represented or had represented the host State, he was very likely to be one of its nationals and therefore subject to the limitation already imposed by the paragraph."

Mr. Ushakov's proposal was adopted.

Paragraph (2), as amended, was approved.

The commentary to article 40, as amended, was approved.

ARTICLE 41 (Duration of privileges and immunities)

6. The CHAIRMAN said that at the 1036th meeting, it had been agreed that an attempt should be made to produce a more satisfactory text for paragraph 2 of article 41. With the help of Mr. Ago he had accordingly prepared the following new text.

"2. The person in question shall normally enjoy privileges and immunities [, except in case of the waiver of one of these immunities by the sending State] as long as his functions in the permanent mission continue, and thereafter until the person in question leaves the territory of the host State or until

¹ See 1023rd meeting, para. 52.

² See 1022nd meeting, para. 48.