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Summary record of the 1095th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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1095th MEETING

Friday, 7 May 1971, at 10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1-3; A/CN.4/L.162/Rev.1)

[Item 1 of the agenda]

(continued)

ARTICLE 28 (Freedom of movement) (*resumed from the previous meeting*)

1. The CHAIRMAN said that before the Commission continued consideration of the Special Rapporteur's sixth report (A/CN.4/241/Add.3), Mr. Kearney wished to reply to a suggestion made by Mr. Ushakov in connexion with article 28.[1]

2. Mr. KEARNEY said that at the previous meeting Mr. Ushakov had suggested that if he (Mr. Kearney) was concerned about the problem of abuse of the rights and privileges proposed under the draft articles, he should submit a text or propose a definite solution.

3. He agreed that that was desirable. Indeed he thought that a major part of the solution to that problem had already been suggested in the observations of the United Nations Secretariat on article 45, on respect for the laws and regulations of the host State (A/CN.4/239, section D.1.II) and he would propose at the appropriate time that article 45 be amended to include the pertinent clause of the United Nations Headquarters agreement relating to the abuse of privileges of residence.[2]

4. A related problem was that of the settlement of disputes between the sending State, the host State and the organization, and in that connexion several governments had suggested that article 50 should be strengthened. He would also submit a proposal to that effect at the appropriate time.[3]

ARTICLE 29

5. The CHAIRMAN invited the Special Rapporteur to introduce article 29.

6.

Article 29

Freedom of communication

1. The host State shall permit and protect free communication on the part of the permanent mission for all official purposes. In communicating with the Government of the sending State, its diplomatic missions, its permanent missions, its consular posts and its special missions, wherever situated, the permanent mission may employ all appropriate means, including couriers and messages in code or cipher. However, the permanent mission may install and use a wireless transmitter only with the consent of the host State.

2. The official correspondence of the permanent mission shall be inviolable. Official correspondence means all correspondence relating to the permanent mission and its functions.

3. The bag of the permanent mission shall not be opened or detained.

4. The packages constituting the bag of the permanent mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the permanent mission.

5. The courier of the permanent mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the permanent mission may designate couriers *ad hoc* of the permanent mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the permanent mission's bag in his charge.

7. The bag of the permanent mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a courier of the permanent mission. The permanent mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

7. Mr. EL-ERIAN (Special Rapporteur) said that the observations of governments, of the secretariat of the International Atomic Energy Agency and of the United Nations Secretariat were summarized in his report (A/CN.4/241/Add.3). One government favoured the inclusion of a provision on the lines of article 28, paragraph 3 of the Convention on Special Missions,[4] but he did not think there was a true analogy. He proposed that the article be retained in its present form.

8. The CHAIRMAN suggested that article 29 be referred to the Drafting Committee.

It was so agreed.[5]

ARTICLES 30 and 31

9. The CHAIRMAN invited the Special Rapporteur to introduce articles 30 and 31 together.

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[1] See previous meeting, para. 94.

[2] Section 13 (*b*): United Nations, *Treaty Series*, vol. 11, p. 22.

[3] For resumption of the discussion see 1113th meeting, para. 20.

[4] See General Assembly resolution 2530 (XXIV), Annex.

[5] For resumption of the discussion see 1113th meeting, para. 22.

10.

Article 30

Personal inviolability

The persons of the permanent representative and of the members of the diplomatic staff of the permanent mission shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

Article 31

Inviolability of residence and property

1. The private residence of the permanent representative and of the members of the diplomatic staff of the permanent mission shall enjoy the same inviolability and protection as the premises of the permanent mission.

2. Their papers, correspondence and, except as provided in paragraph 3 of article 32, their property, shall likewise enjoy inviolability.

11. Mr. EL-ERIAN (Special Rapporteur) said that he had found no justification for making any changes either in article 30 or in article 31.

12. The CHAIRMAN suggested that articles 30 and 31 be referred to the Drafting Committee.

It was so agreed.[6]

ARTICLES 32, 33 and 34

13. The CHAIRMAN invited the Special Rapporteur to introduce articles 32, 33 and 34 together.

14.

Article 32

Immunity from jurisdiction

1. The permanent representative and the members of the diplomatic staff of the permanent mission shall enjoy immunity from the criminal jurisdiction of the host State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(*a*) a real action relating to private immovable property situated in the territory of the host State unless the person in question holds it on behalf of the sending State for the purposes of the permanent mission;

(*b*) an action relating to succession in which the person in question is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(*c*) an action relating to any professional or commercial activity exercised by the person in question in the host State outside his official functions;

(*d*) an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person in question.

2. The permanent representative and the members of the diplomatic staff of the permanent mission are not obliged to give evidence as witnesses.

3. No measures of execution may be taken in respect of the permanent representative or a member of the diplomatic staff of the permanent mission except in cases coming under subparagraphs (*a*), (*b*) [and] (*c*) [and (*d*)] of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of the permanent representative or of a member of the diplomatic staff of the permanent mission from the jurisdiction of the host State does not exempt him from the jurisdiction of the sending State.

Article 33

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 40 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 40 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 judgement, for which a separate waiver shall be necessary.

Article 34

Settlement of civil claims

The sending State shall waive the immunity of any of the persons mentioned in paragraph 1 of article 33 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. If the sending State does not waive immunity, it shall use its best endeavours to bring about a just settlement of such claims.

15. Mr. EL-ERIAN (Special Rapporteur) said that the most controversial provision had been article 32, paragraph 1 (*d*), which had therefore been left between square brackets. During the debate in the Sixth Committee, a number of representatives had supported that provision as a means of protecting the victims of motor accidents, and others had considered that the exception it provided for should extend to accidents caused by a vehicle used in the performance of official functions. Still others had considered that provisions should be adopted requiring representatives to international organizations to be insured against liability for accidents caused by vehicles they used.

16. In some of the written comments of governments, exception had been taken to the expression "outside the official functions of the person in question". He himself had concluded, however, that it would be appropriate to include the provision contained in paragraph 1 (*d*).

17. Mr. TAMMES said that the views of governments on article 32, paragraph 1 (*d*) seemed to be just as divided as those of the Commission had been at its twenty-first session.[7]

[6] For resumption of the discussion see 1113th meeting, paras. 27 and 31.

[7] See *Yearbook of the International Law Commission, 1969*, vol. I, p. 138 *et seq.*

18. Among the governments in favour of including that provision was Switzerland, one of the host States to whose views particular attention had been paid during the discussion. Another important host State, the United States of America, preferred a formulation such as that of article 43, paragraph 2 (*b*) of the Vienna Convention on Consular Relations,[8] which provided that immunity would not apply in respect of a civil action "by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft".

19. Some other governments less directly interested had taken the same view—not only the Netherlands, but also the United Kingdom, Japan, Finland and Sweden—while at the 1961 Vienna Conference a number of governments had advocated the inclusion of a provision such as article 32, paragraph 1 (*d*), in the Vienna Convention on Diplomatic Relations.

20. Many of the smaller countries now thought that the problems caused by immunities could be much greater for the host State of a permanent mission than for the receiving State of a diplomatic mission. He had been particularly struck by the Swedish Government's comment on article 32 that "There is undoubtedly a growing tendency, based on public opinion, to limit the immunity in the case of traffic accidents" and that "an element of progressive development" should be incorporated in article 32 (A/CN.4/238/Add.1, section B.7). He had seen the same reaction by public opinion in his own country where, in a case involving a Netherlands diplomat who had been involved in a road accident outside his official functions, the general view expressed had been that the rules governing diplomatic immunity in such cases were completely obsolete.

21. It was true that paragraph 1 (*d*) might give rise to the problem of determining whether a vehicle was used "outside the official functions", but a similar problem might arise in connexion with article 34 as to whether or not the sending State could waive immunity in respect of a civil claim without impeding the performance of the functions of the permanent mission.

22. The different views had been analysed by the Special Rapporteur. He himself was in favour of including a provision on the lines of article 32 paragraph 1 (*d*).

23. Mr. ROSENNE said that his Government, in its comments on article 76 (A/CN.4/240, section B.3) had suggested that permanent observer missions and their members should be required to carry third party insurance policies to cover damage or injury that might arise from the use of vehicles by them in the receiving State. That comment also applied to articles 45 and 112, and was offered as a contribution to the solution of the problem dealt with in articles 32, paragraph 1 (*d*), and 100, paragraph 2 (*d*) (alternative A).

24. The importance of public opinion on the question of immunity should not be exaggerated, since it was mainly an emotional reaction; the important thing was that there should be some satisfactory solution to the problem of damages after an accident. He was not enamoured of article 32, paragraph 1 (*d*), but he would keep an open mind until the Drafting Committee had taken a closer look at it. He did not think, however, that the authorities of the host State, including the courts, which frequently sat with a lay jury, should be in a position to decide whether a vehicle had or had not been used outside the official functions of the person concerned.

25. Mr. USHAKOV said that paragraph 1 (*d*) of article 32 had no more place in the draft articles than in the Vienna Convention on Diplomatic Relations. In practice, questions of damages arising out of accidents caused by diplomatic agents, whether in the performance of or outside their official functions, were settled through the diplomatic channel. The same practice should be followed in the case of permanent missions.

26. Mr. ALBÓNICO said that paragraph 1 of article 32 should include a reference to commercial as well as to civil and administrative jurisdiction, because there were often special courts to deal with commercial cases.

27. In sub-paragraph (*a*), he proposed that in the Spanish version the word "*radicados*" be replaced by the word "*situados*". Sub-paragraph (*b*) called for no comment. He had doubts about the inclusion of sub-paragraph (*c*), since professional or commercial activity on the part of a member of a permanent mission would be quite improper and contrary to the provisions of article 46. He was in favour of retaining sub-paragraph (*d*) for the reasons given by the governments of the Netherlands, Japan and Sweden (A/CN.4/238, section B.3 and 7; A/CN.4/239/Add.2, section B.5).

28. He had no comment to make on paragraph 2. With regard to paragraph 3, he proposed that in the Spanish version the words "*medida de ejecución*" be replaced by the words "*medida coercitiva*".

29. As to paragraph 4, he considered that the sending State would still retain jurisdiction over the members of its permanent mission, even in the absence of that exception.

30. Mr. KEARNEY said that the suggestion that the Commission adopt the formula used in article 43, paragraph 2 (*b*) of the Vienna Convention on Consular Relations had the advantage that it would eliminate any dispute about whether the vehicle had been used outside official functions. The difficulty was that many governments would consider that to eliminate the functional test was going too far. The question whether a vehicle had been used outside official functions was a type of question that was decided under internal law with a fair degree of regularity and in accordance with well-established rules.

31. He would not say, as Mr. Rosenne had suggested, that the emotional factor of public opinion was irrelevant, since it was a fact that in cities where there were permanent missions there was considerable dissatisfaction with the driving of motor vehicles bearing diplomatic

[8] United Nations, *Treaty Series*, vol. 596, p. 298.

plates. As Mr. Tammes had pointed out, that dissatisfaction did influence the attitude of governments, since it was their own citizens who were most concerned.

32. He did not think that the problem could be solved completely by resorting to compulsory insurance, since insurance coverage was subject to continual inflation and insurance companies were apt to delay the settlement of claims or to force the claimant into expensive litigation. As a compromise solution, therefore, he was prepared to support article 32, paragraph 1 (*d*).

33. Mr. USTOR said he did not consider the solution proposed in article 32, paragraph 1 (*d*) either desirable or satisfactory, because its effect would be to subject many members of permanent missions to the jurisdiction of local courts. Nor did it offer a satisfactory solution from the point of view of the person who sustained damage or injury, since it might lead to prolonged litigation. Moreover, the diplomat in question might be transferred to another country, in which case a judgement against him could no longer be enforced.

34. The best solution in his opinion, was the system of compulsory insurance, which in his own country was operated as a State enterprise. That system, as Mr. Kearney had pointed out, did not provide a complete solution, but if the rules governing it were properly drawn up, it was the best possible solution in the circumstances and he hoped that some reference would be made to it in the commentary. For those reasons, he could not support article 32, paragraph 1 (*d*).

35. Mr. ROSENNE said that he endorsed Mr. Ustor's remarks about the difficulty of enforcing civil judgements when a diplomatic representative was transferred or recalled to his own country. A very pertinent example of that was to be found in the decisions of the Jerusalem District Court of 10 March and 13 July 1953 in the case of *Heirs of Shababo* v. *Heilen and others.*[9]

36. He had not meant to say that the reaction of public opinion should be ignored altogether, but much of the dissatisfaction of the citizens of New York and Geneva was based on the incorrect popular assumption that immunity meant impunity. It would surely be in the service of the progressive development of international law if the Commission could disabuse the public of that mistaken idea. It was important to minimize as far as possible any interference with, or unnecessary embarrassment to, the members of permanent missions, in order not to impair the institutional basis of diplomatic relations.

37. Mr. REUTER said he agreed with Mr. Ustor that the only correct solution, imperfect though it might be, was to establish a system of compulsory insurance. But it was not enough to express pious hopes, for the present situation was frankly scandalous. A financial privilege which had to be paid for by the victims of that type of accident was inadmissible.

38. In some countries, the court which tried the case and the law applied were different according to whether the accident occurred in the performance of official functions or not. Although several countries had put an end to such distinctions, the situation was far from satisfactory at the international level, so that paragraph 1 (*d*) had its drawbacks in the absence of an international tribunal to interpret it. There was, however, some jurisprudence of the Court of Justice of the European Community on the official character of the functions of international officials.

39. Since no text had been submitted to the Commission stipulating that such immunity from jurisdiction could be made subject to compulsory insurance cover, he would support paragraph 1 (*d*) in the hope that it would induce States to take adequate measures.

40. Mr. CASTRÉN said he had no comments to make on articles 33 and 34. With regard to article 32, paragraph 1 (*d*), which the Commission had already debated at length, he repeated that he found that provision useful and reasonable. The obligation to take out insurance could be evaded in certain cases by using provisional registration plates and counting on less rigorous inspection of diplomatic vehicles.

41. Mr. ALCÍVAR said the solution proposed by Mr. Ustor, though not perfect, seemed at any rate to be the most acceptable. Where compulsory insurance was operated as a State enterprise, as in Mr. Ustor's country, the insurer could not avoid the payment of claims, but unfortunately that was not the case in all countries. So in view of the lack of uniformity in insurance matters, he hoped the Commission might find some formula which would reconcile the two solutions proposed.

42. Mr. BARTOŠ said he agreed with Mr. Ustor and Mr. Reuter. There were, however, a number of considerations which militated against the establishment of an effective system of compulsory insurance on a general international basis. First, the question arose whether the sending State should be required to give its *exequatur* to foreign judgements pronounced against its missions or representatives in each case, even if there was provision for compulsory insurance, and to consider in each case whether a question of private law of the host State or a question of public or private international law was involved. Secondly, some insurance companies, defending their own interests, sometimes managed to evade their obligation to pay the sum due under the insurance policy. Thirdly, not all companies were willing to participate in that type of "compulsory" insurance and it would be difficult to compel them to do so. Furthermore, the amount of the insurance could be restricted in some countries, either by a maximum amount payable, or by a franchise, or by obstacles to the transfer of foreign exchange.

43. If the Commission wished to provide for a system of compulsory insurance, it should bear those points in mind and try to draw up genuinely effective rules. Up to the present, most governments had adopted varied attitudes to the question. Some systematically defended their nationals even when they were in the wrong, while others compelled them always to meet their obligations.

[9] Sir H. Lauterpacht, ed., *International Law Reports, 1953* (London, Butterworth and Co., Ltd., 1957), pp. 391 and 400.

But in all cases the need to take out insurance would provide a uniform solution and would induce many drivers to be more careful.

44. Mr. AGO said that it was becoming more and more difficult to uphold immunity from civil and administrative jurisdiction in cases of that kind, for public opinion and the courts had become alarmed at the injustices to which such immunity could lead. He hoped the Drafting Committee would stipulate that, if the person concerned had not taken out an insurance policy guaranteeing automatic and full compensation, his immunity from jurisdiction would, exceptionally, be forfeit.

45. Mr. ELIAS proposed that the Commission should retain article 32, paragraph 1 (*d*) in its present form until the Drafting Committee had considered it.

46. Mr. Ustor had suggested what might seem an ideal solution, but in view of the differences in legal systems throughout the world, he had some doubts about it. In the United Kingdom, for example, and in Commonwealth law generally, there was the practice of the third-party procedure. In the case of *Dickinson* v. *Del Solar*,[10] a Bolivian ambassador had seriously injured a British subject, who had brought a civil action not only against the ambassador, but also against the latter's insurance company. The ambassador had wished to waive his diplomatic immunity, but the insurance company, in defending the case against itself, had invoked that immunity; it had thus been the insurance company which had become the real litigant. Insurance companies, after all, were better known for their readiness to receive premiums than for their willingness to settle claims.

47. The Commission should therefore retain article 32, paragraph 1 (*d*), and include a strong recommendation in its commentary that the General Assembly should consider, as part of the progressive development of international law, some better solution for the future.

48. Mr. RAMANGASOAVINA said that, although immunity from criminal jurisdiction was generally considered to be justified, immunity from civil jurisdiction provoked strong reactions from public opinion. The ideal solution would be to impose compulsory insurance, but that solution depended on the law of States, which was far from uniform on the subject; and the practice of insurance companies also varied. Moreover, even if insurance were made compulsory, it would be difficult to keep a check on all the vehicles which would be subject to the system. For although it was easy to check vehicles at the frontier, it was not so easy once they were inside the country.

49. He agreed that paragraph 1 (*d*) be retained, but he hoped that the Drafting Committee would so word it as to provide better guarantees for the victims of accidents.

50. Mr. YASSEEN said that, in his view, the Commission could not go farther than it had in paragraph 1 (*d*) of article 32. In reality, the problems which the Commission was trying to solve were hardly likely to arise, because most international organizations had their headquarters in European countries where the insurance in question was compulsory. Consequently, the discussion only concerned cases in which the relevant law was repealed or international organizations were established in countries where third party insurance for motor vehicles was not required. To cover the latter case, the Commission could simply point out that it would be advisable for any country which became host to an international organization to make such insurance compulsory.

51. Mr. USTOR said that the substance of article 34 was taken from resolution II adopted on 14 April 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities.[11]

52. In its draft on special missions the Commission had included, as article 42,[12] a provision similar to article 34 of the present draft. After considerable discussion in the Sixth Committee, however, the General Assembly had adopted the same solution for special missions as the 1961 Conference had adopted for diplomatic missions: no article on the settlement of civil claims had been included in the Convention on Special Missions, and the General Assembly had adopted resolution 2531 (XXIV), which was similar to resolution II of the 1961 Conference.

53. In the present instance, he was inclined to favour the same approach, in order to keep the draft on permanent missions in harmony with the 1961 Vienna Convention on Diplomatic Relations and the 1969 Convention on Special Missions.

54. Mr. BARTOŠ said he was in favour of a solution which would protect, in an equitable manner, both the interests of the permanent mission and those of the victims of accidents caused by vehicles of the mission. It was necessary to prevent the abuses which could sometimes arise, either as the result of immunity from jurisdiction or as the result of false claims by unscrupulous victims, who very often demanded excessive compensation in the belief that the government of the sending State or the mission's insurance company would pay the whole amount claimed in order to avoid a public scandal. Hence, a rule should be drafted guaranteeing that victims would be compensated by the insurance company under the terms of a compulsory insurance, and that the amount of the compensation would really correspond to the damage actually caused.

55. Mr. YASSEEN said that as the Vienna Conference on Diplomatic Intercourse and Immunities and the General Assembly, when examining the draft articles on special missions, had both preferred to deal with the settlement of civil claims in a recommendation, he did not see why the Commission should not follow the same course with the present draft articles.

56. Mr. ROSENNE said that it was not the Commis-

[10] [1930] 1 KB 376.

[11] United Nations, *Treaty Series*, vol. 500, pp. 218-220.

[12] See *Yearbook of the International Law Commission, 1967*, vol. II, p. 365.

sion's function to draft resolutions for the General Assembly. If it was thought that the point of substance under discussion deserved a draft article, either as codification of existing law or as progressive development, article 34 should be retained; it would then be for the General Assembly to take a decision.

57. Mr. EL-ERIAN (Special Rapporteur) said that the discussion on articles 32, 33 and 34 had revealed the same division of opinion among members of the Commission as at the twenty-first session in 1969.

58. A number of interesting suggestions had been made concerning both the text of article 32 and its commentary. They all required careful consideration and he would not comment on them individually.

59. There had been no comments on article 33 and he would take it that the Commission agreed with his conclusions on that article.

60. Article 34 had given rise to discussion, as in 1969, of the question whether it should be retained or replaced by a resolution.[13] He himself adhered to the view expressed in his sixth report and believed that article 34 should be retained in order to balance article 32, on immunity from jurisdiction.

61. The useful drafting suggestions that had been made should be referred to the Drafting Committee.

62. Mr. YASSEEN said he did not think that article 34 reflected positive international law. The Commission's work was not confined to formulating draft articles; it could also propose other solutions. Moreover, the draft articles were not final, and there was no reason why the conference of plenipotentiaries which would adopt the resultant convention should not decide, on the Commission's recommendation, to express the provisions of article 34 in a resolution.

63. Mr. KEARNEY said that the inclusion of a provision on the settlement of civil claims could be amply justified on general grounds of humanity, as had been pointed out during the discussion on article 28, on freedom of movement. He believed that a clause which, like article 34, attempted to promote the settlement of civil claims was in accord with all legal systems.

64. Mr. BARTOŠ, referring to the question of the extent of the Commission's competence in regard to codification of the rules of international law, said that there were two opinions: one held that the Commission must remain within the limits of existing law, the other that it should go farther, in order to find new solutions which would adapt international law to the needs of modern society and the international community. If the Commission went beyond the existing rules, it must at least respect present trends toward the establishment of greater justice in international relations. If it confined itself to codifying existing rules, it would have no alternative but to perpetuate injustices, since international society was imperfect. His own view was that in dealing with the subject under consideration it should try to make good the present gaps in international law.

65. One might approve or disapprove of the text proposed by the Special Rapporteur, but it must be admitted that he had tried to strike a fair balance between the existing contradictory trends. The only question was whether the present text would safeguard the sovereignty of States. It was clear from the discussions on the corresponding provisions in the Conventions on Diplomatic Relations, Consular Relations and Special Missions, and also from the writings and discussions on the present question, that immunity should be maintained except in cases where the interests of the State did not conflict with the legitimate interests of individuals.

66. Mr. EL-ERIAN (Special Rapporteur) said that the previous speaker had rightly stressed the need to take the demands of international life into consideration. He did not wish to take a position at present on the question whether the provision in article 34 constituted codification of existing law; but the Commission's task was not confined to codification: it included the progressive development of international law. Members of the Commission were jurists and, as such, social scientists; in formulating drafts of international legislation, they should bear in mind that there was widespread resentment at the abuses of immunity.

67. Mr. RAMANGASOAVINA said that he too believed that the Commission's task was to formulate rules in keeping with the facts of international life. In view of the real danger presented by the increasing number and higher performance of motor vehicles, it should draft a provision that would make it possible to avoid the abuses which might result from immunity from jurisdiction, and would be the counterpart of the special protection given to the means of transport of the permanent mission under article 25, paragraph 3.

68. To achieve that aim, it was necessary to go farther than the Special Rapporteur had done in the text he had proposed for article 34. Perhaps it could be stated in article 45 that the laws and regulations of the host State which the permanent mission was required to respect included those on compulsory insurance. That would be an innovation; but the progressive development of international law was part of the Commission's work.

69. Mr. YASSEEN said that it was States which were directly responsible for the progressive development of international law. Moreover, it was clear from the Commission's Statutes that in that respect more than in any other it was subordinate to the General Assembly. It was the General Assembly that had proposed in 1969 that the corresponding provisions of the Convention on Special Missions should be made into a resolution. There was no reason to take a different course in the case of the present draft articles.

70. The arguments he had advanced at the previous meeting concerning freedom of movement had not been based on purely humanitarian considerations, as Mr. Kearney had said, but on positive international law, since freedom of movement was a fundamental human right.

[13] Op. cit., *1969*, vol. I, p. 29, para. 18 *et seq.*

71. Mr. AGO said that he had no hard and fast opinion on article 34; but it was not so easy to transform into an article what in the case of two previous Conventions had become a recommendation. In the Vienna Convention on Diplomatic Relations[14] and the Convention on Special Missions,[15] States had given the option of waiving immunity, but, if the present provision on civil claims was included as an article, the option would become an obligation.

72. Some said that that was an example of the progressive development of international law; but is was wrong and dangerous to believe that the law developed every time there was a departure from the law in force. Article 34 provided that the sending State "shall waive the immunity" when that could be done without impeding the performance of the functions of the permanent mission. But it would be very easy to say that proceedings taken against a member of a permanent mission did not impede the performance of the functions of the mission; and that would be the end of immunity from civil and administrative jurisdiction. It was, of course, desirable to find a formula which would prevent abuses, but he himself could not subscribe to a solution which would, in practice, mean the end to immunity from jurisdiction.

73. Mr. ALCÍVAR said he was in favour of deleting article 34, because a provision on similar lines had already been rejected by the General Assembly in connexion with the 1969 Convention on Special Missions.

74. It would be very dangerous for the independence of States to try to convert the option to waive immunity into an international obligation.

75. Mr. ALBÓNICO said that the first sentence of article 34 did not state an obligation, but introduced the second sentence, the only one in the article which did state an international obligation, namely, the obligation of the sending State to "use its best endeavours to bring about a just settlement" of civil claims. That particular obligation was one which every State should be prepared to accept.

76. The CHAIRMAN suggested that articles 32 and 33 should be referred to the Drafting Committee for consideration in the light of the discussion; the Commission would continue its consideration of article 34 at the next meeting.

It was so agreed.[16]

Seventh session of the Seminar on International Law

77. The CHAIRMAN invited Mr. Raton, senior legal officer in charge of the Seminar on International Law, to address the Commission.

78. Mr. RATON (Secretariat) said he wished first to thank the members of the Commission, and particularly Mr. Elias, who, when speaking in the Sixth Committee of the General Assembly, had stressed the value of the Seminar on International Law and so convincingly described the organizational problems it involved. He also thanked the members of the Commission who had agreed to lecture to the participants in the seventh session of the Seminar. The Legal Adviser of the International Labour Organisation would also be speaking at the session, the participants in which had for some years been showing an increasing interest in the work of the ILO.

79. In 1971, Switzerland had joined the other States financing fellowships,[17] while the Federal Republic of Germany had increased the amount of the fellowships it was offering from $1,000 to $1,500. In accordance with the wish expressed by the Sixth Committee, two young diplomats, from El Salvador and the Sudan, who had participated in the work of the Sixth Committee at the General Assembly's twenty-fifth session, had been invited to attend the seminar. It was also to meet a wish of the Sixth Committee, that Spanish was henceforth to be a working language of the seminar.

80. Mr. YASSEEN thanked Mr. Raton and said that it was to his initiative that the international community owed the Seminar on International Law, which was a link between the International Law Commission and the world at large. That link would be further strengthened by the participation of young jurists who represented their countries in the Sixth Committee of the General Assembly — a development which would also make for closer contact between the Sixth Committee and the International Law Commission.

81. Mr. ROSENNE said he wished to express to Mr. Raton and his colleagues his appreciation of the able manner in which they had organized the annual Seminar and the continual improvements they had introduced.

82. He noted with interest that the legal adviser of the ILO was to take part in the seventh session of the Seminar and suggested that, in planning the eighth session, consideration should be given to the possibility of including lectures by representatives of other Geneva organizations, especially the various economic organizations and even the Conference of the Committee on Disarmament, which was also centred on Geneva. The Seminar was by now sufficiently well established not to be limited to subjects under consideration by the International Law Commission; it could well cover a wider range of United Nations activities.

83. Mr. ALCÍVAR said that Mr. Raton was to be congratulated on the excellent organization of the Seminar and its continued success. The Sixth Committee of the General Assembly attached increasing importance to the Seminar.

84. Fellowships had been granted on a number of occasions to junior officials of the Ministry of Foreign Affairs of his country to enable them to attend the

[14] United Nations, *Treaty Series*, vol. 500, p. 112, article 32.

[15] See General Assembly resolution 2530 (XXIV), Annex, article 41.

[16] For resumption of the discussion on articles 32 and 33 see 1113th meeting, paras. 35 and 68.

[17] Denmark, Federal Republic of Germany, Finland, Israel, Netherlands, Norway and Sweden.

Seminar; that experience had been of great benefit to them in the discharge of their duties on their return to Ecuador.

85. He welcomed the action taken to give effect to Mr. Yasseen's suggestion that young jurists participating in the work of the Sixth Committee should be invited to the Seminar.

86. Mr. ELIAS said he associated himself with the tributes paid to Mr. Raton. He requested that the Commission set aside part of a forthcoming meeting for consideration of the suggestions made in the Sixth Committee regarding the Seminar and certain related problems.

87. Mr. EUSTATHIADES endorsed Mr. Elias's remarks. He warmly congratulated Mr. Raton on his increasingly successful organization of the Seminar which, side by side with the Commission, was giving such valuable assistance to young lawyers from different countries.

88. The CHAIRMAN, speaking on behalf of the Commission, thanked Mr. Raton and expressed his best wishes for the success of the seventh session of the Seminar on International Law.

The meeting rose at 1.10 p.m.

1096th MEETING

Monday, 10 May 1971, at 3.5 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add 1-6; A/CN.4/241 and Add.1 to 3; A/CN.4/L.162/Rev.1)

[Item 1 of the agenda]

(continued)

ARTICLE 34 (Settlement of civil claims) *(resumed from the previous meeting)*

1. The CHAIRMAN invited the Commission to resume consideration of article 34.

2. Mr. USHAKOV said there was a contradiction between the two sentences of the article. The first sentence stated an obligation, while the second implied that the State could evade it.

3. Moreover, the article provided that the sending State must comply with the obligation "when this can be done without impeding the performance of the functions of the permanent mission". If the sending State was entitled to decide whether the performance of the functions was impeded, the host State or the organization might contest its decision, and there would have to be consultations in accordance with article 50. He hoped the Drafting Committee would be able to obviate that danger by judicious re-drafting of article 34. If that was not possible, it would be better to drop the provision, which did not appear either in the Vienna Convention on Diplomatic Relations or in the Convention on Special Missions.

4. Mr. SETTE CÂMARA said that Mr. Ago had put his finger on the spot when he had pointed out that article 34 purported to establish an obligation for the sending State to waive diplomatic immunity in the case of civil claims, even though that obligation was subject to the condition of non-impediment of the performance of the functions of the permanent mission.

5. Waiver of immunity was a serious act of sovereignty. In a well known case,[1] Lord Phillimore had affirmed that waiver was a privilege which diplomats could not use unless under the direction of their sovereigns. Waivers given without government consent had been invalidated by the courts.[2] The only known case of implicit waiver was the initiation of proceedings by the diplomat himself.

6. Only the sending State could decide whether it was appropriate and necessary to waive immunity in each particular case, according to the circumstances. He could not see how the Commission could depart from the 1961 Vienna Convention on Diplomatic Relations and transform a mere recommendation[3] into a rule of law from which obligations would derive.

7. He therefore reserved his position on the article and suggested that, if necessary, a recommendation similar to that adopted at Vienna be inserted in the commentary, where it belonged.

8. Mr. TAMMES said that he felt some apprehension regarding article 34 and was inclined to take an intermediate position between those who thought that the article added nothing to resolution II of the 1961 Vienna Conference and those who thought that it constituted an important step in the right direction.

9. The first sentence of article 34 did in fact represent a step forward in that it used the word "shall" instead of "should", the word used in the Vienna resolution. Moreover, the first sentence did not contain the subjective criterion embodied in section 14 of the 1946 Convention on the Privileges and Immunities of the United Nations in the form of an express reference to "the

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[1] Mussmann *v.* Engelke [1928] 1 K.B. 90.

[2] *In re* Suarez [1917] 2 Ch. 131.

[3] United Nations, *Treaty Series*, vol. 500, pp. 218-220, resolution II.