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Republic of the ex-Belgian Congo had been a Member of the United Nations since 1960; (iv) the United Nations General Assembly had recognized President Kasavubu as head of the State, and had also recognized the sovereignty of the State; (v) only the United Nations could have accepted or refused the participation of delegations the composition of which had been communicated to it before the opening of the Conference; (vi) the question of the representation of the Republic of the Congo (Leopoldville) should be raised in the United Nations General Assembly and not at the Conference.

62. He was surprised at the contradictory attitude adopted by the representatives of the countries of the Soviet bloc towards the validity of the credentials of some delegations. They recognized the validity of the credentials of the representative of Hungary because that country was a Member of the United Nations; and at the same time they challenged the credentials of the delegation of the Republic of the Congo (Leopoldville).

63. Mr. IBRAHIM (Ethiopia) said that some of the governments represented at the Conference did not recognize others also represented at the Conference. Surely, however, the important point was that they were all Members of the United Nations, and as such had been invited to take part in the Conference. The Ethiopian delegation would vote for the adoption of the Credentials Committee's report, but it did not approve of the conclusions that committee had reached concerning the credentials of some delegations. In other words, all the credentials of the delegations participating in the Conference were, in the opinion of the Ethiopian delegation, valid for the purposes of the Conference.

64. Mr. LINTON (Israel) said he would vote for the adoption of the Credentials Committee's report, but considered that the Committee should have recognized the validity of the Hungarian delegation's credentials.

65. The PRESIDENT put the Credentials Committee's report (A/CONF.20/L.14) to the vote.

The report was adopted by 69 votes to 1, with 1 abstention.

The meeting rose at 6 p.m.

NINTH PLENARY MEETING

Thursday, 13 April 1961, at 10 a.m.

President: Mr. VERDROSS (Austria)

Consideration of the question of diplomatic intercourse and immunities in accordance with resolution 1450 (XIV) adopted by the General Assembly on 7 December 1959 (item 10 of the agenda) *(resumed from the seventh meeting)*

1. The PRESIDENT invited the Conference to resume its debate on the draft convention (A/CONF.20/L.2/Add.1).

ARTICLE 35 *(resumed from the seventh meeting)*

2. Mr. JEZEK (Czechoslovakia) said that article 35 was an important provision and should be retained. Exemption of diplomatic agents from the automatic application of the nationality law of the receiving State was a generally recognized privilege, and the convention would be incomplete if it did not contain an article stating that privilege.

3. It was essential, as a guarantee of the independence of diplomatic agents vis-à-vis the authorities of the receiving State, that the nationality of that State should not be imposed upon their children. The arguments for the deletion of article 35 were not convincing, and a decision to delete it would be open to dangerous interpretations.

4. Mr. OJEDA (Mexico) said that he would vote for the deletion of article 35. His delegation accepted the principle that diplomatic immunity exempted a foreign diplomatic agent and his family from application of the nationality law of the receiving State in cases where the effect of that State's law was to attribute its nationality to a person by reason of birth in its territory or of marriage. However, he could not accept the extension of the privilege to all members of the mission and their families; it should be limited to persons enjoying full immunity from jurisdiction.

5. If the Conference should decide to delete or not to adopt article 35, he would interpret that decision to mean that, in the case of foreign diplomatic agents, nationality questions would continue to be governed by the rules of customary international law, as was stated in the fifth paragraph of the preamble.

6. If article 35 were retained, his delegation would be compelled to sign the convention with an express reservation in respect of that article.

7. Mr. CAMERON (United States of America) supported the proposal that article 35 should be deleted. It had become quite clear during the discussions in the Committee of the Whole that no wording would be generally acceptable. The provision as it stood conflicted with the municipal law of many countries and, in the case of the United States of America and some other States, with the Constitution or fundamental laws. If, therefore, article 35 were adopted as drafted, many delegations would have to make express reservations. His own delegation would have to make a reservation limiting the application of the article to persons not born subject to the jurisdiction of the United States of America.

8. The deletion of article 35 would not affect the existing practice of States, since according to the fifth paragraph of the preamble questions not regulated by the provisions of the convention would continue to be governed by the rules of customary international law.

9. Mr. REGALA (Philippines) also thought that article 35 should be deleted. Because of the fundamental differences between the legal and constitutional provisions governing nationality in the various States, it was neither appropriate nor practical to adopt such a provision.

10. Matters of nationality were extremely complex, and efforts to regulate them by international instruments had not been successful. The Hague Convention and protocols had been ratified by only a few States, and the special protocol concerning statelessness had not received sufficient ratifications to enter into force.[1]

11. In the *Nottebohm* case, in which Guatemala had refused to recognize the grant by Liechtenstein of the nationality of the Principality to a German national, the International Court of Justice had ruled against the validity of the naturalization on the ground of the absence of any bond of attachment between the person concerned and Liechtenstein.[2] The Court had stated that the diversity of demographic conditions had thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affected international relations.

12. For those reasons it was preferable to delete article 35, in which event nationality questions affecting diplomats would be settled by municipal law.

13. Mr. GASIOROWSKI (Poland) recalled that the Committee of the Whole, after a prolonged discussion, had appointed a working group to prepare a generally acceptable text for article 35 (31st meeting). At the 34th meeting, the draft prepared by the working group (A/CONF.20/C.1/L.314) had, however, been rejected by the Committee of the Whole, which had previously also rejected an amendment deleting article 35 altogether (A/CONF.20/C.1/L.204). The Committee had then, after rejecting a number of amendments, adopted the International Law Commission's text of article 35, by the large majority of 46 votes to 12, with 12 abstentions.

14. An effort was being made to reopen debate on the question of the deletion of article 35. The purpose of the Conference was to clarify and develop diplomatic privileges and immunities and so to foster the maintenance of diplomatic relations. The aim was to maintain and extend existing facilities, not to restrict them, still less abolish them. Diplomatic agents, precisely because of their duties, served abroad, and if the nationality of the place of birth were imposed upon their children, they might be placed in the intolerable situation of having children of several different nationalities, who might later even find themselves at war with each other.

15. The *jus soli*, imposing the nationality of the place of birth, was very useful to countries of immigration, and fully justified in the normal case of the children of permanently settled immigrants. The case of the child of a diplomatic agent was, however, completely different and exceptional, and to apply the *jus soli* to his child would be manifestly unjust.

16. It had been objected that matters of nationality pertained to private international law and should be therefore regulated by appropriate conventions. Nationality questions in general undoubtedly belonged to private international law; but the specific question of the nationality of a diplomatic agent and of members of his family was a matter, not of private, but of public international law and therefore fully within the competence of the Conference.

17. He was not impressed by the argument that nationality questions were regulated by municipal law. The proposition that municipal law should prevail over international law was untenable; if it were accepted, any State could repudiate its international obligations by passing laws inconsistent with them.

18. For those reasons he urged that the determination of the nationality of members of a diplomatic mission and of members of their families should not be left to the internal law of the receiving State, and that the text of article 35, so carefully prepared by the International Law Commission, should be accepted by the Conference. It was, of course, unfortunate that certain countries might have to make reservations, but that was better than leaving the whole matter unregulated.

19. Mr. VALLAT (United Kingdom) agreed with those representatives who favoured the deletion of article 35. The language of the article was extremely vague and general; its interpretation largely turned on the meaning of the word " solely "; and serious difficulties of interpretation had been raised by words of that type in the Covenant of the League of Nations and in the United Nations Charter. He had no objection to the principle laid down in article 35, but thought that many countries would find the article almost impossible to apply as it stood. Nationality law dealt with a great variety of cases, and had to be drafted very precisely.

20. For those reasons he would vote against article 35, the deletion of which would leave the matter still subject to the general rules of customary international law.

21. Mr. YASSEEN (Iraq) favoured the retention of article 35, for it reflected an international practice sufficiently general to deserve endorsement in the convention. It was a rule of customary international law that a State had sovereign jurisdiction over its own nationals. Precisely for that reason, an exception to the rule was mentioned expressly in article 36.

22. As for the substance of article 35, he said there was ample reason for exempting a diplomatic agent from the application of laws which, but for that provision, would impose on his children the nationality of a State in whose territory he was present purely for the purpose of his duties.

23. In fact the diplomatic agent himself, not only his children, required to be protected from the automatic application of the nationality laws of the receiving State. In some countries, a person was deemed to be a national by reason of his mere residence on its territory. Under the law of some countries a national who became a naturalized citizen of another country was deprived of his nationality of origin; but if he returned to his country

[1] (i) Convention on certain questions relating to the Conflict of Nationality Laws, 12 April 1930, League of Nations, *Treaty Series*, vol. 179; (ii) Protocol relating to Military Obligations in certain cases of Dual Nationality, *ibid*, vol. 178; (iii) Protocol relating to a certain case of statelessness, *ibid*, vol. 179; (iv) Special Protocol concerning Statelessness, L. of N. doc. C.227. M.114. 1930 V. All these instruments are reprinted in United Nations *Legislative Series, Laws concerning Nationality* (ST/LEG/SER. B/4), United Nations publication, Sales No. 1954.V.1, pp. 567-577.

[2] Nottebohm case (second phase), Judgment of 6 April 1955, *ICJ Reports, 1955*, p. 4.

of origin its nationality was automatically restored to him. Accordingly, if the country of which he had become a naturalized citizen sent him as a diplomatic agent to the State of his former allegiance, he would find that the laws of that receiving State imposed its nationality on him.

24. That example, like others that had been mentioned, showed the need for a provision which, like article 35, exempted not only the children of diplomatic agents but also the agents themselves from the automatic operation of the nationality laws of the receiving State.

25. He fully understood the demographic reasons which had led to the adoption of the *jus soli* principle by countries of immigration; but article 35 would exempt only a very small number of families from the operation of that principle, and its adoption would not therefore materially conflict with the policy followed by those countries in nationality questions.

26. Mr. AGO (Italy) said that he had the greatest respect for the position of those who applied the *jus soli*, but asked them to show the same respect for the position of other countries which would be faced with great difficulties if article 35 were not adopted. The article was perfectly clear. Its purpose was to exempt diplomatic agents and their children from the automatic operation of the nationality laws of the receiving State. Thus under article 35 the child of a diplomat born in a *jus soli* country would not, merely by the operation of the law, become a national of a country to which he was unlikely ever to return. Similarly, a woman diplomat accredited to Italy who married an Italian citizen would not acquire Italian nationality by the mere operation of the law, as a foreign woman marrying an Italian national usually did.

27. The PRESIDENT put to the vote article 35.

There were 42 votes in favour and 28 against, with 6 abstentions.

Article 35 was not adopted, having failed to obtain the required two-thirds majority.

28. Mr. de ERICE y O'SHEA (Spain) said that article 35 contained a useful principle; he proposed that since its inclusion in the body of the convention had been rejected, it should form the subject of a separate optional protocol. Since the convention would remain open for signature until 31 March 1962, there would be ample time for States to decide whether they wished to sign the convention with or without a protocol on nationality. Such an additional protocol would certainly be of interest to many States, and would be of great assistance to diplomats in regard to the nationality of their children.

The proposal was adopted by 54 votes to 4, with 11 abstentions.[3]

ARTICLE 36

29. The PRESIDENT, inviting debate on article 36, drew attention to the amendment submitted by Libya, Morocco and Tunisia (A/CONF.20/L.9/Rev.1) and to that submitted by nineteen delegations (A/CONF.20/L.13 and Add.1).

Paragraph 1 was adopted unanimously.

Paragraph 2

30. Mr. PINTO de LEMOS (Portugal) recalled the doubts expressed by his delegation in the Committee of the Whole (32nd meeting) regarding the extension of diplomatic privileges and immunities to members of the administrative and technical staff of a diplomatic mission. The arguments put forward had failed to convince him that that extension was consistent with the stage of development of international law or with the basic principles underlying the relevant section of the convention.

31. There existed no generally accepted practice to warrant the adoption of a rule embodying that extension. Nor was there any good reason, on grounds either of "functional necessity" or of the "representational character" of the mission, to grant to members of the administrative and technical staff the privileges prescribed for diplomatic agents.

32. Diplomatic privileges and immunities were, by definition, an exception to the normal freedom of action of States within the bounds of their domestic jurisdiction. States were prepared to concede that exception only for a specific purpose and for very special reasons. Any attempt to broaden its scope unduly would weaken the whole system of diplomatic privileges and immunities, which was effective and respected precisely because it was exceptional.

33. Members of the administrative and technical staff should, of course, enjoy privileges and immunities in respect of acts performed by them in the course of their duties. To ensure the smooth functioning of the mission, they should also be exempted from tax on their remuneration, from social security legislation (article 31) and from public service (article 33). They should enjoy the exemption from customs duty set forth in article 34, paragraph 1, in respect of articles imported at the time of first installation. Naturally, the receiving State could always grant staff of that category wider privileges, either unilaterally or subject to reciprocity. His delegation's vote on article 36, paragraph 2, and the amendments thereto would be guided by the principles which he had stated.

34. Mr. BOUZIRI (Tunisia) introduced, on behalf of its sponsors, the three-nation amendment to article 36 (A/CONF.20/L.9/Rev.1).

35. The problem raised in article 36 was the extremely grave one of determining which persons were entitled to privileges and immunities. There was complete agreement on paragraph 1, granting those privileges to the diplomatic agent's family. The position of members of the administrative and technical staff was, however, much more difficult to settle.

36. The commentaries of the International Law Commission (A/3859) and the discussion in the Committee

[3] For debate on the optional protocol concerning the acquisition of nationality see 12th plenary meeting.

of the Whole (32nd and 33rd meetings) showed that the provision extending privileges and immunities to that category of persons was based on the consideration that some of them performed confidential tasks. He could not accept the idea that, because some of the persons concerned might need protection from pressure by the receiving State, all of them should enjoy diplomatic immunities. The number of such persons was very large, and many States would never agree to extend privileges and immunities to them all, particularly since their training and selection did not provide the same safeguards as did those of diplomatic agents.

37. That was why the three-nation amendment proposed that the privileges set forth in paragraph 2 should be limited to " members of the administrative and technical staff of the mission performing confidential duties ", and to their families. The number of persons covered by that definition would necessarily be small. The amendment required the receiving State to apply the limitation without discrimination between the various missions, and to take into account the reasonable needs of the mission.

38. The amendment also proposed an additional paragraph extending to all members of the administrative and technical staff immunity in respect of acts performed in the course of their duties, the exemptions set forth in articles 31, 32 and 33, and, in respect of articles imported at the time of their first installation, the privileges mentioned in article 34, paragraph 1.

39. He believed that the proposed formula was a satisfactory compromise. It went further than existing international law, but the sponsors had put it forward in order to meet to some extent the views of others. Clearly no one formula could satisfy all delegations.

40. The nineteen-nation proposal (A/CONF.20/L.13 and Add.1) was a commendable attempt to solve the difficulties raised by paragraph 2. It was satisfactory in that it would grant to members of the administrative and technical staff immunity from jurisdiction only in respect of acts performed in the exercise of their functions. It went somewhat too far when it granted them, without any discrimination, the privileges set forth in articles 27 (personal inviolability) and 28 (inviolability of residence and property), which were not necessary to persons not performing confidential duties.

41. For those reasons he considered that the nineteen-nation amendment improved upon article 36; but he naturally preferred the three-nation amendment, and urged the Conference to adopt it as the least unsatisfactory solution.

42. Mr. de VAUCELLES (France), introducing the nineteen-nation amendment, said that its sponsors intended the immunity from jurisdiction should be in conformity with all the provisions of article 29. The privileges of a diplomat might be envied, but it was his immunity from jurisdiction which aroused the greatest resentment, and to extend that immunity too widely might have serious consequences.

43. The Government of France, in its agreement with the United Nations Educational, Scientific and Cultural Organization (UNESCO), which had its headquarters in Paris, had granted some high officials of the Organization the same privileges as those granted only to the purely diplomatic members of missions; the administrative and technical staff of diplomatic missions in France enjoyed in principle, unless a reciprocal agreement provided otherwise, immunity from jurisdiction only in respect of acts performed in the exercise of their functions. The other officials of UNESCO enjoyed similar immunity, under article 22 of the French Government's agreement with the Organization. If the administrative and technical staff of diplomatic missions were granted complete immunity from jurisdiction, the UNESCO officials would be entitled to claim it too. The result would be that 25,000 persons, including members of families, would enjoy immunity from jurisdiction. It would be much more dangerous to extend privileges and immunities too far than to appear to discriminate between the different categories of staff.

44. The French delegation appreciated the motive for the three-nation amendment, and would support it, should the nineteen-nation amendment be defeated, as an improvement on the existing text, although it might give rise to disputes and divergent interpretations. The Government of France regretted that it would have to vote against paragraph 2 as it stood, even if that resulted in the deletion of the paragraph. The existing practice, which had caused no difficulty, would continue in any case.

45. Mr. CAMERON (United States of America) recalled that the text of article 36 had been adopted in the Committee of the Whole as a compromise, by a substantial majority. His delegation would have preferred the original proposal of the International Law Commission, but had voted for the compromise text in the spirit of co-operation which had moved all delegations. A number of delegations now sought to amend the article; but the reasons they gave for eliminating or curtailing the grant of privileges and immunities to members of administrative and technical staff were no more persuasive than similar arguments had been in the Committee of the Whole. It had been suggested that opposition to the compromise text arose from considerations extraneous to the convention. For example, concern had been expressed that article 36 might be applied automatically, as a precedent, to international organizations. His delegation believed that concern unwarranted. The reasons for granting privileges and immunities to the administrative and technical staff of missions in relations between States might or might not apply to missions to international organizations, or to the staff of an international organization. It should be kept in mind that the whole question of the relationship between States and international organizations was a distinctly separate one, which had yet to be considered thoroughly by the International Law Commission. If it would assist in allaying concern, however, his delegation would agree that the Conference should express, in a resolution or otherwise, its view that article 36 was not to be considered a prece-

dent with respect to international organizations, and that the International Law Commission should consider that question *de novo*.

46. Concern had been expressed by the delegations of some countries in which international organizations had their seat that the provisions of existing headquarters agreements might require the automatic application of article 36 to missions to those organizations. If any additional burden did accrue from the aodption of article 36, it should be weighed against the advantages to the receiving State resulting from the presence of the international organization. It was by no means clear, however, that the headquarters agreements required the automatic application of article 36. Under section 15 of the United Nations Headquarters Agreement of 1947,[4] for example, article 36 would apply only to such resident members of the staffs of missions to the United Nations in New York as were agreed upon by the Secretary-General, the Government of the United States, and the government which sent the mission concerned. Similarly, article 12 of the Ottawa Agreement of 1951 on the Status of the North Atlantic Treaty Organization [5] provided that, apart from the principal permanent representative, only such members of the staff of a mission as might be agreed upon between the sending State, the Organization, and the receiving State should enjoy the immunities and privileges accorded to diplomatic representatives and their official staff of comparable rank. Clearly, therefore, the receiving State was not powerless to regulate the extent to which article 36 should be extended to the administrative and technical staff of international organizations.

47. The proposal in sub-paragraph (*a*) of the nineteen-nation amendment was an apparently unobjectionable drafting change. It would, however, cause difficulty in regard to the new sentence proposed in sub-paragraph (*c*) beginning with the word " They ", the antecedent of which included members of families. The result was an incongruity: members of the family would enjoy immunity for " acts performed in the exercise of their functions ". More significantly the proposal in sub-paragraph (*b*) was to omit article 29 from the articles applicable to members of the administrative and technical staff, who would in consequence be subject, except for official acts, to the criminal as well as to the civil jurisdiction of the receiving State. That possibility was fraught with many dangers. Any prosecution or civil suit which might ensue would, moreover, be a curious one, since both article 27 and article 28 were still enumerated. Under article 27 the person of the member of the administrative and technical staff was inviolable; consequently, he was not liable to arrest or dentention. Under article 28 his residence and other property were inviolable. If the amendment were adopted, therefore, the receiving State could not compel the attendance of the staff member at a trial, nor could a penal sentence be carried out or a civil judgment executed; the jurisdiction of the receiving State would be more or less illusory.

48. The new compromise text proposed by Tunisia, Libya and Morocco would create more problems than it would solve, and demonstrated the wisdom of not attempting to make extensive changes at the last minute. During the discussions of the International Law Commission and again at the Conference it had become abundantly clear that the distinction between different categories of personnel was often very difficult. The amendment would add an additional category by dividing the administrative and technical staff into what might be called superior and inferior categories. It was not at all clear what criteria would determine the category in which a staff member should be. The words " to the extent of the reasonable needs of the mission " were so elastic that they would cause endless controversy and confusion, which the Conference was trying to eliminate. His delegation would find it difficult, if not impossible, to support such language. The duties of an individual might not be confidential, yet he might have confidential information as important as a person " performing confidential duties ". Again it was not clear whether the sending State or the receiving State would judge who was performing confidential duties. Could the receiving State make a sound judgment without access to the records of the mission ?

49. The purpose of privileges and immunities was, as was stated expressly in the preamble, not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions. His delegation would therefore strongly urge the Conference to approve the existing text of article 36.

50. Mr. RIPHAGEN (Netherlands) said that there had been a general tendency to affirm, and sometimes even to extend, the traditional privileges and immunities, which his delegation thought needed some adaptation to modern conditions, particularly as members of foreign missions had become much more numerous and were in much closer contact with the everyday life of the receiving State. The adaptations proposed had, however, not been incorporated in the convention, and the majority of delegations seemed reluctant to modify the classical privileges and immunities, or even to place any legal obligation on the sending State to waive immunity. His delegation therefore considered that the only course was to limit the number of persons eligible for privileges and immunities, and it would vote in favour of the amendments which would do so.

51. Mr. GASIOROWSKI (Poland) said that the Conference found itself in an almost unprecedented situation. The Committee of the Whole at its 33rd meeting had adopted paragraph 2 by 59 votes to none, with only 7 abstentions. Yet two amendments, one proposed by three and the other by nineteen delegations, had been submitted to the paragraph in plenary. The amendment submitted by Tunisia, Libya and Morocco provided that certain privileges and immunities should be granted " to the extent of the reasonable needs of the mission ". The representative of Tunisia had admitted, in introducing the amendment, that the receiving State would be the judge of whether, for example, a diplomatic mission was claiming too many cipher clerks. But surely the

[4] Agreement regarding the Headquarters of the United Nations, signed at Lake Success on 26 June 1947: United Nations, *Treaty Series*, vol. 11, p. 26.

[5] United Nations, *Treaty Series*, vol. 200, p. 10.

sending State could hardly agree that the receiving State should be the judge of how it would allocate its staff, or of which members were " performing confidential duties ". The effect of the amendment in practice would be to remove all privileges and immunities from the administrative and technical staff. It was therefore the further removed from the existing text of article 36 and should be voted on first.

52. The nineteen-nation amendment dropped the reference to article 29, which provided for immunity from jurisdiction. How then was it possible, despite the omission of the reference to article 29, to mention article 27, which provided that the person of a diplomatic agent was inviolable ? The amendment further proposed that administrative and technical staff should enjoy immunity from jurisdiction in respect of acts performed in the exercise of their functions. That provision would be absurd in practice, since a cipher clerk, for example, could hardly be arrested for any failure to perform adequately his duties of coding and decoding. The amendment, however, would afford protection only in that case.

53. The Conference had worked in an excellent atmosphere of co-operation. If, however, the amendments to article 36, a key provision of the convention, were put to the vote, it was probable that no text would receive the required two-thirds majority and the convention would be wrecked. He therefore appealed to the sponsors of the amendments not to press them.

54. Mr. GLASER (Romania) said that article 36 had to reconcile two conflicting interests: that of the sending State, which wished to ensure that the members of its missions should not be subjected to pressure or exposed to other dangers detrimental to the exercise of their official functions; and that of the receiving State, which wished to ensure that the smallest possible number of persons in its territory were immune from its laws. The problem was difficult, and as the representative of Tunisia had said, no solution was likely to be entirely satisfactory to everyone. The only course, therefore, was to seek a solution that would do the least harm and the most good.

55. The fundamental principle of diplomatic law was *ne impediatur legatio*; but that principle could not be applied without regard to existing conditions. Diplomacy had become very complicated since the time of the Vienna Regulation, and many more people were involved in it. If States wished to maintain diplomatic relations, they had to accept all the consequences, and one of those was the protection of the persons concerned, however many they might be. The duty to protect foreign diplomatic personnel might place a heavy burden on receiving States; but it was essential, for there was ample evidence to show that the dangers to which they could be subjected were real and not imaginary.

56. In his opinion, the best solution would be one that followed the evolution of diplomacy. Thus the first need was to grant immunities to all the personnel of diplomatic missions, whether or not specifically engaged in confidential work — for even the service staff often received confidential information. It was artificial and unrealistic to separate administrative and technical staff into those who performed confidential duties and those who did not; and in any case it was scarcely feasible to determine which members were engaged on confidential work. The real principle to be decided was whether or not the administrative and technical staff should be protected; he did not think diplomatic relations could exist in modern times unless they were. The Romanian delegation would therefore vote for article 36 as approved by the Committee of the Whole. The amendments would destroy the entire work both of the Committee and of the International Law Commission.

57. Mr. RUEGGER (Switzerland) said he wished to explain Switzerland's attitude concerning the problem dealt with in article 36.

58. In conformity with its government's instructions, the Swiss delegation supported the nineteen-power amendment of which Switzerland was a sponsor. During the debate in the Committee of the Whole, the Swiss delegation had stated — and that had also been the opinion of other delegations — that in the matter covered by article 36 it would be desirable to do no more than codify the law, not to create new law. While acknowledging the authority of the International Law Commission, the Swiss delegation had referred during the debate in the Committee to the evolution which had been taking place and which was adverse to the extension of " privileges ". That was why the Swiss delegation had spoken in the Committee in support of the view held by the great majority and had approved a formula which was more in conformity with current practice. There still remained, however, the question of " immunities ". After the discussion in the Committee, several of the governments represented at the Conference had in the normal course of events given closer attention to the delicate problem of immunities. Among those was the Swiss Government. In the light of its assessment of the situation the Federal Government had directed the Swiss delegation to vote, so far as immunities likewise were concerned, in favour of a provision that preserved the *status quo*. That was why his delegation supported the amendment.

59. If the amendment should not be adopted, the Swiss delegation would regretfully be obliged not to vote in favour of article 36 in the form in which it was before the Conference. That attitude would likewise mean that Switzerland might possibly have to enter a reservation concerning that article later. Conceivably, neither the amendment nor the provision as approved by the Committee would receive the required majority. In that event, article 36 would lose its paragraph 2. In his delegation's opinion that would not be an irreparable misfortune, for, according to the preamble, the rules which would then apply would be those of customary international law which were, after all, sound and yet flexible and capable of progressive development.

60. Mr. EL GHAMRAOUI (United Arab Republic) said that he would vote against article 36 as approved by the Committee of the Whole because he believed that

there should be a distinction between diplomatic staff and administrative and technical staff. The Committee had rightly indicated in the preamble that functional necessity and representative character were the basis of diplomatic privileges and immunities. The administrative and technical staff could not be said to have representative character, and it was only logical that that difference between them and the diplomatic staff should be reflected in their respective privileges and immunities. The limitation of privileges and immunities for administrative and technical staff to acts performed in the exercise of their functions should be an essential principle under article 36, and he would therefore support any amendment to that effect.

61. Mr. KRISHNA RAO (India), speaking also on behalf of the representatives of Burma and Indonesia, supported article 36 as drafted. The most important point on which the text proposed in the nineteen-nation amendment differed from that of the Committee of the Whole was its denial to administrative and technical staff of the immunities provided under article 29, except in respect of acts performed in the exercise of their functions. The omission of a reference to article 29 was serious, for as a consequence whatever immunities were granted under the other articles would be nullified. In the light of the purpose for which protection was given to the category of staff in question (as explained by the International Law Commission in its commentary), the immunity given by article 29 was the most important. Yet if the amendment were adopted, an ambassador's secretary or an archivist — who through their very work were repositories of secret and confidential knowledge equally with the diplomatic staff — would be subject to the criminal and civil jurisdiction, to a summons to appear in court to give evidence, and to measures of execution. It was very difficult to draw a line between official and personal activities, and a receiving State would be able to put pressure on persons who — in their possession of vital and confidential information — were on a par with heads of missions and members of the diplomatic staff.

62. Commenting on the references to international organizations made by some representatives, he said that the subject was entirely irrelevant. The fact that a State had linked the privileges and immunities of the staff of missions with those of the staff of international organizations established in its territory did not justify an attempt to reduce the immunities and privileges which States in general wished to obtain for their diplomatic staff.

63. The three-nation amendment was even less acceptable than the nineteen-nation amendment. It granted immunities to members of the administrative and technical staff " performing confidential duties ". But how could the receiving State be expected to know which members of a foreign mission performed confidential duties, and what diplomatic mission was likely to divulge particulars of such purely internal arrangements ? Moreover, how could a receiving State pronounce on the " reasonable needs " of the mission in regard to each member of its administrative and technical staff ? He would therefore vote for article 36 as drafted, on the understanding that in respect of the privileges specified in article 34, paragraph 1 (referred to in article 36, paragraph 2), the receiving State should have power to make regulations concerning the importation of certain articles by the administrative and technical staff.

64. Mr. VALLAT (United Kingdom) cautioned the Conference against any hasty or ill-considered rejection of the work of the International Law Commission and the Committee of the Whole on a vital and integral part of the Conference's task — to determine what immunities were necessary to enable diplomatic missions to fulfil their function. If the legal background of paragraph 2 were examined, ample precedent would be found in international law for the grant of privileges and immunities to the technical and administrative staff. The generally, if not universally, accepted practice was to grant technical and administrative staff the same immunities as to diplomats. If there were any doubt on the matter, the Conference should remove it. The International Law Commission had recognized in its commentaries that there was room for doubt and had therefore, after prolonged discussion, produced a text providing the necessary immunity.

65. Its reasons for doing so were worth considering. Briefly, it had taken the view that the function of the mission as a whole should be taken into consideration, rather than the work done by individuals; that many of the technical and administrative staff performed more important confidential tasks than some of the diplomatic staff; that an ambassador's secretary or an archivist was as likely to possess secret or confidential information as the diplomatic staff; and that it was difficult to distinguish between members within the administrative and technical category. The Commission's conclusion had been that staff of the category in question should be given " not only immunity from jurisdiction in respect of official acts performed in the course of their duties but, in principle, all the privileges and immunities granted to the diplomatic staff " — a conclusion that was particularly important in the light of the three-nation amendment. Both amendments would give rise to difficulties in application, and the resulting controversy would inevitably interrupt the mission's work.

66. The United Kingdom delegation fully agreed with the wise statements of Professor Ago and of the late Professor Scelle at the ninth session of the International Law Commission (409th meeting) and supported article 36, paragraph 2, as approved by the Committee of the Whole. The three-nation amendment was entirely unacceptable. The nineteen-nation amendment (although he sympathized with the representative of France because of his country's special cricumstances) was equally unacceptable, and indeed impracticable, for its provisions infringed the principle of inviolability. Moreover, the deletion of paragraph 2 would leave a serious gap in the convention, which would then provide for all categories of staff and members of a mission, as well as their families, except administrative and technical staff. In his opinion there was no proper safeguard in the paragraph of the preamble which stated that the

rules of customary international law should govern questions not expressly regulated in the convention. It was better to retain paragraph 2, protecting the life-blood of the mission, and leave the question of civil jurisdiction to be settled by waiver of immunity when necessary. That subject was dealt with in the draft resolution submitted by Israel (A/CONF.20/L.4/Rev.1).

67. Mr. AGO (Italy) said that all speakers were agreed on the importance and delicacy of the issue. The central point of discussion was a conflict of interest, not between States, but within States; for each wished to protect its interests both as sending and as receiving State; and each wished the law of the receiving State to be the rule and everything else, including privileges, the exception. He fully sympathized with the need of the sending State to ensure the best conditions for its missions, and therefore supported the views of the representative of Romania. He could declare that he maintained the opinion he had expressed as a member of the International Law Commission and to which the representative of the United Kingdom had referred. Nevertheless, he appealed to representatives not to forget that some countries were faced with special conditions: his own, for example, was host to a very important specialized agency of the United Nations. The representative of France had described what the situation in Paris would be if article 36 were applied without limitation; the situation in Rome would be similar.

68. The nineteen-nation amendment, of which Italy was a sponsor, was a compromise seeking to reconcile the two conflicting interests (the provision approved by the Committee of the Whole was not a compromise, for it protected only one side). It had been argued that the amendment did not provide the protection required by the principle *ne impediatur legatio*. In fact, however, it gave the administrative and technical staff of the mission the privileges and immunities specified in articles 27, 28, 30, 31, 32 and 33 — including (article 27) the privilege essential to inviolability, immunity from arrest. Moreover, the immunity covered not only the person but the home, papers and correspondence of the persons concerned. The discussion really centred on article 29, which provided immunity from jurisdiction in the receiving State: he and his co-sponsors could only agree to such immunity for technical and administrative personnel in respect of their official functions. He could see no reason why such persons should be immune from jurisdiction in the case, for example, of traffic offences: it would be invidious for them to escape penalties to which nationals of the receive State were subject. He could not agree with the suggestion that States which did not agree with the article could make reservations; for a convention with reservations would not be a satisfactory outcome of the Conference. As the representative of the United Kingdom had said, it was essential to resolve all controversial issues.

69. He appealed to representatives to show the same spirit of compromise as the sponsors of the amendment, and to approve a generally acceptable text, for otherwise the convention would be either incomplete or weakened by reservations.

70. The PRESIDENT drew attention to a correction to the French text of the nineteen-nation amendment: the words " et immunités " should appear between the word " privilèges " and the word " mentionnés " in the proposed paragraph 2.

The meeting rose at 1.20 p.m.

TENTH PLENARY MEETING

Thursday, 13 April 1961, at 3.20 p.m.

President: Mr. VERDROSS (Austria)
later: Mr. BOLLINI SHAW (Argentina)

Consideration of the question of diplomatic intercourse and immunities in accordance with resolution 1450 (XIV) adopted by the General Assembly on 7 December 1951 (item 10 of the agenda) *(continued)*

1. The PRESIDENT invited the Conference to continue its debate on the draft convention (A/CONF.20/L.2/Add.1).

ARTICLE 36 *(continued)*

2. The PRESIDENT said that, in addition to the amendments submitted at the previous meeting (para. 29), an amendment submitted by the United Kingdom (A/CONF.20/L.20) was before the Conference.

Paragraph 2

3. Mr. de ERICE y O'SHEA (Spain) said he had listened carefully to the comments made by the various delegations on the amendments to article 36, paragraph 2, and, in particular, on the nineteen-nation amendment (A/CONF.20/L.13), of which Spain was one of the sponsors. The object of the amendment was to restrict the privileges granted to the administrative and technical staff of the mission, without thereby hindering them in the performance of their duties. He believed that the proposed provision would facilitate the work of the mission. Obviously, the head of the mission should enjoy immunities; but it was difficult for him to supervise a staff which was tending to grow considerably. Thus a member of the staff might misuse his privileges and the head of the mission find it hard to intervene. Moreover, the population of the receiving State did not readily understand the need for such privileges. The convention would be submitted for ratification to parliaments, which might have some difficulty in understanding or accepting the scope of the privileges and immunities. Any government might, of course, enter reservations, and that was current practice; but it was not desirable that there should be too many reservations to the text adopted by the Conference.

4. If the Conference adopted neither of the two amendments (A/CONF.20/L.9/Rev.1 and L.13) nor paragraph 2, the established rules of customary international