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Summary record of the 1038th meeting

Topic:
Other topics

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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.

the expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the permanent mission, immunity shall continue to subsist.”

7. Mr. ROSENNE said that he did not understand the implication of the word “normally”.

8. The CHAIRMAN said that the word “normally” was intended to exclude cases of death and the exceptional cases in which the sending State terminated the functions of a permanent representative or a member of the diplomatic staff under article 46.

9. Mr. CASTRÉN said he supported the new text, though he did not see any point in retaining the phrase in brackets, since the proviso it contained stated something that was self-evident. On the other hand, since the words “the person in question” referred to the persons mentioned in paragraph 1, it would be better to say explicitly “the persons mentioned in paragraph 1” and put the whole paragraph in the plural. The commentary would, of course, have to be modified accordingly.

10. Mr. USTOR said that, although he was averse to introducing a new element into the discussion at that late stage, he must draw attention to the need for a provision concerning members of families, whose position was different from that of members of the permanent mission exercising official functions. The problem of the beginning and end of the privileges and immunities of members of families was dealt with in a detailed and somewhat casuistical manner in article 53, paragraphs 2 and 3, of the Vienna Convention on Consular Relations. He held no particular brief for that wording but considered that some mention of the problem should be made in the commentary to article 41, since Governments would otherwise notice the omission.

11. According to article 53, paragraph 2, of the Convention on Consular Relations, members of the family and members of the private staff received the privileges and immunities from the date of their entry into the territory of the receiving State or from the date of their becoming a member of such family or private staff, whichever was the later. The cessation of their privileges and immunities was dealt with in paragraph 3 of the same article. The problem of members of the private staff was a minor one and could be left aside, but the problem of members of the families of members of a permanent mission was a genuine problem and should be taken into account.

12. Mr. BARTOŠ said that both he and Mr. Castrén had several times drawn attention to the fact that an appropriate form of words ought to be found covering the situation of members of the family of persons entitled to privileges and immunities.

13. Sir Humphrey WALDOCK said he had not yet been convinced that there was any need to alter the opening phrase of the Drafting Committee’s text³ for paragraph 2 “When the functions of a person enjoying privileges and immunities have come to an end,” which

had been modelled on an analogous provision in article 39, paragraph 2, of the Vienna Convention on Diplomatic Relations. The wording proposed in the new text might give rise to speculation about the Commission’s reasons for departing from the Convention.

14. Article 39, paragraph 2, and article 53, paragraph 3, of the Conventions on Diplomatic Relations and on Consular Relations respectively were clearly not intended to be exhaustive and had deliberately been framed in general terms so as to make that clear. There were various ways in which the functions of the member of a permanent mission could come to an end and it was not necessarily the consequence of his being declared *persona non grata* by the government of the host State. The argument set out in paragraph (3) of the commentary to article 41 did not affect the issue. Ideally, the Chairman’s text was perhaps more satisfactory, but no strong case had yet been made for departing from the traditional formula.

15. Mr. USTOR said he agreed with Sir Humphrey Waldock that the wording of the two Vienna Conventions should be followed as closely as possible.

16. After some further discussion, the CHAIRMAN suggested that the Commission adopt the Drafting Committee’s text for paragraph 2, with the deletion of the words “but shall subsist until that time, even in case of armed conflict” at the end of the first sentence. In the French version, the latter part of that sentence would read: “ou à l’expiration d’un délai raisonnable pour ce faire.”

It was so agreed.

Article 41, as thus amended, was adopted.

COMMENTARY TO ARTICLE 41 (Duration of privileges and immunities)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

17. Mr. KEARNEY said that there was nothing in article 41 to justify the statement in the second sentence of paragraph (2) of the commentary. The article completely ignored the question of the dates applicable to the beginning and end of privileges and immunities for members of the family of members of permanent missions. If the Commission thought it preferable not to insert a provision on that question but to leave it to the practice of States, then it should not be mentioned in the commentary at all.

18. The CHAIRMAN said that paragraph 2 of the article was modelled on the corresponding article in the Vienna Convention on Diplomatic Relations, which had been article 38 of the Commission’s draft, and paragraph (2) of the commentary was based on the commentary which the Commission had drafted at the time to article 38. Therefore it should preferably not be amended for the time being. If the Commission decided at the second reading to bring article 41 into line with the corresponding article of the Vienna Convention on Consular Relations, the commentary would be amended accordingly.

³ See 1023rd meeting, para. 54.

19. Sir Humphrey WALDOCK suggested that a further passage be added to the end of paragraph (2), reading: "The Commission noted that the Vienna Convention on Diplomatic Relations did not contain any specific provisions on the question, whereas the Vienna Convention on Consular Relations did so in article 53. The Commission wished to invite the views of Governments as to whether it is desirable to include a provision on these lines".

It was so agreed.

20. Mr. KEARNEY suggested that the words "in their official capacity" be substituted for the words "in their own right" in the first and second sentences of paragraph (2).

It was so agreed.

Paragraph (2), as thus amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

21. Mr. ROSENNE said that, in his view, paragraph (4) should be deleted altogether. It was clear from paragraph 89 of the study prepared by the Secretariat of the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities⁴ that, in the *Case of B.v.M.* mentioned in the footnote to paragraph (4) of the commentary, the contention in question had not been made by the Swiss Government but by a federal tribunal in Lausanne. Accordingly, the words "gave rise to differences", in the first sentence of paragraph (4), were inaccurate. There was nothing in the Secretariat's study to substantiate the contention that there had been any difference between the United Nations and the Swiss authorities.

22. In the *Santiesteban Case*,⁵ which was also mentioned in the footnote to paragraph (4), the study by the Secretariat showed that some discussion had arisen between the United Nations and the United States Government. It was stated in paragraph 60 of the study by the Secretariat that on 31 July 1964 the Secretary-General had sent a note to permanent missions which contained the following sentence: "The United States authorities informed the Secretary-General that it is proposed to put into effect a new procedure to reduce or eliminate the delay which presently arises between the arrival in the United States of members of the staff of Permanent Missions and the recognition by the host Government of the privileges and immunities accorded to such members under the Headquarters Agreement."

23. Paragraph (4) was not illuminating and in fact was too lapidary a statement on an extremely complicated matter. It ought therefore to be dropped.

24. The CHAIRMAN said he agreed with Mr. Rosenne, particularly as the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies respectively did not contain a pro-

vision concerning notification on the lines of that included in article 17 of the present draft.

Paragraph (4) was deleted.

Paragraph (5)

Paragraph (5) was approved.

The commentary to article 41, as amended, was approved.

COMMENTARY TO ARTICLE 42 (Transit through the territory of a third State)

The commentary to article 42 was approved.

COMMENTARY TO ARTICLE 43 (Non-discrimination)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were approved.

Paragraph (5)

25. Mr. KEARNEY said that the last part of the second sentence of paragraph (5) did not correctly reflect the relationship between the host State, the sending State and the Organization. He therefore suggested that the word "among" be substituted for the word "between".

It was so agreed.

26. The CHAIRMAN said that if the word "exclusively" were inserted after the word "belongs", that would make the text even clearer.

It was so agreed.

27. Mr. ROSENNE suggested that the word "framework" be substituted for the word "orbit" in the first sentence.

It was so agreed.

Paragraph (5), as thus amended, was approved.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were approved.

The commentary to article 43, as amended, was approved.

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

Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were approved.

Paragraph 3

29. Mr. BARTOŠ said that, since the Commission had not considered the sections of the Special Rapporteur's report concerning observers for non-member States to international organizations and delegations to organs of international organizations and to conferences convened by international organizations, they should either not be mentioned at all, or else it should be stated that the Commission had not considered them.

30. Mr. ROSENNE added that the documents relating to those subjects had not even been distributed officially.

⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 176.

⁵ *Ibid.*, p. 172, paras. 56-59.

31. Mr. CASTRÉN said that paragraph 3 dealt with the contents of the Special Rapporteur's report, not with the Commission's work.

32. Mr. AGO said that it would be better to mention only those sections of the Special Rapporteur's report which had actually been before the Commission during its session.

33. Mr. EUSTATHIADES said it was clear from paragraph 5 that the Commission had considered only part II, sections II, III and IV, of the Special Rapporteur's report.

34. The CHAIRMAN suggested that the Secretariat be asked to list in paragraph 3 only the documents it had received from the Special Rapporteur.

It was so agreed.

On that understanding, paragraph 3 was approved.

Paragraph 4

35. Mr. BARTOŠ said that it was going too far to state that the discussions in the Sixth Committee "had touched on a number of questions which relate to representatives of States to international organizations and conferences."

36. Mr. EUSTATHIADES suggested that a better wording might be "had touched on certain questions which may present some interest as regards representatives of States to international organizations and conferences."

It was so agreed.

37. Mr. ROSENNE suggested that, in order to make the paragraph clearer, the Secretariat be asked to add two footnotes giving the references to the relevant General Assembly documents.

It was so agreed.

Paragraph 4, as amended, was approved.

Paragraph 5

38. Mr. ROSENNE suggested that a further sentence be added at the end of the paragraph, reading: "For the sake of convenience, the articles of the present group are numbered consecutively after the last article of the previous group. Accordingly, the first article of the present group is numbered 22.", and that, in accordance with the usual practice, articles with a "bis" number be renumbered appropriately.

It was so agreed.

39. The CHAIRMAN suggested that the titles of sections II, III and IV of part II be included in brackets.

It was so agreed.

Paragraph 5, as amended, was approved.

Paragraph 6

40. Mr. BARTOŠ said that the Commission had not considered either the question of permanent observers for non-member States to international organizations or that of delegations to organs of international organizations; the wording of the paragraph should therefore be changed. It would be enough to state that the Commission had decided to defer those questions to its next

session. Paragraph 6 would then have to be placed after paragraph 8 and paragraphs 7 and 8 renumbered accordingly.

41. After an exchange of views, the CHAIRMAN suggested that the following text be substituted for the existing text of paragraph 6, and placed after paragraph 8: "At this session, the Commission again considered the question referred to in paragraph 28 of its report on the work of its twentieth session. At its 992nd meeting, it reached the conclusion that its draft should also include articles dealing with permanent observers of non-member States to international organizations and with delegations to sessions of organs of international organizations.⁶ Opinions were divided on whether the draft should, in addition, include articles on delegations to conferences convened by international organizations or whether that question ought to be considered in connexion with another topic. At its 993rd meeting, the Commission took a provisional decision on the subject,⁷ leaving the final decision to be taken at a later stage. The Commission intends to consider, at its twenty-second session, draft articles on permanent observers of non-member States and on delegations to sessions of organs of international organizations and to conferences convened by such organizations."

It was so agreed.

Paragraph 6, as amended, was approved.

New paragraph

42. Mr. AGO said that, as requested by the Commission,⁸ and with the help of Mr. Reuter and Sir Humphrey Waldock, he had drafted an additional paragraph concerning the proposed new article⁹ dealing with cases of armed conflict and the absence of diplomatic and consular relations. That paragraph, which he proposed should be inserted between paragraphs 6 and 7, read as follows: "the Commission also briefly considered the desirability of dealing, in separate articles, with the possible effects of abnormal situations —such as absence of recognition, absence or severance of diplomatic and consular relations, or armed conflict —on the representation of States in international organizations. In view of the extremely delicate and complex nature of those questions, the Commission decided to resume their examination at a future session and to postpone any decision on the matter for the time being."

43. Mr. CASTRÉN suggested that the word "extremely" be deleted.

It was so agreed.

44. Mr. BARTOŠ said that the only relations between some States were either diplomatic or consular. The expression "absence or severance of diplomatic and consular relations" was not, therefore, adequate.

⁶ See 992nd meeting, para. 55.

⁷ See 993rd meeting, para. 26.

⁸ See 1035th meeting, para. 85.

⁹ See 1035th meeting, para. 9; also 1026th meeting, para. 50; 1027th meeting, para. 46, and 1034th meeting, para. 50.

45. The CHAIRMAN suggested that the words "and consular" be deleted.

It was so agreed.

46. Mr. REUTER said that the word "abnormal" had a critical connotation, which, though appropriate to armed conflict, hardly applied to the absence of diplomatic relations. He suggested that it be replaced by the word "exceptional".

It was so agreed.

The new paragraph, as amended, was approved.

Paragraph 7

47. Mr. ROSENNE proposed that a sentence on the following lines be inserted in the paragraph: "The explanations for the terms used contained in article 1 of part I are also applicable to part II. At the same time, as is explained in paragraph (5) of the commentary to article 24, it was found necessary to add a further explanation, for the purpose of this part, of the term 'the premises of the permanent mission'. This explanation is provisionally numbered 1 (k) (bis)." That additional sentence was similar to the passage which the Commission had included in the introduction to its 1963 draft of part II of the articles on the law of treaties.¹⁰

48. He also proposed that a new paragraph, a purely technical addition, be inserted between paragraphs 7 and 8, reading:

"In preparing these draft articles, the Commission has sought to codify the modern rules of international law concerning permanent representatives to international organizations, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law."

It was the Commission's standard practice to include a paragraph on those lines in the introduction to its drafts, and its omission from the present draft could give rise to difficulties.

49. Sir Humphrey WALDOCK said he supported both Mr. Rosenne's proposals.

Mr. Rosenne's amendments were adopted.

Paragraph 7, as amended, was approved, subject to correction by the Secretariat of the numbering of the sections.

Paragraph 8

Paragraph 8 was approved.

Paragraph 9

50. Mr. ROSENNE asked that paragraph 9 should be redrafted by the Secretariat in order to make it clear first, that the draft articles were being submitted to the Government of Switzerland at its request; and secondly, that not only the draft articles adopted at the present session but also those already adopted at the last session, would be transmitted to that Government.

It was so agreed.

On that understanding, paragraph 9 was approved.

Paragraph 10

Paragraph 10 was approved.

The introduction, as amended, was approved.

General comments

Paragraph 1

51. The CHAIRMAN suggested that the opening words of the English and French versions be amended to read "As a general rule . . ." and "En règle générale" respectively.

It was so agreed.

52. Mr. ROSENNE suggested that, in the first sentence, the words "of foreign States" be added after the words "permanent representatives". Some of the draft articles applied to the permanent representative of the host State as well, but the position was different with regard to privileges and immunities.

Mr. Rosenne's amendment was adopted.

Paragraph 1, as amended, was approved.

Paragraphs 2, 3 and 4

Paragraphs 2, 3 and 4 were approved.

Paragraph 5

53. Mr. USTOR said that the third sentence was unduly restrictive since the permanent representative did occasionally enter into direct relationship with the host State. Perhaps the statement should be clarified by inserting the word "normally" at the appropriate point.

54. Mr. ROSENNE said that, even with that change, the sentence would still be too restrictive. He suggested that the whole of the sentence be dropped.

55. Mr. KEARNEY suggested that the second and third sentences be merged into a single sentence reading: "The representative of a State to an international organization is not the representative of his State to the host State, as in the case of the diplomat accredited to that State."

It was so agreed.

56. Mr. EUSTATHIADES suggested that the sixth sentence be deleted, as it drew over-elaborate distinctions.

57. Mr. ROSENNE suggested that the concluding words of the fifth sentence and the rest of the paragraph be deleted so that it would end with the words "represents his State before the organization". It would be inappropriate for the Commission to include in the commentary references to the extremely controversial ideas of the separate identity and personality of the organization; those ideas had been put forward by the Special Rapporteur but had not been accepted by the Commission.

Mr. Rosenne's amendment was adopted.

Paragraph 5, as amended, was approved.

The general comments, as amended, were approved.

¹⁰ See *Yearbook of the International Law Commission, 1963*, vol. II, p. 189, para. 16.

COMMENTARY TO ARTICLE 22 (General facilities)

*Paragraph (1)**Paragraph (1) was approved.**Paragraph (2)*

58. Mr. KEARNEY suggested that paragraph (2) be deleted; its contents were too elementary to be of interest.

*Paragraph (2) was deleted**Paragraph (3)*

59. Mr. ROSENNE suggested that paragraph (3) be deleted for the same reason.

*Paragraph (3) was deleted.**Paragraph (4)*

60. Mr. ROSENNE suggested that, in the first sentence, the words "intended to be signed and ratified by the organizations themselves" be replaced by a reference to the organizations becoming parties, and that in the third sentence, the words "would accede to" be replaced by the words "would become parties to".

61. He further suggested that the whole of the fourth and fifth sentences, relating to the recommendation by the United Nations Conference on the Law of Treaties to the General Assembly that it refer to the Commission the study of the question of treaties concluded between States and international organizations or between two or more international organizations, be deleted, as they were quite irrelevant. The Commission's decision on whether to recommend that organizations in one form or another should be parties to the Convention when it was completed was going to have nothing to do with any resolution which might be adopted by the General Assembly. He also did not think that the Commission at that stage ought to anticipate what that resolution was going to say, because he would recall that, on one of the test votes at Vienna on one of the amendments¹¹ to the draft resolution relating to article 1, there had been no fewer than 30 abstentions.¹²

Mr. Rosenne's amendments were adopted.

62. Mr. KEARNEY suggested the deletion from the second sentence of the words "merely concerned with stating general principles and was".

*It was so agreed.**Paragraph (4), as amended, was approved.**Paragraph (5)*

63. Mr. KEARNEY suggested that the words "are designed to emphasize that the granting of facilities to a permanent mission . . ." be replaced by the words "are designed to emphasize both that the facilities which an organization is able to grant are limited and that the granting of the facilities to a permanent mission . . .".

*It was so agreed.**Paragraph (5), as amended, was approved.*

¹¹ Sweden: Amendment to the draft resolution relating to article 1 recommended by the Committee of the Whole (A/CONF.39/L.46).

¹² See *United Nations Conference on the Law of Treaties, second session, Official Records, thirty-second plenary meeting.*

The commentary to article 22, as amended, was approved.

COMMENTARY TO ARTICLE 23 (Accommodation of the permanent mission and its members)

Paragraph (1)

64. Mr. KEARNEY suggested that the words "that provision", in the second sentence, be replaced by the words "article 23".

*It was so agreed.**Paragraph (1), as amended, was approved.**Paragraph (2)**Paragraph (2) was approved.**Paragraph (3)*

65. Mr. KEARNEY said he objected to the idea, contained in paragraph (3), that the Organization could be called on to give legal advice to permanent missions. He suggested that the paragraph be reworded to read: "The assistance which the Organization may give to the members of the mission in obtaining suitable accommodation under paragraph 2 would be very useful, among other reasons, because the Organization itself would have a vast experience of the real estate market and the conditions governing it".

*It was so agreed.**The commentary to article 23, as amended, was approved.*

The meeting rose at 1.5 p.m.

1039th MEETING

Thursday, 7 August 1969, at 10.20 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

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(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.