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Summary record of the 1140th meeting

Topic:
Representation of States in their relations with international organizations

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what less extent. He felt that article T must at least include a provision to the effect that any additional personnel should enjoy immunity from jurisdiction in respect of acts performed in the exercise of their official functions.

92. Mr. ROSENNE said that he was grateful to Mr. Bartoš for having raised his point, since the Commission's work might otherwise have been rejected by the General Assembly.

93. He wished to ask the Working Group about the relationship between article I and the apparent veto of the host State referred to in article E. Article I stated that "The Organization or, as the case may be, the Organization and the conference, shall, where necessary, assist the sending State, its observer delegation and the observer delegates in securing the enjoyment of the privileges and immunities provided for in the present articles." How did that article operate if the granting of privileges and immunities was intended to be the exclusive prerogative of the host State?

94. A second question: if the host State did not grant minimum privileges and immunities, did the Working Group envisage that the procedure for consultations would be applicable? If the answer was in the affirmative, it would be necessary to redraft all the articles in order to exclude that apparent right of the host State.

95. Mr. USHAKOV said that article 37 dealt with a specific case and that the régime of privileges and immunities that it established could not be easily transposed.

96. Ultimately, there were two solutions: either to enumerate the various classes of personnel which could form part of an observer delegation—diplomatic, administrative and technical, service and domestic—or to state that observer delegations consisted solely of delegates. In the latter case, the consent of the host State would be necessary for the other members of the personnel. In the former case, the enumeration would be a very long one for a delegation whose sole task was to observe and not to participate in the work of the body concerned.

97. Sir Humphrey WALDOCK said that it had not been in his mind to propose that the Commission should drop article U, which referred to nationals of the host State and persons permanently resident in the host State. He was troubled, however, by the fact that the "other persons" referred to in article T might include experts and confidential secretaries whose privileges and immunities would be at the disposal of the host State. He did not think that the host State could admit persons in an observer delegation, other than private servants, without granting them privileges and immunities in respect of their official acts.

The meeting rose at 6.10 p.m.

1140th MEETING

Tuesday, 20 July 1971, at 10.25 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Sir Humphrey Waldock.

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 to 3; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.151; A/CN.4/L.162/Rev.1; A/CN.4/L.173; A/CN.4/L.174/Add.4 and 5)

[Item 1 of the agenda]

(continued)

FOURTH REPORT OF THE WORKING GROUP

(continued)

Draft articles on observer delegations
to organs and conferences (continued)

ARTICLE E (Composition of the observer delegation) and
ARTICLE T (Privileges and immunities of other persons) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of articles E and T in the Working Group's fourth report (A/CN.4/L.174/Add.5).
2. Mr. KEARNEY (Chairman of the Working Group) said that there appeared to be serious differences of opinion as to the approach the Commission should take in dealing with observer delegations. One of the problems was that the Secretariat had not produced any full-scale study showing what was the practice concerning such delegations.
3. In view of the broad definition given to the term "delegation", the Working Group had decided that it was dealing with a very limited type of delegation which would exist only on relatively rare occasions and which would normally consist of only one or two persons. He personally was not aware of any customary law whatever concerning observer delegations of that type. He would therefore submit that the Commission had three courses open to it.
4. Either it could follow the line proposed by the Working Group, with some modifications. Or it could say that observer delegations were entitled to all the privileges and immunities enjoyed by regular delegations; in his view, that would be an extreme course for which no basis in international law existed. Or again, it

could conclude that there was simply such a lack of general information and scientific studies that it was unable to take a final decision at the present time.

5. He had no objection to expanding the present text to include the case of such assistants as coding clerks and secretaries, if the Commission considered that necessary. For example, paragraph 1 of article E might state that the observer delegation could consist of one or more observer delegates and the essential technical and administrative personnel.

6. That would, of course, raise the question of the privileges and immunities to be granted to such technical and administrative personnel under paragraph 2 of article T. He could agree to amend paragraph 2 of article T, as Sir Humphrey Waldock had suggested, in order to provide exemption from jurisdiction for such additional personnel in respect of acts performed in the exercise of official duties. Such an amendment would involve certain consequential amendments to other articles, such as articles Q and R. He was, however, opposed to the complete assimilation of observer delegations to regular delegations.

7. The Commission should either reject the Working Group's draft articles altogether or else make only modest changes in them.

8. Mr. ROSENNE said that he would like to suggest that Mr. Kearney's view that observer delegations rarely consisted of more than one person contained an element of optical illusion. It was true that the majority of such delegations consisted of one person, but it should not be forgotten that in most cases, particularly in Geneva and in New York, there was a permanent mission behind that person. In the light of the important statement made by Mr. Bartoš at the previous meeting,¹ the Commission should bear in mind not only the observer delegations present in Geneva and New York but also those which might be sent elsewhere.

9. Like Mr. Kearney, he also wondered whether the Commission was really in a position to put forward any proposals concerning that area of the law which would meet the standards of meticulousness which the Commission had always set for itself and which the General Assembly and the international community at large expected of it. At the present stage, it was not a question of adopting one approach or another but of deciding whether any approach could meet those standards.

10. He would like to remind the Commission of what had happened in the past when it had put recommendations or proposals to the General Assembly which had not been fully thought out and which had not gone through the full process of criticism by governments and thorough discussion in the Sixth Committee. He feared that if the Commission should decide to omit the chapter on observer delegations and merely include in its report a statement to the effect that it had considered

that subject but had not completed it, the General Assembly might send it back to the Commission.

11. Mr. EL-ERIAN (Special Rapporteur) said that Mr. Kearney had referred to the lack of general information and scientific studies about observer delegations. In that connexion, he would like to draw the Commission's attention to the working paper which he had submitted at the last session on that subject (A/CN.4/L.151). Paragraph 2 of that working paper stated: "The Study of the Secretariat does not include detailed information on temporary observers. According to the information provided to the Special Rapporteur by the Legal Advisers of some specialized agencies, the practice relating to the privileges and immunities of temporary observers is fragmentary and varied". There was also very little legal literature on the subject.

12. The draft articles which he had submitted on the subject at the present session (A/CN.4/L.173) had been based on the assumption that observer delegations covered a wide variety of categories of personnel. He had, therefore, tended to give them rather broad privileges and immunities, but in view of the definition which the Commission had adopted for the term "delegation", the personnel of observer delegations, and accordingly their privileges and immunities, had become much more restricted.

13. The Commission could choose between two alternatives: it could either remain silent on the subject of observer delegations, or it could do its best to prepare a set of draft articles and submit them to the General Assembly. Since, in his opinion, the absence of such articles would represent a lacuna in the draft, he thought that the Commission should submit a final text, without waiting for the comments of governments, to the General Assembly, which would then be in a better position to take a decision concerning that type of delegation.

14. Mr. AGO said that he was glad to hear that the Special Rapporteur advocated the inclusion of a set of articles on observer delegations; the draft would be incomplete without one.

15. The proposed articles as a whole were satisfactory. The problem to be settled was a fairly limited one. It was simply to decide on what conditions persons other than delegates might participate in an observer delegation and what their status should be.

16. It was tempting just to draft brief provisions referring to the agreement between the host State and the sending State on privileges and immunities, and omitting the opening words of paragraph 2 of article E, as Mr. Bartoš had proposed at the previous meeting.²

17. It would be preferable, however, to make a further attempt to draft provisions setting out specifically the categories of staff to be included in observer delegations in addition to the delegates themselves, and the régime of privileges and immunities to be accorded to such staff. It would look strange if nothing were said about the

¹ See 1139th meeting, paras. 64, 68, 69, 71, 74, 75, 89 and 90.

² *Ibid.*, para. 71.

privileges and immunities of such staff, when article T, paragraph 1, was devoted to members of the families of observer delegates.

18. Articles E and T should therefore be referred back to the Working Group.

19. Sir Humphrey WALDOCK said he personally thought that the Commission should include some articles on observer delegations to organs and to conferences, since otherwise, having spent almost the whole of the session on the present topic, it might lay itself open to valid criticism by the General Assembly if it merely recognized the existence of a gap in its draft and made no proposals in regard to it.

20. He felt that article T was altogether too illogical when read in conjunction with article U, since while article T, paragraph 1, dealt with the privileges and immunities of families, article U made no attempt to provide for the privileges and immunities of "additional personnel" who might include important technical experts or a confidential secretary. At the very least it seemed to him essential to specify their immunity in respect of acts done in the performance of their official functions. Consequently, he thought that both articles E and T were in need of some revision by the Working Group.

21. Mr. EUSTATHIADES said that the Commission should be grateful to Mr. Bartoš for raising the problem. The discussion had clearly shown, however, that there was no need for undue apprehension. The sending State could ensure that experts of high rank were accorded the desired privileges and immunities by appointing them delegates.

22. The problem of the link between article E and article T arose with regard to members of the staff of lower rank. All that was needed in article E, paragraph 2, was the addition of a specific provision concerning the size of the additional staff, specifying that it should not be unduly large. In article T, paragraph 2, however, the formulation suggested by the Working Group should be retained, whereby the question was to be regulated by agreement between the sending State and the host State, but some minimum requirements might well be stated explicitly for inclusion in any such agreement.

23. It was true that the Commission had not been able to consult governments on that part of the draft, but in view of the scanty information to be derived from international practice, government comments would be largely *de lege ferenda*. Such consultations were unlikely to disclose anything of great interest.

24. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer articles E and T back to the Working Group.

It was so agreed.

25. Mr. KEARNEY (Chairman of the Working Group) suggested that he might give a rapid summary of the remaining articles. Members could then mention any particular difficulties which occurred to them.

26. Mr. BARTOŠ said that, after the discussion which had just taken place, the Commission had come near to finding a solution. The discussion had shown, first, that the composition of a delegation must be a matter solely for the sending State, but that the sending State was obliged to ensure that the size of the delegation did not exceed what was strictly necessary, and secondly, that the members of the staff should enjoy as of right certain minimum privileges and immunities, such as inviolability of the person and inviolability for acts performed in the exercise of their official functions.

27. If the Working Group succeeded in settling the problem on that basis, it would be possible to reach unanimous agreement on provisions which would meet the concern of the larger States without prejudicing the interests of the smaller States.

28. Mr. TABIBI said he agreed with the Special Rapporteur that to omit the chapter on observer delegations would mean leaving a serious gap in the draft as a whole.

29. He also felt, however, that the Commission should be very careful not to permit the same status to observer delegations as to regular delegations, since that might create a number of problems from a practical point of view. The United Nations now numbered more than 127 Members and every Member had the right to send observers to any United Nations Conference. That was a particular hardship for the poorer countries of Asia and Africa, which for economic reasons found it impossible to send observer delegations to all conferences, and, for the same reasons were unable to act as hosts to conferences. The expansion of observer delegations, therefore, was certainly not to be encouraged. In any case, they should not be placed on the same level as regular delegations with respect to privileges and immunities.

30. Sir Humphrey WALDOCK said that he hoped that the Working Group would have authority to review all the articles in the chapter on observer delegations.

31. Mr. AGO said he endorsed Sir Humphrey Waldock's comment. A definition should be added to article A, and the text of article F, on notifications, should be reviewed.

32. The CHAIRMAN said that, if there were no objections, the Working Group would be asked to consider the effects of its reconsideration of articles E and T on other articles in that part of the draft.

It was so agreed.

ARTICLES F to S and U to W

33. The CHAIRMAN invited the Chairman of the Working Group to make some preliminary comments on articles F to S and U to W.

34. Mr. KEARNEY (Chairman of the Working Group) said that article F, on notifications, would require an additional paragraph to cover the situation of families. Article G, on precedence, and article H, on general facilities, did not present any particular problems.

35. No article on premises and accommodation, along the lines of article 51, had been included, since in most cases observer delegations would use the premises of their permanent missions, or else operate from their hotel rooms.

36. Article I, on assistance in respect of privileges and immunities, merely reproduced the language of article 52.

37. Article J did not present any problem. No article had been included in the present draft on exemption of the premises from taxation.

38. Article L, on freedom of communication, was largely in accordance with article 57, although the provisions concerning authorization to install a wireless transmitter, to designate couriers *ad hoc* and to entrust the bag of the delegation to the captain of a ship or of a commercial aircraft had been omitted.

39. Article M, on personal inviolability, was the same as article 58 concerning regular delegations, as was also article N, on inviolability of accommodation and property, although some changes had been necessary in paragraph 3 in order to distinguish it from paragraph 3 of article 53.

40. With respect to article O, on immunity from jurisdiction, the Working Group had decided to use alternative B of article 60. It had granted immunity from the criminal jurisdiction of the host State in full and had not limited such immunity to acts performed in the course of official functions.

41. For article P, on waiver of immunity, the Working Group had decided to retain paragraph 5 of article 61, in respect of a civil action.

42. Articles Q, R and S were substantially the same as those provided for regular delegations, although the Working Group had not included the provisions of article 63, on exemption from dues and taxes.

43. Article T had, of course, already been discussed.

44. Article U, on nationals of the host State and persons permanently resident in the host State, was shorter than the corresponding provisions of article 67, since it contained no breakdown of the staff of the delegation into different categories.

45. Article V, on duration of privileges and immunities, in effect reproduced article 68.

46. Article W, on end of the functions of the observer delegates, was the same as article 69.

47. No articles had been included on the protection of the premises, property and archives of observer delegations. Certain adjustments would be necessary in the general provisions.

The meeting rose at 11.30 a.m.

1141st MEETING

Wednesday, 21 July 1971, at 3.10 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Sir Humphrey Waldock.

Review of the Commission's long-term programme of work

(A/CN.4/245)

[Item 7 of the agenda]

1. The CHAIRMAN invited the Legal Counsel to introduce the Survey of International Law (A/CN.4/245), the working paper prepared by the Secretary-General in the light of the decision of the Commission to review its programme of work.

2. Mr. STAVROPOULOS (Legal Counsel) said that the Survey of International Law was in fact the second Survey which the Secretariat had undertaken. The first Survey¹ referred to in the present document as the "1948 Survey" had been written by the late Sir Hersch Lauterpacht, who for that purpose had served for a few months as a member of the Secretariat.

3. The 1948 Survey was remarkable in many ways, above all in the scope and authority of what it said, and had been widely consulted and used over the years, both in universities and amongst practitioners. It was on the basis of that Survey, moreover, that the Commission, at its first session, had drawn up the list of topics which had constituted the Commission's long-term programme of work and which was now to be reviewed.

4. The Commission was almost unique among United Nations bodies in having given itself, not just an agenda, but a programme listing what it hoped to achieve over a long span of years. The Commission had made very substantial progress towards the completion of the programme it had first set itself, so that now the question arose of what adjustments and additions needed to be made to that programme, in order that the Commission might take further steps towards the achievement of its over-all objective, the progressive development and codification of international law as a whole.

5. When, therefore, some twenty-three years later, the Secretary-General was again requested to provide a "Survey of International Law", it was natural that the Secretariat should have turned to the 1948 Survey in order to see both what subjects had been covered in that

¹ A/CN.4/1/Rev.1.