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Summary record of the 1051st meeting

Topic:
Representation of States in their relations with international organizations

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sending State on his residence and means of transport. He therefore proposed that the second sentence of paragraph 1 should be deleted, in order to show the difference between permanent representatives of member States and permanent observers of non-member States.

62. Mr. EL-ERIAN (Special Rapporteur) said that the objections made by Mr. Kearney and Mr. Ushakov raised the question whether the Commission should approach article 59 from the formal or the functional point of view. From the formal point of view, Mr. Kearney was right, since even permanent missions did not have a diplomatic character, inasmuch as they were not sent by one State to another; but from the functional point of view, there was a case for retaining article 59 as it stood.

63. The CHAIRMAN suggested that articles 58 and 59 should be referred to the Drafting Committee, together with the two proposals concerning article 59, paragraph 1.

*It was so agreed.*¹³

The meeting rose at 12.50 p.m.

¹³ For resumption of the discussion, see 1063rd meeting.

1051st MEETING

Tuesday, 19 May 1970, at 3.5 p.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227)

[Item 2 of the agenda]

(continued)

ARTICLES 60 and 61

1. The CHAIRMAN invited the Commission to consider articles 60 and 61 in the Special Rapporteur's fifth report (A/CN.4/227).

2.

Article 60

Facilities, privileges and immunities

The permanent observer mission and its members shall enjoy the same facilities, privileges and immunities as are accorded to the permanent mission and its members in accordance with articles 22 to 44.

Article 61

Conduct of the permanent observer mission and its members and end of functions

The rules relating to the conduct of permanent missions and their members and to the end of functions as laid down in articles 45 to 49 shall apply *mutatis mutandis* to permanent observer missions and their members.

3. Mr. EL-ERIAN (Special Rapporteur), introducing articles 60 and 61, said he had drafted those articles on the assumption that the legal status of members of permanent observer missions was the same as that of members of permanent missions. He drew particular attention to the case of *Pappas v. Francini*, discussed in paragraph (4) of the commentary, in which the Supreme Court of the State of New York had interpreted the International Organizations Immunities Act as applying to permanent observers.

4. Mr. AGO said that the Commission should beware of the danger of simply equating the status of heads of permanent observer missions of non-member States with that of heads of permanent missions of member States. Article 60 was one of the most important in the part of the draft under consideration, as it gave the Commission an opportunity to consider whether it wished to indicate a difference in status and whether recognition of the representative character of a permanent observer mission led *ipso facto* to the conclusion drawn in article 60. It was a question to which some thought should be given; it had already arisen during the consideration of previous articles, in particular when the Commission had been determining the respective functions of a permanent mission and a permanent observer mission. If the Commission adopted an article as liberal as the article 60 on facilities, privileges and immunities submitted by the Special Rapporteur, it might destroy the effect of the cautious position it had taken in regard to the preceding articles. He therefore urged the Commission to reflect on the scope of article 60 itself and on the relationship between it and the preceding articles.

5. Mr. USHAKOV said that the suggestion in the Special Rapporteur's report was that the Commission should draft the articles on permanent observer missions on the basis of the corresponding articles on permanent missions of member States. He supported that suggestion. It was self-evident that articles 22 to 49 could not be applied to permanent observers without change. For instance, a permanent observer mission could not be temporarily recalled, as article 47¹ provided for a permanent mission, and there might perhaps be no justification for granting permanent observer missions the right

¹ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, p. 17.

to communicate with the various missions and consular posts of the sending State "wherever situated", as provided in article 29² for permanent missions. Some changes were therefore essential, and perhaps the Special Rapporteur should be asked to suggest appropriate wording for the articles in question to the Drafting Committee.

6. At its previous session the Commission had decided to postpone examination of the possible effects of exceptional situations on the representation of States in international organizations.³ It might be worth considering whether it would not be advisable to do likewise in regard to permanent observer missions, for example, by deferring consideration of the question until the second reading of the draft articles.

7. Mr. KEARNEY said he shared Mr. Ago's doubts about the propriety of equating permanent observer missions with permanent missions. He did not think the *Pappas v. Francini* case, which was admittedly a complicated one, represented the final thinking of American jurisprudence on the subject, since the judgment in that case had been delivered by what actually, in spite of its name of "Supreme Court", was not one of the higher ranking tribunals, being third in rank among the New York State courts. Moreover, the defendant's motion to dismiss the complaint had been denied partly on the ground that the immunity of an observer had not been established by adequate evidence for the purpose of a preliminary motion, and the final outcome of the case was not on record. In the event, the case was hardly one that could be cited as establishing the broad principle of the immunity of observers to the United Nations.

8. He had additional information regarding the use of the national emblem. The six States which were accredited to United Nations Headquarters as observers displayed such emblems only on their office doors. The Federal Republic of Germany, on special occasions, had also displayed its flag on a building which it owned. None of the observer missions used the flag on mission vehicles.

9. He found it difficult to believe that the nature of the representative function of permanent observer missions was such as to place them on the same level as permanent missions. At the present stage, however, pressure of time made it difficult to consider in detail each of the privileges and immunities to which such missions would be entitled on a functional basis.

10. He proposed, therefore, that instead of attempting to model articles 60 and 61 on the corresponding articles on permanent missions, the Commission should give serious consideration to modelling them on the corresponding provisions of the Vienna Convention on Consular Relations.⁴ Consular missions performed functions on behalf of the sending State which were at least as important as, if not more important than, those of an observer mission, as article 5 of the Consular Con-

vention made clear: protecting the interests of the sending State in the receiving State, furthering the development of commercial, cultural and economic relations and issuing visas certainly involved a representative capacity.

11. Mr. YASSEEN said that the basis for the facilities, privileges and immunities granted to the permanent missions of member States was the Vienna Convention on Diplomatic Relations.⁵ In the case of permanent observer missions, the Special Rapporteur was proposing to take as a basis, *mutatis mutandis*, the rules applied to permanent missions. That seemed to be going too far, because there was a difference in kind between the two sorts of mission. A distinction should therefore be made between the two situations. The Vienna Convention on Diplomatic Relations had been based both on the representational theory and on the functional theory. But the notion of representation, which had formerly meant representation of the sovereign and hence led to the granting of excessive immunities, had evolved; it was confined to a simple function, and it might be said that nowadays even consuls had a representative character. In the case of permanent observer missions, the Commission should not let itself be drawn into a series of analogies which would take it too far, but should adhere strictly to the functional theory. For permanent observers were in the territory of the host State in order to perform certain functions, and that alone should be the reason for the facilities, privileges and immunities granted to them. The Commission should therefore review the facilities, privileges and immunities granted to the permanent missions of member States, with a view to determining, by the criterion of function, which of them might be granted to permanent observer missions. It should be noted that article 61 was in fact based on the functional theory.

12. Mr. RAMANGASOAVINA stressed the importance of article 60, which was intended to grant facilities, privileges and immunities to permanent observers who had hitherto enjoyed them only by courtesy of the organization or the host State. It was undeniable that certain facilities, privileges and immunities were essential to permanent observers, for once their existence was recognized they must be given the means to perform their functions. As Mr. Yasseen had observed, it was in fact the performance of functions that justified the granting of facilities, privileges and immunities. But it was primarily the host State which granted them, and, as far as it was concerned, there was hardly any difference between the functions performed by a permanent observer mission and those performed by a permanent mission; it was within the organization that there was a difference between the status of observers and that of permanent missions.

13. Since it was impossible completely to equate the two kinds of mission, some middle course must be found between granting permanent observers all the advantages granted to permanent missions and refusing them all privileges and immunities. Perhaps some such phrase as "*mutatis mutandis*" or "to the extent necessary for the

² See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, pp. 7 and 8.

³ *Ibid.*, p. 3, para. 18.

⁴ United Nations, *Treaty Series*, vol. 596, p. 262.

⁵ *Op. cit.*, vol. 500, p. 96.

performance of their functions” might solve the problem, unless the Commission wished to make a detailed analysis of the differences between the functions of diplomatic missions and those of consular missions; but he doubted that the respective functions of permanent observers and permanent representatives could be precisely delimited in an article. He approved of articles 60 and 61, subject to the changes he had proposed or similar changes.

14. Mr. ROSENNE said he fully shared the doubts expressed by Mr. Ago and Mr. Kearney concerning articles 60 and 61. Despite those doubts, however, he was of the opinion that the Commission should put forward a definite text, along the lines proposed by the Special Rapporteur but perhaps rather more tautly, and that it should draw the attention of governments and the General Assembly to the elements of novelty which the peculiar position of permanent observer missions presented in modern international relations.

15. He thanked Mr. Kearney for his comments on the *Fappas v. Francini* case referred to in paragraph (4) of the Special Rapporteur’s commentary; those comments should do much to clear up the misunderstanding of that case which was apparent in the Secretariat’s study.⁶ Mr. Kearney’s suggestion that articles 60 and 61 should be modelled on the corresponding articles of the Vienna Convention on Consular Relations deserved careful consideration, but he personally believed that permanent observer missions had more in common with diplomatic than with consular missions.

16. The Commission should also consider how article 44 (Non-discrimination) would apply to permanent observer missions. Would it mean that there should be no discrimination as between permanent observer missions attached to a particular organization? Or would it mean that there should be no discrimination as between permanent missions and permanent observer missions? It should be borne in mind that at Geneva there were instances of States maintaining permanent observer missions to the United Nations which were at the same time permanent missions to other organizations.

17. Mr. USTOR said that the practical implications of article 60 were rather limited. There were very few permanent observer missions and the number was not expected to increase. Since the problem was therefore more theoretical than practical, it would be appropriate to rely on theory in dealing with it.

18. As the preamble to the 1961 Vienna Convention on Diplomatic Relations showed, there were two theories to be considered: that of the representative character of diplomatic agents and that of functional necessity. At the 1961 Vienna Conference, a compromise had been reached and both theories had been taken as the basis for diplomatic privileges and immunities.

19. The reference to functional necessity implied the need to ascertain the functions of permanent observers in order to determine what privileges and immunities should be extended to them. The question of those func-

tions was at present under consideration by the Drafting Committee in connexion with article 52. It could, however, be said that the functions of permanent observers were almost the same as those of permanent representatives. That being so, it was difficult to grant them a different measure of privileges and immunities.

20. The solution adopted by the Special Rapporteur in article 60 was therefore theoretically sound. It had been argued, on the basis of the functional necessity theory, that permanent observer missions should not be granted full jurisdictional immunity; but the same arguments could be invoked with regard to permanent missions themselves. Since permanent observers had a representative character, and since they needed to exercise their functions freely and undisturbed, they should not be denied the same privileges and immunities as were granted to permanent representatives. Their functions were not so different from those of permanent representatives as to necessitate a differentiation in their legal position.

21. No analogy could be drawn with the position of consular officers; consuls did not have a representative character and the treatment extended to them was based on a long tradition. At the same time, it was worth noting that there was a recent tendency to place consuls on the same footing as diplomatic agents where privileges and immunities were concerned. That was the position created by the recent consular treaty between the United States and the USSR, and also by a number of consular treaties between the United Kingdom and the USSR and other socialist countries.

22. The Drafting Committee should examine the provisions of articles 22 to 44, article by article, to find out whether any changes should be made in those texts to adapt them to permanent observers.

23. With regard to article 61, he could accept the text proposed by the Special Rapporteur. He believed that the important provisions of articles 45 to 49 would probably have to be moved to Part I (General provisions) and be made applicable to Parts II to IV.

24. Mr. REUTER observed that the Commission now had four possible solutions before it. The first was to keep articles 60 and 61 as they stood; the second, proposed by Mr. Ushakov and Mr. Ustor, was to re-examine articles 22 to 49 very carefully to see whether minor corrections could be made to them; the third, proposed by Mr. Yasseen, was to re-examine articles 22 to 49 from the point of view of functional necessity and eliminate everything which might appear to assimilate observers too closely to permanent representatives; the fourth, proposed by Mr. Kearney, was that permanent observers should be placed on the same footing as a class of persons whose status was already defined, namely, consuls.

25. There was merit in all those suggestions, but he found some difficulty in determining the relative standing of all the persons who enjoyed, or would enjoy, facilities, privileges and immunities. He would like a synoptic table to be prepared showing the real differences between the various categories; for it was only when he had a general view of that kind that he would be able to take a posi-

⁶ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 191, para. 174.

tion on the facilities, privileges and immunities to be granted to permanent observers. Furthermore, he could not very well judge the scope of the problem with regard to the number of persons concerned, which was likely to be very small. Consequently, he wondered whether the Commission might not perhaps be wasting its time, and whether it might not be well to make a distinction, for the purposes of facilities, privileges and immunities, between two types of mission: those of large States and those of very small States. The text of the draft articles would then have to be reviewed in the light of that distinction. For instance, the Commission might contemplate not applying article 46 to the observer missions of very small States, for it was quite conceivable that States of that kind might wish to choose representatives of press agencies, for example, as observers.

26. The Commission's work at that stage could only be provisional: in order to determine the facilities, privileges and immunities to be granted to permanent observers, it would first have to define the functions of observer missions and the various types of mission. The Commission should be especially careful because, if it reduced the facilities, privileges and immunities of observers, the status of permanent representatives themselves might again be called in question; for it was obvious that States would consider the facilities, privileges and immunities of permanent observers and of permanent representatives as a single whole.

27. Mr. ALBÓNICO noted that the rules made applicable by articles 60 and 61 were taken from the Commission's 1969 draft articles on permanent missions, which were themselves based on the corresponding provisions of the 1961 Vienna Convention on Diplomatic Relations. It should not be forgotten that that Convention was concerned with bilateral diplomacy, in which the institution of permanent observers did not exist. He believed that much of the confusion had arisen from an attempt to apply to permanent observers—an institution of multilateral diplomacy—rules taken from bilateral diplomacy.

28. Since the rules contained in the 1961 Vienna Convention were not applicable to permanent observers, it was necessary to draw up a different set of rules which took account of the special character of their functions. While it was true that a permanent observer had, in a sense, a representative character, it was also true that he only performed representative functions in very exceptional cases. Accordingly, he should be granted only the privileges and immunities necessary for the exercise of those functions.

29. For those reasons, he could not agree that all the provisions of articles 22 to 44 should be applied to permanent observers. The institution was peculiar to multilateral diplomacy, and it had not been envisaged when the 1961 Convention on Diplomatic Relations and the 1963 Convention on Consular Relations had been drafted.

30. Mr. NAGENDRA SINGH commended the Special Rapporteur for submitting articles 60 and 61 in the form best calculated to invite discussion; those articles and their commentaries shed light on an entirely new topic.

31. It had been suggested that discussion of the two articles should be postponed until the question of the functions of permanent observers had been settled. There was no point in adopting that course, because the question had already been sufficiently debated. It had also been suggested that the privileges and immunities of permanent observer missions should be defined by reference to established institutions, such as permanent missions or consulates. He did not believe that approach was the best. Another suggestion had been that a golden mean should be found between maximum and minimum privileges and immunities; but that would entail drafting a large number of articles. The process would take a long time and would result in lengthy provisions on permanent observer missions which would give an exaggerated idea of their importance.

32. His own preference was for an article 60 setting out the privileges and immunities of permanent observer missions in a few paragraphs. For example, the facilities mentioned in article 22 could be restated for permanent observers, and it could be assumed that those listed in articles 23 and 24 were covered by the language of article 22.⁷

33. Sir Humphrey WALDOCK said he started from the position that the existing law accorded little place to permanent observer missions. The articles would therefore bring about a considerable expansion of the general law on the privileges and immunities of permanent observers. If possible, the criterion of functional necessity should be applied, and the privileges and immunities should be limited by reference to that necessity. The real difficulty was how to give concrete expression to those ideas.

34. Every effort should be made to ensure that the privileges and immunities proposed were justified by the functions of permanent observers. There was strong opposition in some quarters to any increase in the number of persons entitled to privileges similar to those of diplomatic agents.

35. He did not favour taking as an explicit basis for the work the idea that the principles to govern permanent observers should be arrived at by reference to those governing consuls. It was, of course, legitimate to seek inspiration from the provisions of each of the other conventions dealing with privileges and immunities. But such an approach would be difficult to defend on grounds of principle, since consuls were very different from observers.

36. Close examination of articles 22 to 44 was necessary and he believed it would reveal that some of those articles might be fully appropriate but others too wide for permanent observer missions. The articles dealing with facilities were probably easier to accept, because the limitations arising from the character of the functions would operate on those provisions automatically. It was the articles on privileges and immunities which contained provisions that appeared too extensive for permanent observer missions.

⁷ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, pp. 4 and 5.

37. The solution might well be to subdivide the articles on facilities, privileges and immunities into two categories. The first would include those provisions which were applicable as they stood to permanent observer missions; for them, a simple reference on the lines of articles 60 and 61 would be adequate. The second category would consist of the articles which would have to be rewritten so as to adapt them to the needs of permanent observer missions. That had been the method adopted in the Consular Convention for dealing with "honorary consuls".

38. Mr. BEDJAOUI pointed out that there was some inconsistency between paragraph (6) of the commentary to articles 60 and 61, which stressed the difference, both in nature and in scope, between the functions of permanent missions and those of permanent observer missions, and article 60 itself, which fully assimilated observer missions to permanent missions as far as facilities, privileges and immunities were concerned. It was certainly true that the situation in which observer missions had no official status and enjoyed facilities, privileges and immunities only by courtesy of the host State should be brought to an end.

39. If the Commission wished to make a distinction between observers and the members of permanent missions, the place to do so was not in article 60. There was not very much difference between the facilities, privileges and immunities granted to senior international officials and those granted to members of the diplomatic corps and to permanent representatives. Admittedly, the functions of those groups of persons differed, but the same régime was sometimes applied to persons performing different functions. He was therefore in favour of articles 60 and 61 as drafted by the Special Rapporteur. By way of compromise, he could also accept the form of words proposed by Mr. Ramangasoavina. The Commission would not reach a coherent solution by following Mr. Reuter's idea of recognizing two types of mission. As to Mr. Kearney's suggestion that permanent observers should be equated with consuls, he thought there were very considerable differences between the functions of consuls and those of permanent observers.

40. Mr. CASTRÉN said that article 60 was one of the most important provisions of the draft articles on permanent observers, since its purpose was to define the legal status of permanent observer missions and their members. The solution suggested by the Special Rapporteur, which was that such missions and their members should enjoy the same facilities, privileges and immunities as permanent missions and their members, was simple and rather radical. In his commentary the Special Rapporteur admitted that it was an innovation, since there were no precise rules and the practice varied widely. Paragraph (6) of the commentary to articles 60 and 61 showed that, at United Nations Headquarters in New York, observers had generally enjoyed the same facilities as those extended to distinguished visitors, that they had no official status and that whatever facilities they enjoyed were given merely as a gesture of courtesy by the United States authorities. With regard to the United Nations Office at Geneva, paragraph (3) of the

commentary showed that permanent observers at that office in fact enjoyed the same privileges and immunities as permanent representatives.

41. To demonstrate that the permanent missions of member States and permanent observer missions should have the same legal status despite the different nature of their principal functions, the Special Rapporteur had several times invoked the representative character of permanent observer missions. It looked at first sight as though he had been too liberal in his efforts to rectify the present situation of such missions, though that situation ought to be considerably improved. As the means of doing so, he had some doubts about applying the régime in force for consuls, as suggested by Mr. Kearney.

42. He agreed with Mr. Bedjaoui that there was a contradiction between the conclusion in paragraph (6) of the commentary and the text of article 60 itself. The problem could be solved by assimilating observers to delegates to organs of international organizations and to conferences convened by them. There was no great difference between the legal status of such delegates and that of members of permanent missions to organizations, and the permanent character of the functions of members of permanent observer missions might be said to militate in favour of granting them extensive facilities, privileges and immunities.

43. He would be inclined to accept provisionally the text prepared by the Special Rapporteur, on the understanding that the Commission would review it on second reading in the light of the comments made by governments.

44. He had no difficulty in accepting article 61.

The meeting rose at 6 p.m.

1052nd MEETING

Wednesday, 20 May 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1)

[Item 2 of the agenda]

(continued)