Document:-

A/CN.4/SR.1019

Summary record of the 1019th meeting

Topic:

Representation of States in their relations with international organizations

Extract from the Yearbook of the International Law Commission:-

1969, **vol. I**

paragraph 1 (*d*) he would urge that the Commission follow its normal practice of including in the commentary an adequate summary of the present discussion of the text proposed by the Drafting Committee.

52. Mr. ELIAS said that while he agreed with Mr. Kearney on the problem of enforcing the system of compulsory insurance, he did not think an analogy could be drawn between sub-paragraphs (*c*) and (*d*) of paragraph 1. Sub-paragraph (*c*) dealt with the well-known distinction in international law between the acts performed by a diplomatic agent in the exercise of his normal functions and those performed by a diplomatic agent while engaged in trade or in a private professional activity. In sub-paragraph (*d*), on the other hand, it was proposed to draw a distinction between driving a vehicle in the course of official functions and driving outside those functions. It would be extremely difficult to determine, for example, whether driving by a diplomatic agent to visit a colleague should be considered as part of his official functions. For those reasons, he still believed that the best course was to drop sub-paragraph (*d*) altogether.

53. Mr. RAMANGASOAVINA said the Commission must find a middle course between two imperative needs: to ensure that the provisions it adopted did not indirectly permit abuse of privileges and immunities to go unpunished, and to ensure that the victims of accidents were protected. An attempt had been made in paragraph 1 (*d*), as in the preceding articles, to strike a balance by distinguishing between official functions and non-official activities.

54. The compulsory insurance solution would cause serious problems, for in many countries, including Switzerland, insurance companies paid claims only on the strength of a judgement by a competent court. To obtain a judgement when a diplomat was involved, either he had to be asked to waive his immunity, which he was not always willing to do, or the sending State had to be asked to withdraw his immunity, which it was not always willing to do either, or proceedings had to be instituted in the sending State, making use of the *exequatur* which was a very complicated procedure. Moreover, the competence of the court of the sending State might be contested by virtue of the rule *locus regit actum*. Public opinion was against immunity from jurisdiction because so many victims of accidents received no compensation.

55. He was therefore in favour of retaining paragraph 1 (*d*) provisionally to see how Governments reacted. A provision of that kind was already to be found in the draft on special missions and in the Vienna Convention on Consular Relations and its absence from the Vienna Convention on Diplomatic Relations was regrettable.

56. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said he was in favour of retaining paragraph 1 (*d*) for the reasons given by several members of the Commission.

The meeting rose at 1.5 p.m.

1019th MEETING

Friday, 11 July 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor.

Relations between States and international organizations

(A/CN.4/218 and Add.1)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

ARTICLE 31 (Immunity from jurisdiction) *(continued)* [1]

1. The CHAIRMAN invited the Commission to continue consideration of article 31 as proposed by the Drafting Committee.

2. Mr. USTOR said that article 31 represented the condification of existing law, in that it provided for complete immunity from criminal and civil jurisdiction.

3. Article 33 (A/CN.4/218), however, added a very important safeguard, for under its provisions, States would undertake to waive immunity in respect of civil claims in the host State "when this can be done without impeding the performance of the functions of the permanent mission". Furthermore, the host State could always impose the requirement of compulsory insurance and the persons enjoying privileges and immunities would have to comply with that requirement by virtue of article 44 (A/CN.4/218/Add.1), which obliged them to respect the laws and regulations of the host State. Those two articles together afforded sufficient protection to the private interests at stake, especially as many countries had a complete social security system which was available to the victims of traffic accidents.

4. It had been asserted that insurance companies might be unwilling to pay compensation to the victim of a traffic accident in the absence of judicial recognition of liability. In those countries where insurance was not in the hands of private enterprise, State-controlled insurance institutions performed a social function and took the necessary steps to ascertain whether a claim was well-founded. The supporters of paragraph 1 (*d*) of article 31 pursued the commendable aim of providing a solution to the problem which might arise in countries where private insurance companies did not perform that function.

[1] See previous meeting, para. 8.

5. Paragraph 1 (*d*), however, hardly provided a satisfactory solution of the problem and he would continue to oppose it for three reasons. First, it would be a serious departure from the principle of immunity, which was an important principle of international law, based on the sovereign equality of States and on the rule that municipal courts had no jurisdiction over a foreign State. It would be a very grave step to give up any part of the principle of immunity, which was an important element in the maintenance of good relations between States and was essential to the efficient performance of the functions of permanent missions. The sacrifice of such a principle would far outweigh any advantages that might be claimed for the proposed provision.

6. Secondly, an obvious weakness of paragraph 1 (*d*) was the qualification that the accident must have been caused by a vehicle "used outside the official functions of the person in question", a distinction virtually impossible to apply. Moreover, the gravity of an accident did not depend on the purpose for which the vehicle was being used.

7. Thirdly, a provision such as paragraph 1 (*d*) provided no guarantee that a court decision in favour of the victim of an accident would in fact be executed; the person enjoying immunity could be transferred to his own country.

8. The proposed provision in fact did no more than pay lip-service to the interests of victims of accidents, while inflicting great damage on the paramount interests of international relations. It would provide no real solution of the problem under discussion; that solution should be sought in other directions, such as co-operation on an international basis between the insurance companies and the social security institutions of the various countries.

9. Mr. ROSENNE said he maintained the view he had expressed at the previous meeting. He had since obtained, through the courtesy of the United Nations Office at Geneva, a copy of a publication by the Swiss Federal Political Department which showed that in 1963, international officials and members of permanent missions had been involved in 67 accidents out of a total of 9,370 in the Canton of Geneva, and in 1964 in 70 accidents out of 9,270. While one vehicle out of every nine in Geneva was involved in an accident each year, the proportion for vehicles belonging to international officials and members of permanent missions was only one in thirty. The relevant passage of that official publication concluded with the following words: "While this difference is largely attributable to the inclusion of motorcycles and motorised bicycles in the statistics, the fact remains that these figures clearly refute the opinion widely held in some quarters that diplomats are dangerous drivers".[2]

10. Mr. BARTOŠ said that under Yugoslav law, there were two kinds of insurance: social insurance and private insurance. Under the social insurance system the insured enjoyed complete autonomy: they were entitled to a share of the profits, in the form of improved benefits, but they also had to make good any deficit. Consequently, the social insurance system could not be required to insure anyone and everyone. The private insurance institutions enjoyed a similar autonomy; so much so that they had successfully contested, before the Federal Constitutional Court, a legislative decree obliging them to insure motorists on conditions other than those which they themselves had fixed. The result was that some persons were unable to obtain insurance if they wished to depart from the rules laid down by the Union of Insurance Institutions and even lost the right to hold a driving licence, which was conditional on having an insurance policy. In Yugoslavia there was thus no guarantee that a diplomat would be able to obtain insurance.

11. Mr. ALBÓNICO said he understood the reference to "criminal jurisdiction" in paragraph 1 in a broad sense: the immunity would cover such matters as fines for traffic offences.

12. With regard to the meaning of the expression "civil and administrative jurisdiction" in the same paragraph, he had been satisfied by the explanations given by Mr. Elias that civil jurisdiction should be taken to cover the jurisdiction of commercial courts.

13. The provisions of sub-paragraphs (*a*) and (*b*) of paragraph 1 embodied exceptions to immunity from jurisdiction which had been long established in international law. He had some doubts, however, about the provisions of sub-paragraph (*c*), which dealt with an action relating to "any professional or commercial activity" exercised in the host State. Article 45, on professional activity (A/CN.4/218/Add.1), specified that "The permanent representative and the members of the diplomatic staff of the permanent mission shall not practise for personal profit any professional or commercial activity in the host State". It was therefore difficult to see in what circumstances the provisions of sub-paragraph (*c*) could apply.

14. With regard to sub-paragraph (*d*), he maintained his view that it did not provide a satisfactory balance between the two interests involved. It should be dropped, on the understanding that the case it contemplated would be one of those covered by article 33; the sending State would then be required either to waive the immunity or to "use its best endeavours to bring about a just settlement of the claims". The position should be made clear in the commentary on article 33.

15. The CHAIRMAN, speaking as a member of the Commission, said he was against retaining paragraph 1 (*d*). It had been proposed that the wording should be amended, but it reproduced article 31, paragraph 1 (*d*) of the draft on special missions word for word, and the Commission would be inconsistent if it altered a formulation which it had itself adopted two years before.[3]

16. With regard to the substance, the provision would not help to protect citizens of the host State, owing to

[2] Département Politique Fédéral, Berne, Septembre 1966, " Les organisations internationales et le Canton de Genève : une analyse de leur interdépendance ", pp. 54 and 55.

[3] See *Yearbook of the International Law Commission, 1967*, vol. II, p. 362.

the difficulty of determining, in the event of an accident, whether the agent involved was or was not performing official functions. A further difficulty arose from the fact that it was not for the courts to decide that issue. Where bilateral relations existed, it was for the host State to decide, but the same did not apply to relations with an international organization; the organization alone was competent to say whether a member of a mission accredited to it was or was not engaged in performing his official functions.

17. It was true the Commission had already proposed an exactly similar text in its draft on special missions, but he very much doubted whether the Sixth Committee would endorse it in the case of permanent missions. To include it in the draft might mean impairing the privileges and immunities not only of members of permanent missions, but also of ordinary diplomats, whom the general public were probably inclined to assimilate to members of permanent missions.

18. He agreed with Mr. Ustor and Mr. Albónico that article 33 would provide a better means of solving the problem; the provision that if the sending State did not waive immunity it must "use its best endeavours to bring about a just settlement of the claims" could be strengthened. Such a provision would make it quite possible to secure compensation for nationals of the host State who were victims of an accident. In Moscow, settlements of that sort were generally reached without difficulty between the Ministry of Foreign Affairs and the embassy to which the diplomatic agent belonged.

19. He was therefore against retaining paragraph 1 (*d*) and in favour of adding to the commentary an explanation of the position regarding traffic accidents.

20. Mr. KEARNEY, referring to Mr. Albónico's remarks on paragraph 1 (*c*), said that it had probably been included by the Special Rapporteur to cover the case in which the host State granted permission to exercise a professional activity. Clearly, in that case taxes would be due. Paragraph (2) of the Commission's commentary on article 49 of the draft on special missions [4] stated that: "Some Governments proposed the addition of a clause providing that the receiving State may permit persons referred to in article 49 of the draft to practise a professional or commercial activity on its territory. The Commission took the view that the right of the receiving State to grant such permission is self-evident."

21. With regard to paragraph 1 (*d*), he believed that its wording was capable of improvement, but he agreed with the Chairman that, since it had been accepted for special missions, it was undesirable to alter it at the present stage. He would urge that the provision be retained, with a view to obtaining comments by Governments to show whether they approved of its inclusion or not.

22. He had been struck by the Chairman's remarks regarding the ease with which claims arising out of traffic accidents involving diplomats were settled in Moscow. Those remarks well illustrated the difference between diplomats covered by the 1961 Vienna Convention on Diplomatic Relations [5] and members of permanent missions who would be covered by the present draft. In the case of diplomats, the problem was a bilateral one and the receiving State could always declare a diplomat *persona non grata* if the ambassador of his country failed to co-operate in reaching a satisfactory settlement. The host State of an international organization had no such remedy at hand and was therefore unable to obtain such results.

23. It had been suggested that article 33, on consideration of civil claims, would provide a solution of the problem with which paragraph 1 (*d*) of article 31 was intended to deal. For article 33 to do that, however, its provisions would have to be amended. They were at present worded merely as an expression of hope and they would need to be put in the form of a binding commitment for the sending State. The concluding words "shall use its best endeavours to bring about . . ." would have to read "shall bring about a just settlement of the claims".

24. The CHAIRMAN asked whether members agreed with Mr. Eustathiades that the term "civil jurisdiction" also covered commercial jurisdiction, and that a statement to that effect should be included in the commentary.[6]

25. Mr. BARTOŠ said that once the commentary had gone the text would not be explicit enough. In some countries the two jurisdictions differed completely in regard to the value of preparatory work.

26. Mr. CASTRÉN said it was true that the commentary would go, but the preparatory work could always be consulted in case of doubt.

27. Despite the arguments put forward by the supporters of paragraph 1 (*d*), he thought it would be better not to keep it, but simply to draw the attention of Governments, in the commentary, to the fact that the provision had given rise to a long discussion and that opinion had been very much divided.

28. He agreed with Mr. Kearney that it was desirable to strengthen the wording of article 33.

29. Mr. ELIAS said he noted that Mr. Albónico had been satisfied with his explanation that the term "civil jurisdiction" also covered commercial jurisdiction.

30. It remained for the Commission to decide whether it wished to retain paragraph 1 (*d*). A decision should be taken one way or the other, in order to direct the Drafting Committee. His own view was that the subparagraph should be dropped. The references that had been made to article 33 were very pertinent. If that article were amended as suggested by Mr. Kearney, it would be very surprising if paragraph 1 (*d*) of article 31 were retained also.

31. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said it was clear that opinions were very divided. As the Commission usually preferred a unanimous decision to a vote and as, in the present instance,

[4] *Ibid.*, p. 367.

[5] United Nations, *Treaty Series*, vol. 500, p. 96.

[6] See previous meeting, para. 6.

it did not have to decide on a final form of words, but simply to draw the attention of Governments to a question and submit a text for their consideration, the best course might perhaps be to keep sub-paragraph (*d*) of paragraph 1 in brackets in order to show plainly where it would be placed and how it would be worded, and then to explain the reasons for it in the commentary, where Governments could be asked whether they wished it to be retained or not.

32. Mr. BARTOŠ said he supported Mr. Castañeda's proposal, on the understanding that the Governments would be clearly asked in the commentary to state whether they considered that the notion of civil jurisdiction included commercial jurisdiction. The Special Rapporteur should also be asked to point out to Governments that special commercial jurisdiction had not been mentioned either in the earlier Conventions or in the present draft, because the Commission had taken the view that it was covered by civil jurisdiction. Incidentally, that was a further argument against adding a reference to separate commercial jurisdiction at the present stage, since it might give the impression that such jurisdiction was excluded from the earlier Conventions.

33. Mr. RAMANGASOAVINA said that administrative jurisdiction had been expressly mentioned because in some countries there was recourse to a special jurisdiction when the government was a party to a suit. Civil jurisdiction was a very general notion and if the Commission wished to specify everything it covered, it would not be enough to add a reference to commercial jurisdiction. The various courts which came under civil jurisdiction, such as commercial courts, social courts and labour courts, were more in the nature of a specialization of competence. As a general rule, the term "civil jurisdiction" was used in contradistinction to criminal jurisdiction.

34. Mr. ROSENNE said he agreed with the interpretation of the words "civil and administrative jurisdiction" given by the previous speaker.

35. With regard to paragraph 1 (*d*), he agreed that it would be unfortunate and unnecessary to divide the Commission by a vote at the present stage and he supported Mr. Castañeda's suggestion that the provision be left in brackets with an appropriate explanation in the commentary.

36. Mr. RUDA shared the view that it was desirable to draw the attention of Governments to the serious problem that the Commission had been discussing. That aim could be achieved either by the method suggested by Mr. Castañeda, or by putting the text of the proposed sub-paragraph (*d*) in the commentary, with the explanation that opinion in the Commission had been divided on the subject. To retain the provision in brackets in the article itself might give the impression that the Commission was inclined to favour its inclusion.

37. If the majority preferred the method suggested by Mr. Castañeda, however, he would not oppose it, provided it was made clear in the commentary that the Commission had not taken any decision in the matter. But whatever comments might be made by Governments, the Commission would remain free to take whatever decision it wished. The fact that the majority of comments were for or against a provision was not binding upon the Commission.

38. Mr. BARTOŠ said that formerly codes had made a general distinction only between civil procedure and criminal procedure, but for the past twenty years or so there had been a growing tendency to draw a finer distinction between courts according to their competence. In Switzerland, for instance, there was even a special court of final appeal for insurance cases, which was distinct from the federal court of final appeal. Other countries had set up special courts for commercial cases and even for housing cases. It was obviously impossible to make provision for all those details in the draft articles. It would be enough to specify in the commentary that the term "civil jurisdiction" was to be understood in the old private law sense, and that the distinction intended was between two broad classes of action, not between two kinds of court. The Special Rapporteur should be instructed to include that idea in the commentary.

39. Mr. ALBÓNICO said he noted that the Commission agreed that the expression "civil jurisdiction" should be interpreted broadly as covering the jurisdiction of, for example, commercial courts, insurance courts and labour courts. There was therefore no need to change the wording of article 31 on that point, it being understood that an explanation would be given in the commentary.

40. With regard to paragraph 1 (*c*), he was satisfied with the explanation given by Mr. Kearney, but would like to have it reproduced in the commentary to make it clear that the provision was intended to cover cases in which the host State granted permission for the exercise of a professional or commercial activity.

41. With regard to paragraph 1 (*d*), it had been generally agreed that the commentary should state that opinion in the Commission had been divided; some members wished to retain the paragraph, while others, like himself, would prefer to see it dropped, provided that it was made clear in the commentary on article 33, that that article covered the case.

42. The CHAIRMAN said it was agreed that the Special Rapporteur would explain in the commentary the difference between the jurisdictions referred to in the draft articles.

43. No drafting change to paragraph 1 (*d*) had been proposed, so he concluded that the Commission wished to retain it in the form proposed by the Drafting Committee.

44. In the light of the discussion, he suggested that sub-paragraph (*d*) be kept in brackets and that, in the commentary, the Special Rapporteur should draw the attention of Governments to the fact that the Commission had discussed that provision at length, but had been unable to reach any decision because opinions differed too widely.

It was so agreed.

Subject to that reservation, article 31 was adopted.

ARTICLE 32 (Waiver of immunity) [7]

45. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 32.

46. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text:

Article 32

Waiver of immunity

1. The immunity from jurisdiction of the permanent representative or members of the diplomatic staff of the permanent mission and persons enjoying immunity under article 39 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by the permanent representative, by a member of the diplomatic staff of the permanent mission or by a person enjoying immunity from jurisdiction under article 39 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

47. A number of minor drafting changes had been made at the request of members of the Commission. In paragraph 1 the words "permanent representatives" and "permanent missions" had been put in the singular. In paragraph 3 the words "of the" had been substituted for the words "of a" before "permanent mission".

48. The Drafting Committee had examined one important substantive matter, but that had not led to any change in the text. At the beginning of paragraph 1 it was stated that the sending State might waive the immunity from jurisdiction. It had been asked whether that immunity also applied to the obligation to give evidence as a witness. The Drafting Committee had thought it unnecessary to decide the point, since it was only a technical question of procedure. The Special Rapporteur had, however, mentioned to the Drafting Committee that it would be well to specify in the commentary on article 32 that paragraph 2 also applied to article 31, paragraph 2, which concerned giving evidence. The Drafting Committee had considered that it would be better to expand the commentary to explain that the immunity from jurisdiction mentioned in article 32 applied to all the immunities listed in article 31.

49. Several members of the Drafting Committee had asked whether it would not be better to state that point in the text of the article itself, but the majority had been against doing so. In any case, the difference between the two solutions was not very great: the legal consequence of not mentioning all the immunities in detail in article 32 could not be to exclude waiver of immunities other than immunity from jurisdiction in the strict sense.

50. The CHAIRMAN, speaking as a member of the Commission, said that article 32 of the Vienna Convention on Diplomatic Relations [8] was worded in the same way as article 32 of the Special Rapporteur's draft and did not specifically mention giving evidence as a witness. Any express statement in the present draft might lead to article 32 of the Convention on Diplomatic Relations being interpreted as making no provision for the possibility of waiving immunity from giving evidence, whereas that article had the same meaning as was given by the Special Rapporteur to article 32 of his draft.

51. The position was perfectly clear: a State could always waive immunity, including immunity from giving evidence. The latter point should therefore be mentioned only in the commentary.

52. Mr. KEARNEY said that in some legal systems the initiation of proceedings would itself constitute a waiver of immunity from having to testify, for example, in pre-trial examinations. In such cases, if a plaintiff refused to testify, the court would entertain a motion by the defence to quash the proceedings. Legal systems differed so widely in that respect, however, that he did not think the Commission could deal with the matter, either in the text of the article or in the commentary. Unless it was prepared to carry out a far-reaching study of the problem, the Commission should limit itself to a very general statement in the commentary.

53. Mr. ALBÓNICO noted that under paragraph 3 the initiation of proceedings by the permanent representative precluded him from invoking "immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim". He wondered whether that provision referred only to immunity from civil jurisdiction or also to immunity from criminal jurisdiction. If, for example, a counter-claim or counter-charge was advanced against a criminal action initiated by the permanent representative, would he be entitled to plead immunity from criminal jurisdiction?

54. Mr. EUSTATHIADES said that article 32 should be read together with article 31.

55. The points raised by Mr. Kearney and Mr. Albónico were extremely delicate. Even if they were elucidated in the course of the discussion, the Commission could go no further than embodying its conclusions in the commentary, since article 32 followed the analogous articles in the Vienna Conventions; the Chairman had pointed out the disadvantages of using different wording.

56. The question of giving evidence was simpler. The solution proposed by the Drafting Committee was the wisest one. It left aside the problem of possible differences in internal law regarding the sphere of immunity; but if immunity from giving evidence was regarded as an integral part of immunity from jurisdiction, the Drafting Committee's formulation solved the problem.

57. That solution had a further advantage. In some kinds of legal proceedings, the sending State might have something to say on the question whether a permanent representative or member of the diplomatic staff of a

[7] For previous discussion, see 996th meeting, para. 10.

[8] United Nations, *Treaty Series*, vol. 500, p. 112.

permanent mission could exercise his right to testify or to refuse to testify. Before giving evidence, the representative or member concerned might then wish to consult his government to find out whether it authorized him to do so or not. The solution proposed by the Drafting Committee covered all such contingencies.

58. Mr. ROSENNE said that article 32 stated the law concerning waiver of immunity as he understood it. The Commission should be extremely careful not to disturb an existing practice which had always worked satisfactorily in many different circumstances and in many different legal systems. In the commentary, in particular, the Commission should avoid creating possible theoretical difficulties involving what was sometimes called the "inter-temporal law". The Special Rapporteur's commentary was perfectly adequate and should be left as it was.

59. Mr. CASTRÉN said it would be better not to change a text which was in substance the same as that of the Vienna Convention on Diplomatic Relations. He agreed that caution should be exercised in the commentary.

60. The question of giving evidence should not arise, since article 31 was entitled "Immunity from jurisdiction". Even though the title was not decisive for the interpretation of the article, it could not fail to affect it.

61. The counter-claims mentioned in paragraph 3 undoubtedly related to civil cases. In any event, it would be better not to try to be more specific. The record of the discussion should suffice.

62. Mr. CASTAÑEDA (Chairman of the Drafting Committee) said that the Drafting Committee had not considered the question of counter-claims from the angle suggested by Mr. Albónico.

63. Speaking as a member of the Commission, he observed that article 32 reproduced the Vienna text. No categorical reply could be given to the question regarding immunity from criminal jurisdiction, for everything depended on the laws and regulations of each country. Counter-claims could be brought only in civil suits, but under some legal systems there could be a criminal element involved in a civil suit. That, however, was a special question which could not be regulated in a general text.

64. Mr. ELIAS, referring to Mr. Kearney's remarks, said it was often very difficult to induce members of a diplomatic mission to testify in the courts of the host State, even when it was in their own interest to do so. In his own country, for example, an embassy whose premises had been burgled had been unwilling to waive its immunity from jurisdiction to the extent of testifying against the criminals in the local court and it had been suggested that the court should send a commission to the embassy to take its evidence—a procedure which was not permitted by the local law in such matters.

65. With regard to the question raised by Mr. Albónico, it seemed to him that, in Anglo-Saxon legal systems at least, a counter-claim of the kind referred to in paragraph 3 could be brought only in civil cases, since it was inconceivable that the defendant in a criminal case could file a counter-claim against the State.

66. Mr. USTOR said the Commission was in general agreement that it would not be desirable to change the wording of article 32, since it was based on the corresponding article of the Vienna Convention on Diplomatic Relations and any change in it might have repercussions on the interpretation of that Convention.

67. With regard to the commentary, he thought that the Special Rapporteur should be free to decide whether or not he wished to include any of the suggestions made in the Commission and in the Drafting Committee, some of which raised certain difficulties concerning the interpretation of the Vienna Convention.

68. As to the point raised by Mr. Elias, a waiver of immunity from jurisdiction, including immunity from having to testify in the courts of the host State, must always be express. A sending State might waive such immunity to the extent that it would permit evidence to be given in the house or office of the permanent mission, and the court would then have to decide whether it would accept such a waiver.

69. On the point made by Mr. Kearney, he agreed that the initiation of proceedings by the permanent representative amounted to submission to the jurisdiction of the courts of the host State. It would be for the sending State, therefore, to decide whether it wished to permit its permanent representative to initiate proceedings, in the full knowledge that such an action would automatically involve a waiver of immunity in respect of any counter-claim.

70. Mr. ALBÓNICO said it was clear that article 31 dealt with immunity from proceedings against the members of a permanent mission. But it was equally clear that as soon as a member himself initiated proceedings against a national of the host State, he was submitting himself to the jurisdiction of its courts and could not invoke immunity from any counter-claim.

71. Nevertheless, he still had some doubts about the exact scope of article 32, paragraph 3, for in the Latin-American legal system there were actions, such as those for slander and libel, against which the only possible defence was a counter-claim or counter-charge of a criminal nature. In such cases he was not sure to what extent a member of a permanent mission would enjoy immunity.

72. Immunity from having to give evidence was clearly established in article 31, paragraph 2, and any waiver of that immunity under article 32 would certainly have to be express.

73. Mr. RAMANGASOAVINA said he was not in favour of going into too much detail, since that might alter the meaning of the text or raise fresh problems.

74. On the question of giving evidence, when the sending State waived its representative's immunity, the waiver also applied to the obligation to give evidence. In any case, since the waiver was express, the sending State could always specify its scope.

75. Paragraph 3 raised a question of procedure. The French term "*demande reconventionnelle*", like the

English "counter-claim", could only apply to a civil suit; it was a claim similar to that of the original plaintiff and was in some sort its counterpart.

76. In criminal procedure, on the other hand, it was hard to see how a diplomat bringing a claim for assault and battery, for example, could avoid the issue if his opponent maintained that the assault had been mutual and offered to prove it. Diplomats should be cautious about initiating proceedings. Before waiving immunity from jurisdiction, a sending State should therefore consider whether the proceedings might not injure its reputation.

77. The CHAIRMAN, speaking as a member of the Commission, stressed that immunity from criminal jurisdiction was an absolute rule firmly established in international law by custom, by several centuries of practice and by a number of conventions in force, including the Vienna Convention on Diplomatic Relations. That rule was reproduced in article 31, paragraph 1 of the present draft. No other interpretation was possible, even in connexion with article 32, paragraph 3. To initiate proceedings meant to initiate civil proceedings, and a counter-claim, likewise, could only be a civil claim. The Commission should not depart from the principle that immunity from criminal jurisdiction was absolute.

78. Speaking as Chairman, he noted that no member of the Commission had proposed any amendment to the text of article 32. He therefore suggested that the Commission adopt the article, on the understanding that the Special Rapporteur would reconsider the commentary in the light of the discussion and that the Commission would revert to the commentary in due course.

Subject to that reservation, article 32 was adopted.

The meeting rose at 1.5 p.m.

1020th MEETING

Monday, 14 July 1969, at 3.20 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tammes, Mr. Ustor, Mr. Yasseen.

Other business

[Item 8 of the agenda]

1. The CHAIRMAN invited Mr. Rosenne to address the Commission on a matter coming under item 8 of the agenda.

2. Mr. ROSENNE said that, in paragraph 69 of the Commission's report for 1965, reference was made to an examination which the Commission had undertaken of certain suggestions regarding the presentation of its records in the *Yearbooks*.[1] He believed that all members would recognize the very marked improvements which had been made in the Commission's records since then and that it would be right that the Commission's appreciation of the skill and devotion shown by all those who collaborated in producing those records—the precis-writers, revisers, translators, editors and responsible editor-in-chief—should be appropriately noted. The Commission might also take the opportunity to commend the responsible services of the Secretariat for the excellence of the presentation of the official records of the first session of the United Nations Conference on the Law of Treaties [2] which, he noted, followed the same pattern as had been evolved for the Commission's *Yearbook*.

3. In paragraph 64 (*a*) of the Commission's report for 1965, it was implied that volume II of the *Yearbook* was no less important than volume I. He mentioned that because, although volume I was now being issued fairly promptly, there seemed to be excessive delays in the production of volume II. and he hoped that series would not be allowed to fall into arrears.

4. In view of the changes which were continually taking place in the presentation of United Nations documents and records, it was important to remember that the General Assembly, in its resolution 987 (X) of 3 December 1955, had placed on the Commission certain responsibilities regarding the editing of the *Yearbook*—responsibilities which the Commission had exercised from time to time, notably in 1956 and in 1965. It could therefore be assumed that the Secretariat would not introduce changes in the presentation of the material in either volume of the *Yearbook* without first bringing the matter before the Commission, as had been done in the past.

5. The CHAIRMAN said that the Commission was satisfied with the presentation of its *Yearbooks;* the editors should therefore make no changes.

Relations between States and international organizations

(A/CN.4/218)

[Item 1 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

ARTICLE 33 (Settlement of civil claims) [3]

6. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Drafting Committee's text for article 33.

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[1] See *Yearbook of the International Law Commission, 1965*, vol. II, p. 195.

[2] *United Nations Conference on the Law of Treaties, First Session, Official Record.*

[3] For previous discussion, see 996th meeting, para. 17.