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Summary record of the 997th meeting

Topic:
Representation of States in their relations with international organizations

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entitled to privileges and immunities was to enjoy them from the moment he entered the territory of the host State. Enjoyment of those privileges and immunities would therefore seem to be independent of any kind of notification. There was, to be sure, a minor problem if the person appointed as permanent representative was already resident in the host State, since it was obvious that the latter could not accord any privileges and immunities to him until it had received notification of his appointment. Mr. Ago's suggestion should satisfy the majority of the Commission.

77. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the situation of a person arriving from abroad and the situation of a person already in the territory of the host State were different, because the former enjoyed privileges and immunities from the moment of his arrival, whereas the latter could not enjoy them until the organization had notified his appointment to the host State, and that formality could be a source of delay. The two situations should be placed on the same footing.

78. Mr. EL-ERIAN (Special Rapporteur) said that if the Commission agreed, he would prepare a fresh draft of article 41 taking account of that point.

79. The CHAIRMAN suggested that the Commission authorize the Special Rapporteur to prepare a fresh draft of article 41 and refer it to the Drafting Committee.

*It was so agreed.*²⁵

80. Mr. AGO said he would like to ask the Legal Counsel what happened in practice when a person appointed to a permanent mission arrived in the host State before the organization had notified his appointment to that State.

81. Mr. STAVROPOULOS (Legal Counsel) said that the United Nations had always maintained that permanent representatives should enjoy their privileges and immunities from the moment of their arrival, even if notification of their appointment was not received until later. Permanent representatives always arrived bearing credentials addressed to the Secretary-General, who subsequently notified the host State and requested that the necessary privileges and immunities be accorded to them. Such notification was merely a matter of practical convenience and was not a legal obligation of the organization. In the case of United Nations headquarters, of course, the host State was aware of the appointment of permanent representatives because, under its regulations, they were required to apply for a visa before entering United States territory.

82. Mr. BARTOŠ said that in practice few difficulties arose. Even so, the article would have to be drafted with great care.

83. Mr. KEARNEY said that Mr. Bartoš had pointed out the practical problems involved in determining the time when privileges and immunities commenced. Regardless of what the Commission decided to include

in article 41, as a practical matter the host State would be unable to assure certain privileges and immunities until the permanent representative and the organization had complied with the necessary formalities. Exemption from sales tax was an obvious example.

84. The host State would, to some extent, be aware of the arrival of a member of a permanent mission when he passed through immigration controls or the like, but if he was already resident in its territory there was no practical way, except notification, by which the host State could begin to accord him privileges and immunities. He hoped that the Special Rapporteur would bear those problems in mind.

85. Mr. EL-ERIAN (Special Rapporteur) said that the Drafting Committee would take all those problems into consideration.

The meeting rose at 1.5 p.m.

997th MEETING

Thursday, 12 June 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218 and Add.1; A/CN.4/L.118)

[Item 1 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to consider article 42 in the Special Rapporteur's fourth report (A/CN.4/218).

ARTICLE 42

2.

Article 42

Duties of third States

1. If a permanent representative or a member of the diplomatic staff of the permanent mission passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying

²⁵ For resumption of the discussion, see 1023rd meeting, para. 53.

the permanent representative or member of the diplomatic staff of the permanent mission or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the passage of members of the administrative and technical or service staff of a permanent mission, and of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the host State. They shall accord to diplomatic couriers who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the host State is bound to accord.

4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to *force majeure*.

3. Mr. BEDJAOUI said he approved of the substance of the article and had only a few minor comments to make.

4. First, he thought it would be better if article 41 were placed after article 42 and perhaps after article 43 as well, since articles 42 and 43 defined some of the privileges and immunities whose duration was dealt with in article 41.

5. Secondly, although he was aware that they occurred both in the Vienna Convention on Diplomatic Relations and in the draft on special missions, he was not clear as to the purpose of the clause "which has granted him a passport visa if such visa was necessary" in paragraph 1, or of the parallel clause "who have been granted a passport visa if such visa was necessary" in paragraph 3. He thought those clauses could very well be deleted.

6. Thirdly, what was the purpose of specifying that immunities were to be accorded to a permanent representative passing through the territory of a third State "while proceeding to take up or to return to his post, or when returning to his own country?". Presumably, it was to exclude all the other reasons for which he might be in the territory of a third State, such as taking a holiday; but he did not lose his status as a diplomat if he took a holiday. That clause, too, seemed unnecessary and could be deleted.

7. He would not, however, press any of those suggestions and was prepared to support the opinion of the Special Rapporteur and of the Commission.

8. Mr. EL ERIAN (Special Rapporteur) said that in the Vienna Convention on Diplomatic Relations the article on the duties of third States came after the article on the duration of privileges and immunities,¹ whereas in the draft articles on special missions the order was reversed: the article on transit through the territory of a third State came before the article on the duration of privileges and immunities.² He was prepared

to accept Mr. Bedjaoui's suggestion and to reverse the order of articles 41 and 42 in the present draft.

9. With regard to Mr. Bedjaoui's second point, the clause concerning the granting of a passport visa related to the status of the member of a permanent mission rather than to the question of his admission to the territory of the third State. In paragraph (3) of the commentary on article 42 he had pointed out that the Secretariat study on practice referred to the special problem which might arise when access to the country in which a United Nations meeting was to be held was only possible through another State, and said that "While there is little practice, the Secretariat takes the position that such States are obliged to grant access and transit to the representatives of member States for the purpose in question" (A/CN.4/L.118, Part I.A. para. 173). In paragraph (2) of its commentary on article 43 of the draft on special missions, the Commission had also made it clear that that article was not concerned with the question of the admission of representatives, but rather with the regulation of their status once they were admitted. The paragraph stated that "... the Commission wished to show that a third State is not obliged to give its consent to the transit of special missions and their members through its territory".

10. Mr. TABIBI suggested that, in connexion with paragraph 3 of the article, it might be useful to include in the commentary a reference to the conventions of the Universal Postal Union and the International Telecommunication Union.

11. Mr. CASTAÑEDA said that when the Commission had drafted the corresponding articles of the 1961 Vienna Convention and of the draft on special missions, it had not intended to lay down an obligation for third States to authorize transit; it had merely wished to regulate the status of diplomats in transit. There, the situation of permanent missions and of persons engaged in bilateral diplomacy was completely different. The purpose of article 42 was to ensure, in the interests of the organization, that the permanent representative would be able to rejoin his post or return to his country without hindrance. The situation should therefore be reviewed in the light of Mr. Bedjaoui's comments, and the fundamental question of the transit State's obligation to grant a visa should now be considered.

12. The CHAIRMAN, speaking as a member of the Commission, said that the clause "which has granted him a passport visa if such visa was necessary" left the third State free to grant or not to grant permission to pass through its territory. It would be better to retain the clause so as to bring out clearly that both possibilities existed.

13. Mr. EL ERIAN (Special Rapporteur) said that Mr. Castañeda had rightly pointed out that the case of transit through the territory of a third State of diplomats engaged in bilateral diplomacy was different from the case of transit of members of permanent missions to international organizations.

14. In the latter case, it was necessary to distinguish between three situations: first, where the member of the

¹ United Nations, *Treaty Series*, vol. 500, pp. 118-120, articles 39 and 40.

² See *Yearbook of the International Law Commission*, 1967, vol. II, pp. 365 and 366, articles 43 and 44.

permanent mission was the national of a State which had special arrangements with the third State; secondly, where such arrangements with the third State did not exist, but it was not necessary to pass through its territory; and thirdly, where the member of the permanent mission, being a national of a land-locked State, was obliged to pass through the territory of the third State.

15. There was perhaps a case in positive international law, by virtue of Articles 104 and 105 of the United Nations Charter, for imposing on third States the obligation to permit transit. Since the question belonged to the progressive development of international law, it was for the Commission to decide whether a positive obligation existed, or whether international law did not yet impose it.

16. Mr. YASSEEN said it would be hard to make the grant of a visa an obligation in positive law. In practice, there were no instances in which a permanent representative could only take one route to rejoin his post or to return to his country. With the assistance of the Special Rapporteur and the Drafting Committee, an attempt should be made to find some formula which was in accordance with actual experience in international life.

17. Sir Humphrey WALDOCK said he shared the doubts expressed by Mr. Yasseen, since he could hardly imagine a case in which a third State would render access to the host State impossible. If third States were recognized as having such a right, however, it would be necessary to consider the situation in which a member of a permanent mission was considered *persona non grata* by a third State.

18. He himself felt strongly that the right of transit should be made obligatory, but in the present state of international practice it was hardly possible to go so far. More problems were involved than the mere right of transit; it was necessary, for example, to consider the difference between the obligations of third States which were members of the organization and the obligations of those which were not. The Commission should reflect further on the problem.

19. Mr. EUSTATHIADES said that a better idea of the subject-matter of the article would be given if its title were changed to something like "Transit and official communications through the territory of a third State".

20. Mr. EL-ERIAN (Special Rapporteur), said that Mr. Casteñeda, Mr. Eustathiades and Sir Humphrey Waldock had done much to reveal the complexity of the problem; he thought that the Drafting Committee should take their observations into consideration and that, whatever it might decide, the commentary on article 42 should include a summary of the present discussion which would help to elicit the views of governments.

21. The CHAIRMAN suggested that the Commission refer article 42 to the Drafting Committee with a request that it prepare a fresh draft on the basis of the discussion.

*It was so agreed.*³

³ For resumption of the discussion, see 1023rd meeting, para. 59.

ARTICLE 43

22.

Article 43

Non-discrimination

In the application of the provisions of the present articles, no discrimination shall be made as between States.

23. Mr. EL-ERIAN (Special Rapporteur) said that article 43 reproduced paragraph 1 of article 50 of the draft on special missions⁴ which in turn reproduced, with the necessary drafting changes, paragraph 1 of article 47 of the Vienna Convention on Diplomatic Relations.⁵ As he had pointed out in the commentary, article 43 did not include paragraph 2 of article 47 of the Vienna Convention, which referred to two cases in which, although an inequality of treatment was implied, no discrimination occurred, since the inequality of treatment was justified by the rule of reciprocity.

24. Mr. YASSEEN said that the Special Rapporteur had been right to reproduce only paragraph 1 of article 47 of the Vienna Convention on Diplomatic Relations, since the reciprocity rule could scarcely be applied in the case of permanent missions. That fact should be emphasized in the commentary, where it should be made clear that reciprocity was not one of the host State's obligations towards the organization.

25. With regard to the wording of the article, he thought that instead of "no discrimination shall be made" it would be better to say "the host State shall not discriminate".

26. Mr. BEDJAOUI said he entirely agreed with the Special Rapporteur's decision not to reproduce paragraph 2 of article 47 of the Vienna Convention, which dealt with reciprocity. Privileges and immunities must depend on function, and relations between organizations and their member States, which belonged to multilateral diplomacy, had nothing to do with bilateral diplomacy. Hence the extension or restriction of privileges and immunities on the basis of reciprocity had no place in the article.

27. He agreed that the words "no discrimination shall be made" should be altered.

28. Mr. RUDA said that the Special Rapporteur had been right to omit the second paragraph of article 47 of the 1961 Vienna Convention, which applied only to bilateral relations and not to relations between States and international organizations. Article 43 should be based squarely on the principle of the equality of States.

29. Like some other members, however, he thought that the present draft failed to make clear whether it was both the host State and the organization or the host State alone which was obliged to refrain from discrimination. He was also uncertain whether the rule "no discrimination shall be made as between States" was intended to apply only to member States of the organization.

⁴ See *Yearbook of the International Law Commission*, 1967, vol. II, p. 367.

⁵ United Nations, *Treaty Series*, vol. 500, p. 122.

30. Mr. EUSTATHIADES said that he too thought it should be clearly stated who had the duty not to practise discrimination.

31. He doubted, however, whether an article on non-discrimination was really necessary in the draft if the intention was merely to state the principle of non-discrimination. The rule of non-discrimination had been included in the Vienna Convention and in the draft on special missions precisely in order to specify the cases in which discrimination was not regarded as taking place, for instance, when there was no reciprocity or when more favourable treatment was extended. It was hard to say what the term "non-discrimination" meant when removed from the context of the other paragraphs of article 47 of the Vienna Convention.

32. Mr. CASTRÉN said he approved of both the substance and the drafting of article 43. The Special Rapporteur had been right not to include the remaining provisions of the corresponding article of the Vienna Convention and of the draft on special missions.

33. In his view, the phrase "no discrimination shall be made" covered the organization, the host State and third States; but if necessary all three could be mentioned.

34. Like Mr. Ruda, he thought it should be made clear at the end of the sentence what States were referred to by the expression "as between States".

35. Mr. TABIBI said that the Special Rapporteur had been right to exclude the second paragraph of article 47 of the Vienna Convention, since article 43 related to the question of non-discrimination, but not to that of reciprocity. Its purpose was to ensure both the smooth operation of the convention itself and a satisfactory international relationship based on the principle of the equality of States.

36. With regard to the phrase "no discrimination shall be made as between States", he preferred that general formula, since it would apply not only to the host State, but also to all member States of the organization throughout the world.

37. Mr. CASTAÑEDA said that the Special Rapporteur had been right to confine his text to paragraph 1 of article 47 of the 1961 Vienna Convention.

38. The wording "no discrimination shall be made" was not very satisfactory, but it would not be enough just to insert the words "by the host State", since the obligation applied to the organization too. A more appropriate formula was needed.

39. Mr. YASSEEN said he agreed that some formula must be found to cover all the parties incurring obligations under the convention, in other words the host State, the organization, and perhaps third States.

40. With regard to Mr. Ruda's point that it should be made clear what States were referred to at the end of the sentence, the convention might even provide that certain categories of States had a lesser status, without thereby introducing discrimination; on the other hand, if the same treatment were accorded to States which did not have the same status, there would be dis-

crimination. The important point was to eliminate any discrimination between States in the same category.

41. Mr. RAMANGASOAVINA said that all members seemed to be in agreement on the principle of article 43 and on the fact that it was not necessary to add the exceptions included in the corresponding article of the Vienna Convention.

42. However, instead of a vague negative wording like "no discrimination shall be made", since it was merely a question of drawing attention to an established principle, it would be better simply to say "... States shall ensure strict application of the principle of non-discrimination." That formula would express the fundamental idea of the article.

43. Mr. BARTOŠ said he was afraid that the simple laconic sentence which constituted the article was not adequate to express a principle as important as that of non-discrimination. Without an absolutely clear definition, there was a danger that those who felt they were the object of discrimination would be encouraged to put forward exaggerated claims and that those who practised discrimination would have the right to decide whether a particular act was or was not discriminatory. It was therefore important to rely on already existing texts, and it was all the more important to find a satisfactory formula because the principle involved was a frequent source of disputes between States. He agreed with Mr. Yasseen that it was essential to state precisely between which States there must be no discrimination.

44. The CHAIRMAN, speaking as a member of the Commission, said it should be specified at the end of the sentence that there should not be discrimination "between States members of the organization".

45. The article might, moreover, be supplemented by a provision to the effect that where, by custom or agreement, the host State extended more favourable treatment to a member State of the organization, that should not be regarded as discrimination.

46. Mr. YASSEEN said that privileged treatment could be considered as non-discriminatory provided it did not affect the rights of other member States.

47. Mr. TABIBI said that to add the words "member States of the organization" would create a problem, since in many cases the host State was not a member of the organization. It would be better, in his opinion, to leave the wording of article 43 flexible.

48. He agreed that host States sometimes accorded special treatment to certain member States of an organization, but those cases were largely a matter of protocol as practised in bilateral relations, and did not constitute discrimination within the meaning of the present article.

49. Mr. RAMANGASOAVINA said he feared that the negative wording used by the Special Rapporteur for article 43 would make it possible to conclude, *a contrario*, that discrimination was permitted in the application of other conventions. By the same reasoning, any explanations given might have a restrictive effect, for if it were said that some particular treatment was not considered to be discriminatory, it might be argued, *a contrario*, that any other treatment which involved an

exception to the equality rule was discriminatory. If the article provided that States must ensure respect for the principle of non-discrimination, that general formula would emphasize that the principle must be applied.

50. Mr. CASTAÑEDA said he was not in favour of any formula that would open the way for differences in treatment that would not be considered discriminatory.

51. With regard to Mr. Yasseen's comment, he doubted whether it was even conceivable that more favourable treatment could be accorded to one State without affecting the situation of other States in any way, especially where privileges and immunities were concerned. The ideas of reciprocity and of special relations between two States had no place in relations between States and international organizations; they belonged exclusively to bilateral diplomacy. If those ideas were included, there would be a danger of creating situations that were incompatible with the basic principle of the sovereign equality of States.

52. Sir Humphrey WALDOCK said he fully agreed with Mr. Castañeda that it would be unwise to open the door to special privileges in relations between States and international organizations, since in such relations the situation was different from what it was in bilateral diplomacy.

53. Mr. CASTRÉN said he had the same doubts about the advisability of adding an explanatory paragraph. He preferred the text as it stood.

54. Mr. EUSTATHIADES said he thought the discussion confirmed the view he had already expressed. Either the Commission would be led to state that certain practices did not constitute discrimination, or, if it confined itself to stating the principle only, the value of the provision would be doubtful, to say the least, and difficulties might possibly arise in certain situations such as those coming under article 27 or when States members of the organization were not recognized by the host State. Several members had spoken in favour of including additional particulars; Mr. Ramagasoavina had proposed stating the principle more rigorously. The discussion seemed to confirm that the concept of non-discrimination should be either more fully explained or not mentioned at all.

55. Mr. TSURUOKA said it was not the principle itself of non-discrimination that was in question, either in the present articles or in any other convention or rule of international law. The question was whether an article should be devoted to the principle. And since the Commission did not seem ready to take a final position on the matter, the Drafting Committee would have to consider whether or not it would be wise to include an article of that kind in the convention. If so, the wording of the article should be flexible so that it would be easily adaptable to real and evolving situations.

56. What was involved was mainly the acts or behaviour of the host State. Since the host State stood alone against a multitude of member States which might criticize its decisions, it was reasonable to assume that it would only act if it was convinced that it was not going against the will of the majority of member States. That

was a reliable guarantee against abuses by the host State, and an argument in favour of omitting such an article. While he would not formally propose the deletion of the article, he would urge that possible cases of discrimination in the application of the articles of the convention be studied in the light of that consideration.

57. Mr. USTOR said he strongly supported the idea embodied in article 43. It was necessary to include an article on non-discrimination in the present draft, if only to prevent difficulties of interpretation, bearing in mind the inclusion of such an article in the Vienna Conventions of 1961 and 1963.

58. He was opposed to the inclusion of any exceptions in the form of a second paragraph. In fact, he was not satisfied with paragraph 2 (a) of article 47 of the Vienna Convention on Diplomatic Relations. The Commission itself, in article 64 of its 1960 draft on consular relations, had decided to omit paragraph 2 (a) from a text which otherwise reproduced the corresponding article of the Convention on Diplomatic Relations. In paragraph (3) of its commentary on article 64, the Commission has expressed its doubts regarding the substance of paragraph 2 (a).⁶ He was therefore strengthened in the view that the present article 43 should be confined to a general statement of the principle of non-discrimination.

59. Since article 43 would apply not only to the articles on permanent missions which preceded it, but also to the sections on permanent observers and on delegations to organs of organizations and to conferences, he would suggest that, in the event of such sections being included, article 43 be moved to the end of the whole draft and placed in a section entitled "General provisions".

60. Mr. EL-ERIAN (Special Rapporteur) said that two general points had been raised during a comprehensive and illuminating discussion. The first was the advisability of including an article on non-discrimination; only two members had expressed doubts, while all the others had advocated the retention of the article. He himself had at one time considered the possibility of omitting it and thus avoiding a difficult subject. He had decided, however, to include the article because certain problems had in fact arisen in practice and it was necessary to provide a solution for them.

61. The second general point was the advisability of inserting a second paragraph on the lines of paragraph 2 of article 47 of the Vienna Convention on Diplomatic Relations. The majority of members had not been in favour of such a paragraph because of the difference between bilateral diplomatic relations and the relations covered by the present draft. Within the framework of an international organization, there was no room for extending special treatment to certain States because of some custom or particular relationship with the host State; it was necessary to establish an objective régime which applied equally to all States. There was also a theoretical reason for not including the suggested second paragraph; in bilateral diplomacy, the receiving State would grant special treatment to certain of the diplo-

⁶ See *Yearbook of the International Law Commission*, 1960, vol. II, p. 178.

matic agents accredited to it but, in the present instance, the permanent representatives and members of the permanent mission were accredited not to the host State but to the international organization.

62. With regard to the drafting of the article, he suggested that the Drafting Committee consider the possibility of adopting wording which would avoid the present negative formulation.

63. It had been suggested that the article should be reworded so as to impose a specific obligation on the host State. He was not attracted by that suggestion, if only because it would not be sufficient to refer to the host State: it would also be necessary to mention the organization, which had obligations in the matter, and perhaps third States. If delegations to organs of organizations and to conferences were ultimately covered by the draft, since a conference or an organ of an organization could meet outside the host State it would be necessary to make specific reference to third States as well.

64. He was not in favour of replacing the concluding words "as between States" by "as between member States". Reference has been made to the difficulties which would arise in a case such as that of the Geneva Office of the United Nations, where the host State was not a member. For that reason, and others mentioned during the discussion, it would be preferable to retain the text as it stood.

65. He could accept Mr. Ustor's suggestion that article 43, as a general provision, be placed at the end of the whole draft, so as to cover observers and delegations to organs of organizations and to conferences, if sections on those subjects were included.

66. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 43 to the Drafting Committee.

It was so agreed.¹

ARTICLE 44

67. *Article 44*

Obligation to respect the laws and regulations of the host State

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the host State. They also have a duty not to interfere in the internal affairs of that State.

2. The premises of the permanent mission must not be used in any manner incompatible with the functions of the permanent mission as laid down in the present articles or by other rules of general international law or by special agreements in force between the sending and the host State.

68. Mr. KEARNEY said that article 44 set forth the duty of all persons enjoying privileges and immunities to respect the laws and regulations of the host State, but paragraph (2) of the commentary explained that: "With respect to immunity from jurisdiction, this immunity

implies merely that a member of the permanent mission may not be brought before the courts if he fails to fulfil his obligations". Thus if a person enjoying such immunity committed a breach of criminal law, the host State was left without a remedy.

69. It was not sufficient simply to reproduce the provisions of the corresponding article of the Vienna Convention on Diplomatic Relations.⁸ There was a great difference between the situation in bilateral diplomacy and the situation covered by article 44. Under the Vienna Convention on Diplomatic Relations, it was possible for the receiving State to declare a diplomatic agent *persona non grata* and that device could be used to expel from the receiving State's territory a diplomatic agent who violated its criminal laws or regulations. In fact, the mere existence of the device was often enough, since the sending State would normally withdraw the diplomatic agent in order to avoid embarrassment and publicity.

70. In the present case, no similar device was available. He did not deny the logic of not permitting the host State to declare *persona non grata* a member of a permanent mission who was accredited to an international organization, since permanent missions were not accredited to the host State and it was essential to ensure their freedom of action. The host State, however, could be faced with an intolerable situation if a member of a permanent mission committed a violation of criminal law: unless some remedy were provided, it would be possible for the person concerned to continue to commit criminal offences and to remain in the territory of the host State indefinitely.

71. The problem was a very real one and unfortunately practical examples could be given. Some provision would therefore have to be included in the present draft which would reconcile the protection of the host State with the freedom of the permanent mission. He therefore suggested that the following third paragraph be added to article 44.

"3. In the event of serious or repeated violations of the criminal laws or regulations of the host State by any person enjoying immunity from the criminal jurisdiction of the host State under this Convention, the sending State, upon notification thereof by the organization, shall remove such person from the permanent mission."

72. The scope of the paragraph was limited to breaches of criminal law of two kinds. The first was serious violations, which in the common law countries would cover felony cases such as manslaughter and violations of the narcotics prohibition legislation. The second kind was repeated violations; an obvious example was violations of speed limits and other traffic regulations which, if repeated often, could have very grave cumulative effects.

73. His proposal would preserve the principle that the concept of *persona non grata* was not applicable; it would in fact reverse the procedure in order to ensure the independence of the permanent mission. An important feature of his proposal was that the organization would be required to notify the sending State concerned;

¹ For resumption of the discussion, see 1023rd meeting, para. 88.

⁸ United Nations, *Treaty Series*, vol. 500, p. 120, article 41.

that requirement would provide a basic protection against abuse of the provision by the host State.

74. He realized that a provision of that type would impose an additional burden upon international organizations, and consideration might have to be given to the question whether it was necessary to lay down a special procedure. The Special Rapporteur had already introduced a general article on the question of consultation, but it might perhaps be necessary to introduce a more formal specific clause on consultation to cover the present case.

75. Unless a remedy of some kind were provided for the situation to which he had drawn attention, it was extremely unlikely that the draft articles would be accepted by States which were hosts to international organizations and, in the absence of such acceptance, the whole draft would become pointless.

The meeting rose at 1 p.m.

998th MEETING

Thursday, 12 June 1969, at 3.40 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218/Add.1; A/CN.4/L.137)

[Item 1 of the agenda]

(continued)

ARTICLE 44 (Obligation to respect the laws and regulations of the host State)¹ (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 44 in the Special Rapporteur's fourth report (A/CN.4/218/Add.1) and of the amendment submitted by Mr. Kearney.²

2. Mr. NAGENDRA SINGH said that the Special Rapporteur had been quite right to follow article 41 of the Vienna Convention on Diplomatic Relations,³ and to omit paragraph 2, which was not relevant.

3. The important point in paragraph 2 of the Special

Rapporteur's text was that the premises of the permanent mission must not be used in any manner incompatible with its functions in relation to the international organization to which it was accredited. That could be made clear by inserting the words "in relation to the international organization concerned" after the words "functions of the permanent mission". He was not proposing that as a formal amendment; it was just a drafting point which could be looked into by the Drafting Committee.

4. Mr. Kearney had raised a valid point and in general he agreed with his view. There were three ways of dealing with the problem: by accepting Mr. Kearney's amendment; by dealing with the problem in article 49, on consultations—that was probably the best solution; or by departing from the principle of absolute immunity, as had been done in the draft on special mission,⁴ and permitting the criminal law of the host State to apply in cases of acts involving criminal responsibility by persons enjoying privileges and immunities under the convention. That solution would certainly be unpalatable to many, but it might be in the interests of the community to confine absolute immunity to activities connected with a person's functions as a member of the permanent mission.

5. Mr. TABIBI said he fully supported the underlying idea of article 44 and the way it had been presented by the Special Rapporteur. It was appropriate to include in the present draft the general rule in article 41 of the Vienna Convention on Diplomatic Relations, so that there would be a balance between the privileges and immunities granted to diplomats in bilateral and in multilateral diplomacy.

6. While he fully shared Mr. Kearney's concern, he doubted whether the solution he had suggested was the best one. To adopt the clause he proposed would create difficulties in applying the rule in force under the Vienna Convention on Diplomatic Relations. The role of a diplomat serving on a permanent mission was in many respects the same as that of a diplomat in bilateral diplomacy; he merely served in a different capacity. Moreover, in many cases the head of a diplomatic mission was also a member of his country's permanent mission to an international organization. In such cases, it would be difficult to determine which rule should apply.

7. The wording of the amendment proposed by Mr. Kearney also raised a number of problems. For example, the words "In the event of serious . . . violations" implied that a judgment would be made on what was a serious violation, but no indication was given as to who would make the judgment. If it was the host State, then serious violation of its criminal laws or regulations could be used by the host State as a pretext for obtaining the withdrawal of a diplomat on a permanent mission for political reasons.

8. He doubted, moreover, whether it was appropriate for a diplomat on a permanent mission to be recalled on the receipt of a notification from the organization

¹ See previous meeting, para. 67.

² *Ibid.*, para. 71.

³ United Nations, *Treaty Series*, vol. 500, p. 120.

⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, pp. 365 and 367, articles 41 and 48.