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Summary record of the 1939th meeting

Topic:
Other topics

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tion of any objection to it. Under general international law, objections were possible only to a unilateral reservation and not to a declaration accepted in advance by all the negotiating States.” That formulation could well be shortened; he was simply concerned that the substance should be inserted in paragraph 19, so as to draw the attention of the Sixth Committee of the General Assembly to the matter.

55. After a brief discussion in which Mr. YANKOV (Special Rapporteur), Mr. OGISO and Mr. CALERO RODRIGUES took part, the CHAIRMAN proposed that paragraph 19 should be provisionally adopted on the understanding that Mr. Ogiso’s proposal would be incorporated by the Special Rapporteur in a shortened form.

It was so agreed.

Paragraphs 20 to 28

Paragraphs 20 to 28 were adopted.

Paragraph 29

56. Mr. RIPHAGEN drew attention to the inaccuracy of the opening words of the third sentence, “In such cases”. The practice mentioned in that sentence was not relevant to the second case mentioned in the previous sentence, namely that of non-recognition of a State.

57. Mr. YANKOV (Special Rapporteur) agreed that the practice in question applied only to the first case, namely that of absence of diplomatic or consular relations. He said that the words “In such cases” should be replaced by “In the first case”.

Paragraph 29, as amended, was adopted.

Paragraphs 30 to 38

Paragraphs 30 to 38 were adopted.

The meeting rose at 1 p.m.

1939th MEETING

Friday, 26 July 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Riphagen, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov

Draft report of the Commission on the work of its thirty-seventh session (concluded)

CHAPTER IV. *Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier* (concluded) (A/CN.4/L.388 and Add.1)

C. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.388/Add.1)

Subsection 1 (Texts of the draft articles provisionally adopted so far by the Commission)

Section C.1 was adopted.

Subsection 2 (Articles and commentaries provisionally adopted by the Commission at its thirty-seventh session)

Commentary to paragraph 2 of article 12 (The diplomatic courier declared *persona non grata* or not acceptable)

The commentary to paragraph 2 of article 12 was approved.

Commentary to article 23 [18] (Immunity from jurisdiction)

The commentary to article 23 [18] was approved.

Commentary to article 28 [21] (Duration of privileges and immunities)

Introductory paragraph

The introductory paragraph was approved.

Paragraph (1)

1. Mr. LACLETA MUÑOZ, referring to the penultimate sentence of paragraph (1) of the commentary to paragraph 1 of article 28 [21], observed that not all members of the Commission had been in agreement as to the exact point in time at which the diplomatic courier started to enjoy immunity. The sentence did not properly reflect the differences of view among the members.

2. Mr. FLITAN proposed that, to avoid the difficulties to which Mr. Lacleta Muñoz had referred, the first part of the penultimate sentence, reading “It was stressed in the Commission that”, should be replaced by “Certain members of the Commission expressed the view that”.

3. Mr. YANKOV (Special Rapporteur) said that his intention had been to reflect views expressed both in the Commission and in the Drafting Committee. Some members had insisted on the interpretation in question.

4. Mr. LACLETA MUÑOZ considered Mr. Flitan’s amendment to the penultimate sentence acceptable and proposed its adoption.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) to (6)

Paragraphs (2) to (6) were approved.

The commentary to article 28 [21], as amended, was approved.

Commentary to article 29 [22] (Waiver of immunities)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were approved.

Paragraph (8)

5. Mr. OGISO proposed the addition, at the end of the paragraph, of the words “and communicated in

writing”, to ensure consistency between the commentary and paragraph 2 of the article.

6. Mr. TOMUSCHAT suggested that the term “administrative proceedings”, in the last sentence, might be made more specific by speaking of administrative courts or agencies.

7. Mr. YANKOV (Special Rapporteur) said that the wording proposed by Mr. Ogiso, while reflecting well-established practice, might be too limitative. However, he was prepared to accept the proposal. As to the question raised by Mr. Tomuschat, the nature of administrative proceedings depended on internal law, which varied considerably from one State to another. Consequently, the wording of the paragraph should be left as broad as possible.

8. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the proposal made by Mr. Ogiso.

It was so agreed.

Paragraph (8), as amended, was approved.

Paragraphs (9) to (11)

Paragraphs (9) to (11) were approved.

Paragraph (12)

9. Mr. McCAFFREY said that the wording of paragraph (12) implied that the Commission as a whole preferred the method provided for in paragraph 5 of the article, which he did not believe to be the case. He therefore proposed the deletion of the second and third sentences of paragraph (12).

10. Mr. YANKOV (Special Rapporteur) said that, to meet the concern expressed by Mr. McCaffrey, the word “may” had been used in the second and third sentences of the paragraph, the purpose being not to preclude other options. However, in order to emphasize further the non-categorical nature of the second sentence, the words “in some instances” might be inserted after the word “offer”.

11. Mr. LACLETA MUÑOZ, referring to the second sentence, said that the comparison implicit in the phrase “It may offer more efficient remedies to solve problems” was awkward. It would be preferable to say simply “efficient remedies to solve problems”.

12. Mr. CALERO RODRIGUES said that, while he tended to agree with the view expressed by the Special Rapporteur, the second sentence of paragraph (12) might be amended to read: “It may offer, in some instances, effective ways to resolve problems.” In the third sentence, the word “more” could be deleted.

It was so agreed.

Paragraph (12), as amended, was approved.

Paragraph (13)

13. Mr. LACLETA MUÑOZ said that the expression “non-waiver of immunity” should be altered. It suggested that “non-waiver” was some form of institutionalized procedure, whereas the matter dealt with in the article was, of course, waiver itself.

14. Following a discussion in which Mr. RIPHAGEN, Mr. LACLETA MUÑOZ, Mr. McCAFFREY, Mr. CALERO RODRIGUES, Mr. YANKOV (Special Rapporteur) and Mr. TOMUSCHAT took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend the paragraph to read:

“(13) It was made clear in the Commission that the paragraph should be interpreted as referring to any stage of a civil action and that it therefore applied equally to cases in which a sending State did not waive the courier’s immunity in respect of execution of a judgment.”

It was so agreed.

Paragraph (13), as amended, was approved.

The commentary to article 29 [22], as amended, was approved.

Commentary to article 30 [23] (Status of the captain of a ship or aircraft entrusted with the diplomatic bag)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were approved.

Paragraph (7)

15. Mr. YANKOV (Special Rapporteur) said that the phrase “is under the obligation to”, in the second sentence, could be replaced by “should”. The kind of regulations in question usually existed, but it might be preferable to avoid suggesting that they should be compulsory.

16. Mr. OGISO proposed that the word “mail”, used twice in the third sentence, should be replaced in each instance by “bag”.

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were approved.

The commentary to article 30 [23], as amended, was approved.

Commentary to article 31 [24] (Identification of the diplomatic bag)

The commentary to article 31 [24] was approved.

Commentary to article 32 [25] (Content of the diplomatic bag)

Paragraph (1)

17. Mr. OGISO noted that the first sentence of paragraph (1) of the commentary stated that paragraph 1 of article 32 [25] was modelled almost exactly on the second part of paragraph 4 of article 35 of the 1963 Vienna Convention on Consular Relations. However, the Drafting Committee had deviated on one important point from article 3 (Use of terms) of the draft, which, in paragraph 1 (2), referred to “official correspondence, documents or articles intended...” and not to “official correspondence, and documents or articles intended...”. Accordingly, it might be advisable to explain the reason for the change somewhere in the commentary, for the guidance of the Sixth Committee of the General Assembly.

18. Mr. YANKOV (Special Rapporteur) pointed out that paragraphs (3) and (4) of the commentary described in detail the Commission's deliberations on the wording of paragraph 1 of the article.

19. Mr. CALERO RODRIGUES proposed the deletion, in the first sentence of paragraph (1) of the commentary, of the words "almost exactly".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were approved.

Paragraph (5)

20. Mr. McCAFFREY said that the words "the latter", in the second sentence, should be replaced by the word "it".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

The commentary to article 32 [25], as amended, was approved.

Commentary to article 34 [26] (Transmission of the diplomatic bag by postal service or by any mode of transport)

The commentary to article 34 [26] was approved.

Commentary to article 35 [27] (Facilities accorded to the diplomatic bag)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were approved.

Paragraph (5)

21. Mr. McCAFFREY proposed the deletion, in the first sentence, of the words "favourable or even preferential treatment in case of heavy traffic or other transportation problems or, also, the lifting or", in order to make the paragraph more realistic and to avoid misunderstandings.

22. Mr. CALERO RODRIGUES said that some provision should be made for the possibility of favourable treatment in cases of emergency.

23. Mr. ARANGIO-RUIZ proposed the deletion, in the first sentence, of the words "or even preferential", "heavy traffic or other" and "lifting or the", so as to meet the concern expressed by Mr. McCaffrey and Mr. Calero Rodrigues.

It was so agreed.

24. Mr. OGISO asked what precise meaning was to be attached to the expression "duties of abstention", in the first sentence.

25. Mr. YANKOV (Special Rapporteur) said that, in using that expression, he had wished to indicate that the authorities of the receiving State or transit State could abstain from the performance of duties which would otherwise affect the situation.

26. Mr. McCAFFREY thought that the expression "duties of abstention" could be replaced by "negative obligations".

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

The commentary to article 35 [27], as amended, was approved.

Section C.2, as amended, was adopted.

Section C, as amended, was adopted.

B. Consideration of the topic at the present session (concluded)
(A/CN.4/L.388)

Paragraph 19 (concluded)

27. Mr. YANKOV (Special Rapporteur), referring to the proposal made by Mr. Ogiso at the previous meeting concerning an addition to paragraph 19, said that the following passage could be added at the end of the paragraph: "One member raised the question of possible objections to the declaration under paragraph 3 of the proposal. He explained that such an optional declaration related to articles which themselves would be accepted in advance by the negotiating States concerned; there could be no question of any objection to it, since under general international law objections were possible to a unilateral reservation but not to a declaration of the type contemplated here."

Paragraph 19, as amended, was adopted.

Section B, as amended, was adopted.

Chapter IV of the draft report, as amended, was adopted.

CHAPTER VII. The law of the non-navigational uses of international watercourses (A/CN.4/L.392)

A. Introduction

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 12 to 20

Paragraphs 12 to 20 were adopted.

Paragraph 21

28. Mr. BALANDA proposed the deletion, in the second sentence, of the words "was equal to this task, and that the Commission". In his opinion, the Commission had always been equal to its task.

It was so agreed.

Paragraph 21, as amended, was adopted.

Paragraph 22

29. Mr. ILLUECA, speaking on behalf of Mr. Díaz González, who was temporarily absent, proposed that it should be specified in the first sentence that articles 1 to 9 had been "provisionally" referred to the Drafting Committee, and, in the second sentence, that it would of course be open to members of the Commission to comment "both on these articles and" on the views expressed by the Special Rapporteur.

30. Mr. McCAFFREY (Special Rapporteur) said that, in drafting the paragraph, he had been guided

by the Commission's report on its thirty-sixth session, paragraph 280 of which contained no reference to the draft articles being provisionally referred to the Drafting Committee.¹ He had endeavoured to reflect in the first sentence of the paragraph the concern expressed by Mr. Díaz González. However, he would not object to the inclusion of a reference to the fact that one member had expressed a desire to discuss the draft articles, if that had indeed been the case.

31. Mr. YANKOV said that any referral of draft articles to the Drafting Committee was by definition provisional, since they were then referred back to the Commission itself. Consequently it was unnecessary to state as much in the report. With regard to the concern expressed by Mr. Díaz González, the words "raised by", in the first sentence, could be replaced by "raised during the consideration of".

32. Mr. USHAKOV said that every member was perfectly free to comment on articles, including articles already referred to the Drafting Committee.

33. Following a discussion in which Mr. RIPHAGEN, Mr. TOMUSCHAT, Mr. ILLUECA, Mr. CALERO RODRIGUES, Mr. USHAKOV, Mr. EL RASHEED MOHAMED AHMED, Mr. ARANGIO-RUIZ and Mr. McCAFFREY (Special Rapporteur) took part, Mr. CALERO RODRIGUES proposed that, in order to take account of the concern expressed by Mr. Díaz González, the words "and that further discussion on them was needed"

should be added at the end of the first sentence of the paragraph, and that the second sentence should end with "articles 1 to 9".

It was so agreed.

Paragraph 22, as amended, was adopted.

Paragraph 23

Paragraph 23 was adopted.

Section B, as amended, was adopted.

Chapter VII of the draft report, as amended, was adopted.

34. Mr. McCAFFREY, referring to chapter VI of the Commission's report, adopted at the 1938th meeting, wished to place on record that he found it unusual that that chapter contained no account of the Commission's consideration (1925th to 1929th meetings) of the Special Rapporteur's second report (A/CN.4/391 and Add.1).

The draft report of the Commission on the work of its thirty-seventh session as a whole, as amended, was adopted.

Closure of the session

35. After an exchange of congratulations and thanks, the CHAIRMAN declared the thirty-seventh session of the International Law Commission closed.

The meeting rose at 5.25 p.m.

¹ Yearbook ... 1984, vol. II (Part Two), pp. 87-88.