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Summary record of the 1090th meeting

Topic:
Representation of States in their relations with international organizations

Extract from the Yearbook of the International Law Commission:-
1971, **vol. I**

or "to the Organization",[9] which raised questions relating to accreditation and other matters dealt with elsewhere in the draft.

71. For those reasons, he would urge that no change be made in the text of article 7, which had been carefully drawn up in 1968.

72. Mr. KEARNEY said he agreed with Mr. Ruda that sub-paragraph (*b*) was not necessary.

73. Mr. EL-ERIAN (Special Rapporteur) said that, although from a strictly logical point of view sub-paragraph (*b*) might be subsumed under the other sub-paragraphs of article 7, he thought the function it specified deserved special mention because of the historical origin of the institution of permanent missions.

74. The expression "in the Organization", which was used in sub-paragraph (*a*), had been examined very carefully by the Drafting Committee and should therefore be retained.

75. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 7 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[10]

The meeting rose at 1 p.m.

[9] Op. cit., *1968*, vol. I, p. 214, para. 78 *et seq.*

[10] For resumption of the discussion see 1110th meeting, para. 33.

1090th MEETING

Friday, 30 April 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 3; A/CN.4/241 and Add.1 and 2; A/CN.4/L.162/Rev.1)

[Item 1 of the agenda]
(continued)

ARTICLES 8 and 9

1. The CHAIRMAN invited the Special Rapporteur to introduce articles 8 and 9.

2.

Article 8

Accreditation to two or more international organizations or assignment to two or more permanent missions

1. The sending State may accredit the same person as permanent representative to two or more international organizations or assign a permanent representative as a member of another of its permanent missions.

2. The sending State may accredit a member of the staff of a permanent mission as permanent representative to other international organizations or assign him as a member of another of its permanent missions.

Article 9

Accreditation, assignment or appointment of a member of a permanent mission to other functions

1. The permanent representative of a State may be accredited as head of a diplomatic mission or assigned as a member of a diplomatic or special mission of that State to the host State or to another State.

2. A member of the staff of a permanent mission of a State may be accredited as head of a diplomatic mission or assigned as a member of a diplomatic or special mission of that State to the host State or to another State.

3. A member of a permanent mission of a State may be appointed as a member of a consular post of that State in the host State or in another State.

4. The accreditation, assignment or appointment referred to in paragraphs 1, 2 and 3 of this article shall be governed by the rules of international law concerning diplomatic and consular relations.

3. Mr. EL-ERIAN (Special Rapporteur) said that a number of comments, mostly of a drafting character, had been made by governments on article 8, and on articles 8 and 9 taken together. He had therefore thought it advisable to deal with the two articles simultaneously.

4. In the Sixth Committee, there had been some criticism of the use of the term "accreditation" in the titles of articles 8 and 9 and of the term "accredit" in the body of article 8. He proposed to deal with those criticisms, and with the suggestion that those terms be replaced by such words as "appointment" and "appoint", when the Commission considered articles 12 and 13, dealing with the credentials of the permanent representative and accreditation to organs of the Organization.

5. One government had suggested the deletion of article 8, pointing out that it referred to a case that was not analogous to that dealt with in the corresponding provisions of the Vienna Convention on Diplomatic Relations and the Convention on Special Missions (A/CN.4/221, section B.6). He recognized the validity of that comment, but thought that the Commission should make the draft as complete as possible, following the example of its draft on the law of treaties. It was useful to deal with the situations envisaged in the article, even if they did not involve legal obligations.

6. The United Nations Secretariat had made elaborate drafting suggestions which he had reproduced in full in his sixth report (A/CN.4/241/Add.2 para. 136). His own proposal was to insert the words "or special" after

the words "head of a diplomatic" in paragraphs 1 and 2 of article 9, and to refer the drafting suggestions by the United Nations Secretariat to the Drafting Committee.

7. Mr. USTOR said that the provisions of articles 8 and 9 were connected with those of article 46, which precluded the permanent representative and the members of the diplomatic staff of a permanent mission from practising for personal profit any professional or commercial activity in the host State. Articles 8 and 9 stated the functions with which a member of the permanent mission might be entrusted, apart of course, from his duties in the mission. The whole system was not completely watertight and there might well be some functions which were not covered by articles 8 and 9, but were not prohibited by article 46. He did not believe that any greater precision was necessary in the matter; the drafting points which had been raised should be referred to the Drafting Committee.

8. With regard to substance, there was considerable merit in the view that, even if articles 8 and 9 were not included, the functions therein mentioned might still be carried out because they were not prohibited. Nevertheless, he agreed with the Special Rapporteur that it would be useful to include the two articles in the draft.

9. The functions specified in articles 8 and 9 did not include membership of an observer mission or of a delegation to an organ or conference. The possibility of a member of a permanent mission exercising such functions would appear to go without saying, but it would be preferable to state it expressly.

10. In view of the complex wording of the two articles, which would be made even more complex if that additional possibility were covered, he suggested that the Drafting Committee consider the possibility of combining articles 8 and 9 with the corresponding articles in Part III. Articles 8 and 9 provided a good example in support of the view that it was possible to deal with permanent missions and permanent observer missions together.

11. Mr. ROSENNE, referring to the choice between the term "accreditation" and the term "appointment", said that the whole matter of terminology had not been adequately clarified, either in the context of articles 8 and 9 or in the broader context of existing diplomatic law or of the draft as a whole. He suggested that the Drafting Committee be asked to report on such problems of terminology at the end of the Commission's consideration of the whole draft. He himself had not been fully convinced by the Special Rapporteur's arguments, either in his observations on articles 8 and 9 or in his observations on articles 12 and 13.

12. With regard to the question of the analogy with the corresponding provisions of the Vienna Convention on Diplomatic Relations and of the Convention on Special Missions, he suggested that it would be advisable to adjust paragraph (14) of the commentary to article 8[1] so as to bring out the points so well made by the Special Rapporteur in his sixth report (A/CN.4/241/Add.2, para. 138).

13. In general, the text of articles 8 and 9 required very careful scrutiny by the Drafting Committee, especially in the light of the constructive suggestions made by the United Nations Secretariat.

14. The idea put forward by Mr. Ustor was attractive, but it was essential, in any attempt to shorten the text of the draft, to avoid consolidating or amalgamating the missions themselves. A consolidation of that kind would involve a major problem of substance which should be avoided at the present stage.

15. Mr. CASTRÉN said that, in general, he agreed with the observations and proposals of the Special Rapporteur; in particular, he agreed that article 8 was not superfluous and should not be deleted, as one government had proposed. He would revert to the observations which related both to articles 8 and 9 and to other articles, when the Commission came to examine those other articles.

16. The text proposed by the United Nations Secretariat for articles 8 and 9 had many advantages and, although longer than the text adopted at first reading by the Commission, it was all the clearer for that. Since it did not entail any substantive change, he was of the opinion that the Drafting Committee should give it most serious consideration.

17. Mr. SETTE CÂMARA said that in general he supported the views of the Special Rapporteur. The arguments of certain governments had not convinced him of the need for any substantial change in the two articles.

18. In particular, the criticisms of the term "accreditation" were groundless. The use of that term with reference to the head of a permanent mission was connected with the formal requirement of credentials; in other contexts the Commission had been careful to use the term "assignment" or "appointment". In any case, he supported the Special Rapporteur's view that that question should be considered in connexion with articles 12 and 13.

19. The problem of multi-accreditation was clearly much more complicated in bilateral diplomacy, in the cases covered by article 5, paragraph 1 of the Vienna Convention on Diplomatic Relations and article 4 of the Convention on Special Missions. For permanent missions, article 10 of the present draft laid down the general principle of the sending State's freedom of appointment. That made multi-accreditation much simpler than in bilateral relations, where the *agrément* of the receiving State was necessary, and where a diplomatic agent could be declared *persona non grata*.

20. He agreed that the drafting suggestions made by the United Nations Secretariat, some of which were very interesting, should be referred to the Drafting Committee, but it should be noted that some of them considerably altered the structure of articles 8 and 9.

21. Mr. USTOR said he must explain that he had had no intention of suggesting that permanent missions and

[1] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 201.

permanent observer missions should be amalgamated or assimilated; the two institutions were quite distinct. He had merely mentioned the possibility of simplifying the drafting of the articles and had pointed out that articles 8 and 9 provided a good example of that possibility.

22. Mr. AGO said that article 8 dealt only with the accreditation of a permanent representative to two or more international organizations or his assignment as a member of two or more permanent missions, but it was also necessary to decide whether or not to mention the possibility of establishing one and the same permanent mission to several organizations.

23. At the previous session, the intention to replace the term "permanent representative" by "head of the permanent mission" had been indicated, and he asked the Special Rapporteur why he had omitted to make that change in the draft articles.

24. Mr. EL-ERIAN (Special Rapporteur) said that he had dealt fully with the question raised by Mr. Ago in his observations on sub-paragraph (*e*) of article 1, on use of terms (A/CN.4/241/Add.1, para. 68). He had pointed out that the term "head of mission" had been used in the Vienna Convention on Diplomatic Relations because it was necessary to cover both embassies and legations. In the case of permanent missions there was only one category of mission, with respect to which the term "permanent representative" was in general use. In the Convention on Special Missions, the term "head of a special mission" had been used because the term "special representative" did not have an established meaning in practice. The Commission would have an opportunity to discuss the matter when it considered article 1.

25. He agreed with Mr. Ustor that it was desirable to include in articles 8 and 9 a reference to the possibility of the permanent representative or a member of a permanent mission being appointed to a permanent observer mission or to a delegation to an organ or conference. When articles 8 and 9 had been drawn up, however, the Commission had not yet decided whether to include provisions on permanent observer missions and delegations to organs and conferences.

26. As to the suggestion that certain articles could be combined, he urged that the Commission should deal first with the various parts of the draft. At a later stage, it would be possible to combine certain articles that lent themselves to general treatment.

27. The Swiss Government had suggested the inclusion in article 6 of a provision to the effect that a State might establish a single permanent mission to several organizations (A/CN.4/239, section C.II); he himself was in favour of including such a provision in article 8. In fact, he had originally drafted the article in that form,[2] but the Commission had preferred not to refer to the permanent mission in the abstract, and had split the text into two separate paragraphs, one dealing with the permanent representative and the other with the members of the permanent mission. He now suggested that article 8 should consist of three paragraphs: the first would make provision for the establishment of a single permanent mission accredited to several organizations; the second and third, corresponding to the present paragraphs 1 and 2, would deal with the multi-accreditation of the permanent representative and of members of the permanent mission respectively.

28. The question of the use of the term "accreditation" could be dealt with when the Commission came to consider article 13. He was aware that the Government of France and some other governments were reluctant to introduce the terminology of diplomatic relations into the law of international organizations, but the term "credentials" had been used in 1948 by the General Assembly, in its resolution 257 (III) on permanent missions to the United Nations, and was well established in the practice of international organizations.

29. Mr. USHAKOV said he thought that, legally speaking, there were as many permanent missions as there were organizations to which a permanent representative was accredited. In fact, a permanent mission to an organization existed only inasmuch as a permanent representative was accredited to the organization. If a single accreditation was sufficient to establish a permanent mission to several organizations at the same time, articles 12 and 13, and even article 14, would be unnecessary.

30. Mr. CASTRÉN said he agreed with Mr. Ushakov. It would be a mistake to introduce a provision on joint permanent missions into the draft articles. Even if the premises, the staff and the permanent representative were the same, accreditation was essential in each case, so that the missions were clearly separate.

31. Mr. CASTAÑEDA said that he could not accept that view. From the strictly legal point of view, it was true that the credentials were made out in the name of the permanent representative, but international practice showed that there were permanent missions accredited, as such, to several organizations. The act of establishing a mission was more a matter of fact than of law, but there could be no doubt that, particularly in Geneva practice, both the organizations and the host State recognized the existence of the mission itself.

32. It would be appropriate for article 8 to reflect that practice, which could be regarded as virtually a rule of customary international law and which was useful because it enabled a member of a permanent mission to act in organs of an international organization for which no special accreditation was necessary.

33. For those reasons, he fully supported the Special Rapporteur's proposal to include in article 8 a paragraph dealing with the multi-accreditation of the mission itself.

34. Mr. RUDA said that, before articles 8 and 9 were referred to the Drafting Committee, he wished to suggest that article 9 be framed in positive terms, as in the text adopted by the Commission at the first reading. The corresponding provisions of the Vienna Convention on

[2] *Ibid.*, p. 134, article 7.

Diplomatic Relations,[3] the Vienna Convention on Consular Relations[4] and the Convention on Special Missions[5] were also in positive terms. It would not be advisable to adopt the negative formula suggested by the Secretariat (A/CN.4/L.162/Rev.1) and quoted by the Special Rapporteur.

35. Mr. NAGENDRA SINGH said that the term "accreditation" was correct legally and conformed with diplomatic terminology, but if it gave rise to objections on the part of certain governments, he would be prepared to accept its replacement by a broader term, such as "appointment".

36. Article 8 was not superfluous and should be retained. As to the possibility of combining it with other articles, he feared that some confusion might result. On the other hand, he would have no objection to shifting certain articles to a more suitable place in the draft.

37. He believed that the Special Rapporteur was right in considering the permanent mission as the central pivotal point; there should be no objection to crystallizing the law in accordance with well-established practice.

38. Mr. ROSENNE said it would be useful if the Secretariat could provide the Commission with information on the position at Geneva with regard to multi-accreditation. In the booklet printed by the United Nations Office at Geneva and entitled "*Missions permanentes auprès des Nations Unies à Genève*", he noticed that most missions were described as "*Mission permanente auprès de l'Office des Nations Unies et des autres organisations internationales à Genève*". In a few cases, the concluding words were replaced by "*l'Office des Nations Unies à Genève et des institutions spécialisées en Suisse*". In at least one case, reference was made to "*institutions spécialisées en Europe*". It would be useful for the Commission to know whether, in the second group of cases, there was only one accreditation, and only one notification to the Swiss Government, and whether the permanent mission represented the sending State both at the Geneva Office and agencies and at the Universal Postal Union (UPU) at Bern. In the last case, the permanent mission would appear also to represent the sending State at organizations with headquarters in other countries of Europe.

39. Mr. AGO said he could accept the practical arguments put forward by the Special Rapporteur in support of the use of the term "permanent representative", even though there were permanent representatives who were not heads of permanent missions. And Mr. Rosenne had just pointed out that the term "permanent representative" was always used in titles. That was a mistake, but usage had to be followed.

40. As to whether there should be one or several permanent missions, Mr. Ushakov and Mr. Castrén had maintained that, where there was representation to several organizations, there were several permanent missions, even if the permanent representative was one and the same person. It could just as well be said that there were as many permanent representatives as organizations to which they were accredited, even if they were one and the same person. Article 8, as drafted, gave the impression that there must be several permanent missions, but that they might have the same head. In reality, however, there was often only one mission, and that was what mattered for the host State. It would therefore be better to specify that any State could establish a single permanent mission to several organizations.

41. Mr. ROSENNE said that the publication he had mentioned listed the permanent missions of three States which were not Members of the United Nations, but were members of specialized agencies; the title used in those cases was "*Observateur permanent auprès de l'Office des Nations Unies et Délégué permanent auprès des autres organisations internationales à Genève*".

42. Mr. BARTOŠ said it was very difficult to decide whether it should be considered that there was one or several permanent missions where the same permanent representative was accredited to several organizations. In fact, although some international organizations would accept a single permanent representative accredited "globally", so to speak, to several of them, there were many others which, for reasons of prestige or convenience, insisted on having a permanent representative accredited to themselves. That applied, for example, to FAO, CERN, the European Economic Communities and the Organization of American States.

43. Hence it would be better not to waste time trying to settle the question, but to provide, mainly in the interests of small States and States which could not afford to have many representatives, that any State might accredit either the same representative, or several representatives, to several organizations, whether the permanent mission was situated in the same place as the headquarters of the organization or not. Practical needs would determine the solution to be adopted. It was to be hoped that the Drafting Committee would find a formula satisfactory to all.

44. Mr. AGO said that, as was clear from what Mr. Bartoš had just said, the consent of the organization was always essential. The right stated in article 8 could be exercised only if the organization made no objection.

45. Mr. EUSTATHIADES said he did not think the discussion was serving any practical purpose, particularly from the standpoint of privileges and immunities. Articles 8 and 9 had been very carefully drafted by the Special Rapporteur and the Commission, and their basic purpose was to state the general rule that accreditation could be to one or to several organizations, in other words that an international organization could not refuse to accept a mission accredited to another organization. Article 12, which provided that the credentials of the permanent representative must be transmitted to the competent organ of the Organization, would make it possible to settle the problems raised by the practice of each organization, especially the possible requirement of separate letters of credence.

[3] United Nations, *Treaty Series*, vol. 500, p. 100, article 5.

[4] Op. cit., vol. 596, p. 276-278, article 17.

[5] General Assembly resolution 2530 (XXIV), Annex.

46. Mr. ROSENNE said that some of the remarks made during the discussion might be interpreted as implying that an organization had some say in a State's choice of its permanent representative. It should be made clear that nothing in articles 8 and 9 could prejudice the basic provisions of article 10 on the sending State's freedom of choice. The application of articles 8 and 9 was also subject to the general provisions of articles 3, 4 and 5.

47. It would now seem appropriate to refer articles 8 and 9 to the Drafting Committee.

48. Mr. ELIAS said that the discussion would have been shorter if the contents of such articles as 10, 12 and 13 had always been kept in mind. The Commission was engaged in the second reading of the draft articles and there was no need to engage in theoretical discussions. Since there appeared to be no fundamental difference of opinion with regard to the substance of articles 8 and 9, he concurred with the suggestion that they should be referred to the Drafting Committee and that the Commission should pass on to consider other articles.

49. Mr. EL-ERIAN (Special Rapporteur), reverting to the question of the appointment of the same permanent mission to two or more organizations, said that from the legal point of view there were certainly several permanent missions. For example, if the sending State withdrew from one organization but not from the others, the permanent mission ceased to exist as far as that one organization was concerned, but continued for the others.

50. The essential purpose of article 8 was to specify that permanent representatives and members of permanent missions were not subject to the requirement of consent, which was laid down in the corresponding provisions of the Vienna Convention on Diplomatic Relations and the Convention on Special Missions. Consequently, an organization could not refuse to accept a permanent mission on the ground that the mission was already accredited to other organizations. It could, of course, refuse to accept permanent missions altogether, but it could not reject the permanent mission of one member State while accepting those of others; such action would be contrary to the principle of non-discrimination.

51. The CHAIRMAN said that if there were no objection he would take it that the Commission agreed to refer articles 8 and 9 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[6]

ARTICLES 10 and 11

52. The CHAIRMAN invited the Special Rapporteur to introduce articles 10 and 11.

53.

Article 10

Appointment of the members of the permanent mission

Subject to the provisions of articles 11 and 16, the sending State may freely appoint the members of the permanent mission.

Article 11

Nationality of the members of the permanent mission

The permanent representative and the members of the diplomatic staff of the permanent mission should in principle be of the nationality of the sending State. They may not be appointed from among persons having the nationality of the host State, except with the consent of that State which may be withdrawn at any time.

54. Mr. EL-ERIAN (Special Rapporteur) said that there had been general agreement in the Sixth Committee and in the observations of governments and of international organizations that there was a fundamental difference between permanent missions to international organizations and traditional diplomatic missions. The latter required the *agrément* of the receiving State, while the former did not.

55. Some governments had proposed that exceptions be provided for in the case of persons who had previously been convicted in the host State of a serious criminal offence or who had previously been declared *persona non grata* by the host State. He had not seen fit, however, to depart from the rule generally accepted by the Commission.

56. The Government of Switzerland had suggested that it should be specified in article 11 that the host State should not be obliged to accept the presence of stateless representatives (A/CN.4/239, section C.II); but he had taken the view that that question was already regulated by a number of international instruments which he would not wish to impair.

57. Mr. YASSEEN said he was in favour of keeping the two articles as they stood.

58. With regard to article 10, he shared the misgivings of the host States, in particular Switzerland, but was not in favour of drawing on bilateral diplomacy for a solution which would not properly meet the requirements of multilateral diplomacy. Although it was true that the host State should have the right to refuse a person who had been convicted of a serious criminal offence, as certain States had proposed, there was no need to include a special provision on that exceptional case. In practice, it was hardly conceivable that a State would appoint a common criminal as a member of one of its permanent missions. The Commission should rely on the good faith of States.

59. Article 11 had not, he noted, been the subject of much criticism. The Swiss Government had raised the question of stateless persons; but as the Special Rapporteur had pointed out, the problems of stateless persons were regulated by a number of international instruments and it was not desirable to introduce into the draft articles on permanent missions a provision dealing with a particular point relating to statelessness.

60. Mr. KEARNEY said that if it were invariably possible to rely on the good sense and discretion of States, as Mr. Yasseen had suggested, then article 10 would not present any difficulties. Unfortunately, the observations of States on that article indicated that there was some doubt as to whether such reliance was always possible.

[6] For resumption of the discussion see 1094th meeting, para. 104.

61. For example, the Government of Japan had stated that: "While the draft articles grant permanent missions privileges and immunities virtually identical with those accorded to permanent diplomatic missions, they do not adequately ensure the protection of the interests of the host State by providing measures comparable to the provisions on *persona non grata* and *agrément* designed to protect the interests of the receiving State in bilateral relations." (A/CN.4/239/Add.2, section B.5, para. 3). Moreover, the Council of Europe Sub-Committee on Privileges and Immunities of International Organizations and persons connected with them had reported on 26 September 1969 that: "The Sub-Committee considered to what extent the host State might have a justifiable interest in the appointment of permanent representatives. It was agreed that, whatever solution might finally be found on this question, it was essential that it should take into account both the interest of the host State to exercise a certain measure of control over persons admitted to take up an official appointment within its territory and the independence of the international organization."[7]

62. He himself did not agree that a host State should be empowered to refuse to grant immunities to permanent representatives, since that would tend to create a kind of second-class citizenship among such representatives. He thought it would be better for the Commission to lay down one or two rules to apply to those cases in which the host State was granted the right to object to an appointment.

63. The comments of governments mentioned by the Special Rapporteur (A/CN.4/241/Add.2, paras. 143-147) seemed to refer to the most important problems, such as those concerning persons with previous convictions and persons who had been declared *persona non grata* by the host State. In those cases, it would seem presumptuous on the part of the sending State to appoint such persons, but that situation had, in fact, arisen in his own country, where persons who had been declared *persona non grata* by his Government for having engaged in espionage had subsequently reappeared on permanent missions to United Nations Headquarters. Consequently, while fully recognizing the theoretical desirability of placing no restrictions at all upon the appointment of members of the permanent mission, he proposed that the Commission provide for such restrictions in at least the two most serious cases to which he had referred.

64. Mr. BARTOŠ said he, too, thought that the two articles under consideration should not be changed.

65. With regard to article 10, he observed that persons had sometimes been convicted in a country and later worked there as members of a permanent mission. A Yugoslav diplomat convicted in France of a criminal offence—using a false passport—had subsequently represented his country at several international conferences and then been appointed ambassador in Paris, with the *agrément* of the French Government. The attention of the French authorities had later been drawn to the diplomat's conviction, but he had been pardoned because the motives of his crime had been political. That example showed that the concept of a criminal offence should be treated cautiously where diplomatic agents were concerned. Refusal on the ground of a previous conviction should be a matter for the practice of States.

66. In considering article 11, it should be remembered that questions of nationality could raise very delicate problems. There was the case of certain Serbian diplomats who had participated in international conferences while claiming to be stateless. The Austro-Hungarian Empire and Turkey, of which they had been nationals, had persistently refused to allow them to renounce their nationality, and Serbia had entered into treaty obligations with those States not to grant Serbian nationality unless the previous nationality had been lost. The Commission should therefore be careful not to exclude all stateless persons from permanent missions, but only those whose actions constituted a threat to the proper functioning of the organization.

67. Mr. USHAKOV said he shared Mr. Kearney's concern regarding the necessity of protecting the interests of the host State. But the Commission should not waste time on exceptional cases.

68. In bilateral diplomacy there were two principles: the freedom of the sending State to choose the members of its mission and the right of the receiving State to declare someone *persona non grata* or unacceptable. But it was possible to imagine extreme cases, such as refusal by the receiving State of all the persons suggested by the sending State. In multilateral diplomacy, on the other hand, the principle of freedom of choice of the sending State was accompanied by the principle that the host State could not refuse everyone. Once again, it was possible to imagine extreme cases, such as the sending of a common criminal or a person previously declared *persona non grata* or unacceptable. Such cases should not, however, be the subject of specific provisions, but should be settled direct by the States concerned through diplomatic channels. As Mr. Yasseen had said, the Commission should rely on the good faith of States.

69. Mr. SETTE CÂMARA said that there could be no objection to article 10, outside the extreme hypotheses covered by articles 11 and 16, and that in his opinion any departure from the freedom of appointment would be very dangerous. Hence he could not accept the suggestion of certain governments that the host State should have the right to reject persons who had been convicted of a criminal offence or who had been declared *persona non grata* by the host State. As the Special Rapporteur had rightly pointed out, members of permanent missions were not accredited to the host State and did not enter into any relations with it.

70. On article 11 he was in full agreement with the Special Rapporteur; he could not support the suggestion of the Swiss Government that the host State should not be obliged to accept the presence of stateless representatives. He agreed with Mr. Yasseen that that would be

[7] *Privileges and Immunities of International Organizations, Resolution (69) 29 adopted by the Committee of Ministers of the Council of Europe on 26 September 1969 and Explanatory Report*, Council of Europe, Strasbourg 1970, para. 154.

contrary to the spirit of many international instruments which had been drawn up—some by the Commission itself—for the defence of stateless persons.

71. Mr. ALCÍVAR said that he fully approved of the formula proposed by the Special Rapporteur for article 10. In the first place, when a State agreed to act as host to an international organization, that was an act of will by which it acknowledged the absolute independence of the organization. Any amendment giving the host State a right to restrict the appointment of permanent representatives would be very dangerous, since it would put a stop to the independence which the organization had to have in order to function efficiently. Admittedly, the world was not perfect, but it was a world of peaceful coexistence, and it was on that basis that international organizations had been established.

72. He fully supported the well-balanced text which the Special Rapporteur had proposed for article 11.

73. Mr. NAGENDRA SINGH said he understood the embarrassment which might be felt by host States at having to receive representatives who were criminals and *persona non grata* to them, but it would be difficult to provide for every contingency of that kind which might arise. Rather than try to draw up articles to meet specific cases, the Commission should provide for some sort of machinery, such as that proposed by the Swiss Government in its observations on article 50 (A/CN.4/239), section B.II). For that purpose, some reference to article 50 might be included in article 10.

74. Mr. ELIAS said that the anxiety expressed by Mr. Kearney was reflected in the comment of a Government quoted in paragraph 146 of the Special Rapporteur's report; that Government had suggested the addition of a new paragraph to article 10, or of a new article 10 (*bis*), which would provide that "the host State should have the right to refuse its consent... (1) in the case of a person who has previously been convicted in the host State of a serious criminal offence; (2) in the case of a person whom the host State has previously declared *persona non grata*".

75. However, in the case of municipal offences, the host States always had the right of pardoning the offender, and as Mr. Bartoš had pointed out, that right had been exercised in the case of representatives who had at one time been declared *persona non grata* because of such offences. He feared, therefore, that the effect of including the two exceptions suggested would be to deprive the host State of the right to change its mind subsequently with regard to such representatives. Article 10 should be retained in its present form, though the Commission could include a short explanation in the commentary.

76. With regard to article 11, he agreed with the Special Rapporteur that it was undesirable to incorporate the Swiss Government's suggestion concerning stateless persons in the article itself, although it might be mentioned in the commentary.

77. Mr. ROSENNE said that when his Government had expressed the view quoted by the Special Rapporteur in paragraph 146 of his report, nothing could have been further from its thoughts than the idea of compelling host States not to exercise the right of pardon.

78. He agreed that it was necessary for the draft articles to remain within the framework of established principles, although at times those principles seemed to be contradictory. One of them was to be found in article 4 of the 1961 Vienna Convention on Diplomatic Relations and in article 12 of the 1969 Convention on Special Missions, regarding the right of the host State to refuse its consent without giving any reason. He thought it would be a corollary of that principle that no State ought to regard itself as being entitled to circumvent it by appointing a person who might be caught by the principle to a diplomatic position in the host State under some other juridical institution.

79. In article 10 of the present draft the second of those principles, the principle of the freedom of appointment, was qualified only by reference to articles 11 and 16, although it was now recognized in article 45, paragraph 2, that the sending State could be required to recall a person in circumstances not far removed from those mentioned in paragraph 146 of the Special Rapporteur's report. In his opinion, the draft would be defective if no attempt was made to reconcile those contradictory principles.

80. Perhaps the best solution would be to ask the Drafting Committee to consider the problem in the light of all the observations of governments and the discussions in the Commission. In any case, it would be wrong to assume that the matter could be dealt with in the commentary, for after all, the commentary would disappear in the course of time.

81. He was prepared to accept article 11 as at present drafted.

82. Mr. CASTRÉN said he had no comments to make on article 11.

83. As to article 10, he thought the fact of having declared someone *persona non grata* should not entitle a State to refuse that person a second time, particularly as States were not obliged to give their reasons.

84. The question of persons convicted of a criminal offence was more difficult. Article 45, paragraph 2, protected the host State in case of grave and manifest violation of the criminal law. The host State could fall back on that provision to oppose the appointment of a criminal. Unlike Mr. Rosenne, he thought the Commission could confine itself to dealing with the question in its commentary to article 10 and should leave the text of the article unchanged.

85. Mr. RUDA said he could accept both article 10 and article 11 as drafted by the Special Rapporteur, since it was obvious that the requirements for accreditation in bilateral diplomacy did not apply in the case of permanent missions to international organizations. It might be advisable, however, to make some reference in the commentary to article 10 to the suggestion of the Swiss Government that the host State should be authorized to formulate objections to the presence of a given individual in its territory and that such objections could

be examined by the conciliation commission referred to in its comment on article 50 (A/CN.4/239, section C.II).

86. With regard to article 11, he agreed with the Special Rapporteur that the problems of stateless persons were adequately covered by the first sentence in that article, which read: "The permanent representative and the members of the diplomatic staff of the permanent mission should in principle be of the nationality of the sending State." The words "in principle" surely implied that it was not impossible that persons other than nationals could be appointed.

87. Mr. EUSTATHIADES said he thought there was no need to make express provision for the very unlikely case of a State appointing a person previously convicted of a serious criminal offence. Moreover, if such a case did arise, the host State could invoke article 45, paragraph 2.

88. The case of *persona non grata*, on the other hand, led to a conflict of interests: those of the host State and those of the organization, which wished to safeguard its proper functioning. The opposition of the host State could not be ignored, but neither could that State be given a right of veto. The word "freely" left the host State very little latitude.

89. In order to reduce the problem to its proper dimensions, perhaps only the case of a person already declared *persona non grata* should be considered. In that case, a "question" arose between the States concerned, and consultations between them could be held in accordance with the provisions of article 50. In his view, it would not be necessary for the sending State to communicate the name of the person to the host State; the latter State could take action when that communication was made to the organization and indirectly brought to its attention.

90. He proposed that article 50 should be mentioned in the text of article 10, which would then begin; "Subject to the provisions of articles 11, 16 and 50...". That compromise solution seemed to him to be the minimum that would partly meet the justified fears expressed during the discussion.

91. Mr. EL-ERIAN (Special Rapporteur), summing up the discussion, said that, as in 1968, a majority of the Commission seemed to be attached to the basic principle of the sending State's freedom of choice of its permanent representative, a principle which itself was based on the fundamental difference between bilateral and multilateral diplomacy. There was general agreement, therefore, that articles 10 and 11 should be retained in their present form.

92. Mr. Elias, supported by other speakers, had suggested that some reference should be made in the commentary to the need for certain exceptions in the case of past criminal activities on the part of proposed members of missions. Mr. Ruda had suggested that the commentary should include some mention of article 50. He realized that the commentary was bound to disappear eventually, but it was nevertheless a part of the *acte préparatoire* of the draft convention.

93. There was always a risk of abuse in connexion with basic immunities, but as Mr. Ushakov had said, it was necessary to assume good faith on the part of the sending State and to allow it freedom of choice. Article 45, paragraph 2, relating to the sending State's recall of members of its mission in the event of grave violations of the law, used the word "shall", and that implied an obligation. There were, however, many delicate considerations which might make a member of a diplomatic mission *persona non grata*, but which would not automatically disqualify a member of a permanent mission to an international organization.

94. Mr. KEARNEY said he reserved the right to revert to the problems presented by articles 10 and 11 at the next meeting.

The meeting rose at 1.20 p.m.

1091st MEETING

Monday, 3 May 1971, at 3.10 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 3; A/CN.4/L.162/Rev.1)

[Item 1 of the agenda]

(continued)

ARTICLE 10 (Appointment of the members of the permanent mission) and

ARTICLE 11 (Nationality of the members of the permanent mission) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of articles 10 and 11.

2. Mr. KEARNEY said he was rather perplexed by the proposal that the problems raised in connexion with articles 10 and 11 should be dealt with in the commentary. He seemed to recall that at the Vienna Conference on the