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Summary record of the 1039th meeting

Topic:
Other topics

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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 Waldoock, 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.

COMMENTARY TO ARTICLE 23 *bis* (Assistance by the Organization in respect of privileges and immunities)

2. Mr. ROSENNE suggested that, in the second sentence, the words "the organization itself" be replaced by the words "the United Nations", since the discussion in the Sixth Committee had related only to the privileges and immunities of the United Nations.

It was so agreed.

The commentary to article 23 bis, as amended, was approved.

COMMENTARY TO ARTICLE 24 (Inviolability of the premises of the permanent mission)

Paragraph (1)

3. Mr. KEARNEY suggested that the words "in practice" be added at the end of the first sentence.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) and (3)

4. Mr. KEARNEY suggested that the Secretariat be asked to modify the language of paragraphs (2) and (3), if necessary, after verifying that the clauses of the international instruments mentioned did in fact provide for the inviolability of the premises and not just the immunity of the property's assets.

It was so agreed.

On that understanding, paragraphs (2) and (3) were approved.

Paragraph (4)

5. Mr. ROSENNE suggested that paragraph (4) be deleted, since it dealt with a special case, that of the International Civil Aviation Organization, which was a rather limited example.

Paragraph (4) was deleted.

Paragraph (5)

Paragraph (5) was approved.

Paragraph (6)

6. Mr. KEARNEY proposed that the following additional sentences should be inserted after the first sentence of the paragraph: "Further, the permanent mission's premises could be located within the premises occupied by the diplomatic mission of the sending State or possibly by a consular mission. The question would then arise as to which representative of the sending State was responsible for the premises concerned."

7. Mr. ROSENNE said that the question of the definition of "permanent representative" arose in connexion with a number of articles, in particular articles 24 and 46. The question was sufficiently important to warrant its being dealt with in the introduction to the whole section. He therefore proposed that an additional paragraph be inserted in the introduction, referring to the definition of the term "permanent representative" given in article 1, and going on to state that, in the course of its examination of the draft articles at the present session, and more particularly of articles 24 and

46, the Commission had noted that it might be necessary to re-examine that definition of the term "permanent representative".

8. The CHAIRMAN said that, if there were no objection, he would take it that the Commission approved paragraph (6) with the addition proposed by Mr. Kearney and subject to the insertion in the introduction of a paragraph on the lines proposed by Mr. Rosenne.

It was so agreed.

On that understanding, paragraph (6) was approved.

Paragraph (7)

Paragraph (7) was approved.

The commentary to article 24, as amended, was approved.

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

The commentary to article 25 was approved.

COMMENTARY TO ARTICLE 26 (Inviolability of archives and documents)

The commentary to article 26 was approved.

9. 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.2.

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

Paragraph (1)

Paragraph (1) was approved.

Paragraphs (2) and (3)

10. Mr. JIMÉNEZ DE ARÉCHAGA said that paragraphs (2) and (3) contained interpretations which were too categorical and which in any case it was undesirable that the Commission should include in its commentaries. He had, for example, doubts regarding the statement in paragraph (2) that the duty to respect the laws and regulations of the host State "does not apply when the member's privileges and immunities exempt him from it".

11. Sir Humphrey WALDOCK said that he shared the same doubts.

12. The CHAIRMAN suggested that both paragraphs be deleted.

Paragraphs (2) and (3) were deleted.

Paragraph (4)

13. Mr. JIMÉNEZ DE ARÉCHAGA suggested that the words "the latter", in the concluding phrase, be deleted.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

14. Mr. KEARNEY suggested that, in the third sub-

paragraph, the words “are to be understood as covering the cases where the person concerned is respectively a national . . .” be replaced by the words “are intended to include the cases where the person concerned is a national . . .”.

15. Mr. CASTRÉN said that the distinction between the persons concerned should be drawn in accordance not with their nationality but with their functions, as was plain from the Commission’s discussion of article 44. The three alternatives offered to the sending State covered the permanent representative, the members of the diplomatic staff and the members of their families.

16. The CHAIRMAN suggested that the third subparagraph be amended to read: “The three alternatives offered to the sending State for the discharge of the obligation imposed on it by paragraph 2 are to be understood as covering the cases of the permanent representative or a member of the diplomatic staff, a member of one of the other categories in the permanent mission and the members of their families”.

It was so agreed.

17. Mr. JIMÉNEZ DE ARÉCHAGA, supported by Sir Humphrey WALDOCK, proposed that, in the last sub-paragraph, the phrase “to guarantee the unimpaired expression of opinions on behalf of their Governments by the persons carrying out the functions of the permanent mission” be replaced by the phrase “to safeguard the independent exercise of the functions of the members of the permanent mission, while keeping within the rule grave crimes committed outside the Organization or the premises of permanent missions, including grave traffic violations”.

It was so agreed.

Paragraph (5), as amended, was approved.

The commentary to article 44, as amended, was approved.

COMMENTARY TO ARTICLE 45 (Professional activity)

The commentary to article 45 was approved.

COMMENTARY TO ARTICLE 46 (End of the functions of the permanent representative or of a member of the diplomatic staff)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

18. Mr. JIMÉNEZ DE ARÉCHAGA said he had doubts regarding the whole of paragraph (2), but in particular the long passage dealing with the case of Indonesia.

19. Mr. CASTRÉN said that he shared those doubts; different views had been expressed in the Commission regarding that case.

20. Mr. KEARNEY suggested that only the first three sentences of the paragraph be retained, so as to eliminate all reference to the Indonesian case.

21. The CHAIRMAN suggested that only the first sentence be retained.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

22. Mr. KEARNEY said that paragraph (4) referred to representatives at meetings convened by specialized agencies, a matter which was not relevant to article 46, and so should be deleted.

Paragraph (4) was deleted.

The commentary to article 46, as amended, was approved.

COMMENTARY TO ARTICLE 49 (Consultations between the sending State, the host State and the Organization)

Paragraph (1)

23. Mr. KEARNEY suggested that the second sentence be reworded on the following lines: “The purpose of the consultations in question would be to seek solutions for any difficulties which may arise between the host State and the sending State in connexion with the activities of the permanent mission. The need for such consultations is underlined by certain difficulties arising as a result of the non-application, between State . . .”.

24. Mr. AGO said that paragraph (1) as it stood merely reflected a concern to facilitate the settlement of disputes between the host State and the sending State; it did not adequately express the essential idea that the organization should have an opportunity of participating in the consultations, if only to prevent an agreement being made between the host State and the sending State concerned that might be detrimental to the interests of other sending States and consequently of the organization itself. He therefore suggested that the second sentence be replaced by a sentence reading: “The purpose of the consultations in question would be to facilitate the solution of any difficulty between the host State and the sending State in connexion with the activities of the permanent mission and also to ensure that such solutions are not adopted without giving the Organization the opportunity of expressing its views thereon.”

25. Mr. REUTER said that Mr. Ago’s suggestion was unacceptable because it introduced an idea about which he had the gravest doubts, namely, that the organization should be entitled to participate in all consultations between a host State and a sending State.

26. Mr. ROSENNE and Mr. CASTRÉN said they supported Mr. Reuter’s view.

27. Sir Humphrey WALDOCK said that Mr. Ago’s preoccupation might be met if the words “remedies in particular for difficulties” in the second sentence were replaced by the words “a means of solving difficulties”. He himself had not been satisfied with the word “remedies” in the context. The Commission had been trying to find a substitute for the procedure of declaring

an individual *persona non grata*, which operated in diplomatic relations, by providing for consultations as a means of solving difficulties and of affording some measure of protection to the host State.

28. Mr. YASSEEN said he thought it would be more correct to speak of "the establishment and the activities of the permanent mission", instead of just "the activities of the permanent mission", in order to cover also any difficulties which might arise before the mission began to perform its activities.

29. Mr. ROSENNE said that some misunderstanding had evidently occurred over the content of paragraph (1), which referred to the examination of twenty-one draft articles and certain suggestions made at the twentieth session. On that occasion the Commission had realized the need for a provision concerning consultations between the sending State, the host State and the organization¹ for purposes of protecting the host State and in connexion with its bilateral relations with sending States. The remaining paragraphs in the commentary dealt with other issues that had arisen at the present session in the course of the discussion on the Special Rapporteur's text of article 49.

30. Sir Humphrey WALDOCK said he agreed with Mr. Rosenne that paragraph (1) was concerned with the origins of the suggestions made in the Commission at its twentieth session. If the point made by Mr. Ago was to be covered at all, it should be in paragraph (2).

31. Mr. TSURUOKA said that the emphasis in article 49 was not on the possibility of the organization having its say; on the contrary, the organization was merely invited to participate in the settlement of disputes. The emphasis should therefore be laid on the assistance the organization could give, not on any possibility or entitlement it might have to intervene.

32. Mr. AGO suggested that, bearing in mind that paragraph (1) expressed only the Special Rapporteur's opinion, an appropriate solution would be to insert the following sentence after the first sentence in paragraph (2): "Moreover, the article provides that these consultations shall be held not only upon the request of the States concerned, but also upon the request of the Organization itself".

It was so agreed.

33. Mr. ROSENNE suggested that the footnote to paragraph (1) be amplified so as to refer also to paragraph (8) of the commentary to article 16, as approved at the previous session.²

It was so agreed.

34. After some further discussion, the CHAIRMAN suggested that the second sentence of paragraph (1) be reworded to read: "The purpose of the consultations in question would be to seek solutions for any difficulties

between the host State and the sending State in connexion with the establishment and the activities of the permanent mission. The need for such consultations is underlined by the difficulties which may arise as a result of the non-applicability between States members of international organizations . . .".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

35. Mr. ROSENNE said it was by no means certain that the article was "drafted in such a flexible manner" as to have the effect described in the first sentence. He suggested that the opening words of the sentence be amended to read: "The article is intended to be sufficiently flexible to envisage the holding . . .".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

36. Mr. ROSENNE suggested the deletion of paragraph (3), since it did not accurately reflect the position.

37. Mr. CASTRÉN said that article 23 *bis* did refer to the duty of the organization regarding the application of the provisions of the draft.

38. The CHAIRMAN said that Mr. Rosenne's point might be met by replacing the words "the interest of the Organization in the application" by the words "the duty of the Organization to ensure the application", and by replacing the words "the Commission refers to its commentary on article 23 *bis*" by the words "the Commission refers to article 23 *bis*".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

39. Sir Humphrey WALDOCK said it was hardly true to say that an organization was always represented by its principal executive official; in certain circumstances, the President of the General Assembly, or of the corresponding body, might act for the organisation.

40. Mr. REUTER said that paragraph (4) was completely unacceptable. Every organization was free to designate whichever of its organs was competent to conduct consultations; it would be contrary to the essence and practice of law to seek to alter the constituent texts of international organizations by means of a treaty.

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

Paragraph (4) was deleted.

Paragraph (5)

42. Mr. JIMÉNEZ DE ARÉCHAGA suggested that the reference to the Treaty of Brussels in the second sentence be deleted.

It was so agreed.

Paragraph (5), as amended, was approved.

¹ See *Yearbook of the International Law Commission, 1968*, vol. I, 984th meeting, para. 93; see also 958th meeting, para. 53 and 959th meeting, para. 8.

² *Op. cit.*, vol. II, Report of the Commission to the General Assembly, chapter II, section E, part II.

Paragraph (6)

43. Mr. JIMÉNEZ DE ARÉCHAGA suggested that the last two sentences be deleted.

It was so agreed.

44. Mr. REUTER said that he was quite unable to accept the first sentence which contrasted difficulties of a practical character with disputes of a more formal character, whereas in fact the former contrasted with difficulties of principle and the latter with disputes of a non-formal character. Article 49 provided for a first stage in the settlement of disputes by what might be called the exhaustion of the diplomatic channel. It was not possible to draw any distinction between practical and theoretical difficulties.

45. Mr. ROSENNE said that there was nothing in paragraph (6) concerning the problem which the Special Rapporteur had sought to cover in his proposed paragraph 2 for article 49.³ The Commission had decided not to include that paragraph on the ground that the matter was dealt with in articles 3, 4 and 5. Some explanation of the fact was needed in paragraph (6) to indicate that article 49 was without prejudice to provisions concerning the settlement of disputes in other international agreements or in the relevant rules of an organization.

46. Mr. JIMÉNEZ DE ARÉCHAGA said that paragraph (6) of the commentary also failed to mention the Commission's decision to consider at a later stage the possibility of including provisions on the settlement of disputes in the draft articles.

47. After some further discussion, the CHAIRMAN suggested that paragraph (6) be redrafted as follows:

“In his fourth report, the Special Rapporteur had proposed the addition to article 49 of a second paragraph drafted as follows:

“The present paragraph is without prejudice to provisions concerning settlement of disputes contained in the present articles or other international agreements in force between States or between States and international organizations or to any relevant rules of the Organization”.

“The Commission did not consider it advisable to add this paragraph in view of the terms of articles 3, 4 and 5 concerning the application of the relevant rules of international organizations and of international agreements. It also reserved the possibility of including at the end of the draft articles a provision concerning the settlement of disputes which might arise from the application of the articles.”

It was so agreed.

Paragraph (6), as amended, was approved.

The commentary to article 49, as amended, was approved.

48. 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.3.

COMMENTARY TO ARTICLE 47 (Facilities for departure)

The commentary to article 47 was approved.

COMMENTARY TO ARTICLE 48 (Protection of premises and archives)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

49. The CHAIRMAN, speaking as a member of the Commission, said that the statement in the first sentence seemed to him to be quite wrong; the contrary was the case.

50. Mr. ROSENNE said he agreed with the Chairman. The first sentence should be dropped altogether and the second sentence should be redrafted to start: “The second sentence of paragraph 1 differs from the corresponding provision of the draft on special missions in that . . .”; the text of the provision in the draft on special missions should not be inserted at all.

51. To turn to a different point, which he thought had been raised at an earlier meeting,⁴ another way in which the obligation of the host State could be terminated would be if the sending State decided to put its property and archives in the charge of a third State representing its interests, in the case perhaps of the suspension of diplomatic relations. That point did not have to be mentioned in the article but it could be mentioned in a few words in the commentary.

52. The CHAIRMAN, speaking as a member of the Commission, said he thought it ought to be explained in the commentary why the article differed from that in the Convention on Diplomatic Relations and even from the corresponding article of the draft on special missions and whether the Commission intended that the host State should be legally released from the special duty to protect the premises and the property and archives of the permanent mission, even when they remained in the host State.

53. Mr. USTOR said he agreed with the Chairman. It should be explained that the meaning of the special duty provision was that if, after the expiry of a reasonable period, the premises still remained in the ownership of the sending State, and it had made no arrangements for their disposal, then the special duty would be transformed into the ordinary duty under general international law to respect and protect the property of a foreign State.

54. With regard to the second question raised by the Chairman, examples might be given in the commentary to illustrate what the Commission had in mind. One had already been mentioned, namely, that the sending State might transmit the property and archives of the permanent mission to its diplomatic mission; another, which Mr. Rosenne had just mentioned, was that it might ask a third State to look after them.

55. Mr. KEARNEY said he did not think it was at all necessary to explain in the commentary what the

³ See 999th meeting, para. 25.

⁴ See 1026th meeting, para. 8.

legal consequences of failure to comply with the special duty were.

56. Mr. BARTOŠ said that, since the Commission had taken the novel decision contained in the second sentence of paragraph 1 of the article, it was bound to give a brief explanation of its reasons. Paragraph (2) of the commentary should be deleted and it should be stated instead that the Commission had been concerned to express, in the second sentence of paragraph 1 of the article, the obligation of the sending State to take the necessary steps to relieve the host State of its special duty of protection within a reasonable time. A short explanation of the meaning of that provision should then be given, because there was none as yet in international law, to indicate how the host State could be released from its special duty. A few words would suffice to explain that the sending State must do its utmost either to transfer its property and archives to its diplomatic mission, or to entrust them to the mission of some other State.

57. Mr. REUTER said he agreed with Mr. Bartoš that it should be stated in the commentary that the sending State was bound either to withdraw its property and its archives or to entrust them to its diplomatic mission, if any, or to entrust them to a friendly diplomatic mission, and then a short sentence should be added explaining that after the expiry of a reasonable time, if the sending State had failed to discharge its obligation, the host State was still bound by any obligations that might be imposed on it by municipal law, by general international law or by any special agreement with the sending State. That would express the general view which had emerged in the Commission's discussions.

58. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the proposal by Mr. Bartoš and Mr. Reuter. It should also be explained why it was necessary to relieve the host State of its special duty even when a permanent mission was withdrawn temporarily.

59. Speaking as Chairman, he suggested that the General Rapporteur be asked to prepare a new text for paragraph (2) with the help of Mr. Kearney and Mr. Reuter.⁵

It was so agreed.

Paragraph (3)

Paragraph (3) was approved.

The meeting rose at 1.5 p.m.

⁵ For the continuation of the discussion on the commentary to article 48, see 1041st meeting, paras. 46-55.

1040th MEETING

Thursday, 7 August 1969, at 3.15 p.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.

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

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

(continued)

Chapter III

SUCCESSION OF STATES AND GOVERNMENTS

1. The CHAIRMAN invited the Commission to consider the part of chapter III of its draft report contained in document A/CN.4/L.145.

A. Historical background (Paragraphs 1-15)

Paragraphs 1-15

2. Mr. ROSENNE said he noted that paragraphs 1-8 were reproduced from the report on the Commission's twentieth session. It seemed unnecessary to preface a summary of its discussions at the present session with a long introduction consisting largely of material drawn from the previous year's report. As chapter II contained a footnote referring to historical background information given in the report on the twentieth session, it might be sufficient if chapter III included a similar reference to the relevant passages in that report.

3. Mr. AGO, supported by Mr. EUSTATHIADES and Sir Humphrey WALDOCK, said he was in favour of retaining the historical background, since it helped to place the rest of the chapter in perspective, and especially since delegations might not have the Commission's previous report before them when the subject was discussed in the Sixth Committee.

Paragraphs 1-15 were approved.

4. The CHAIRMAN invited the Commission to consider the part of chapter III of its draft report contained in document A/CN.4/L.145/Add.1.

B. Succession in respect of matters other than treaties (Paragraphs 16-44)

Paragraph 16

Paragraph 16 was approved.

Paragraph 17

5. Mr. AGO said that some of the wording used was inconsistent with the views expressed by the Special Rapporteur. He suggested that the beginning of the second sentence be amended to read "Even if a special status were to be accorded to the successor States, account would nevertheless have to be taken . . .".

It was so agreed.

6. Mr. KEARNEY said that the reference to the relevant General Assembly resolutions in the second sentence of paragraph 17 was sufficient without the qualifying phrase at the end of the sentence, which was unnecessary and might be confusing. He therefore suggested that either the phrase "which recognized that