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Summary record of the 1096th meeting

Topic:
Representation of States in their relations with international organizations

Extract from the Yearbook of the International Law Commission:-
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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.

opinion of the Member" on the question whether immunity could be "waived without prejudice to the purpose for which the immunity is accorded".[4] In the absence of that subjective criterion, the provisions of the present article 34 were capable of being objectively and functionally interpreted by means of an impartial procedure.

10. The second sentence of article 34, on the other hand, was hardly capable of being impartially applied. It contained a built-in element of national interest. It suggested that it would be for the sending State to determine unilaterally what constituted its "best endeavours" to bring about a just settlement of civil claims. A variety of factors could be taken into acount by the sending State in determining its position and the question was not open to impartial evaluation. Hence the legal obligation stated in the second sentence could not be made practically effective. The provision could only serve as a reminder of a moral duty and he was not certain that that was a sufficient reason for retaining it.

11. Mr. EUSTATHIADES said he agreed with Mr. Ushakov. There was at least some awkwardness, if not a contradiction, in the wording of article 34, but it could be remedied by reversing the order of the two sentences. Thus, after article 33 had stated that immunity might be waived, article 34 would provide, first, that if the sending State did not waive immunity, it must use its best endeavours to bring about a just settlement of the claim, and then would come the provision relating to the particular case covered by article 33, paragraph 1.

12. Mr. REUTER said that Mr. Ushakov's comments were very pertinent. It was impossible to take a final decision on article 34 before considering article 50. The sending State had, in any case, an obligation to use its best endeavours to bring about a just settlement of the claim; but the difficulties involved in the settlement of disputes were well known, and where the sending State refused to waive immunity it should perhaps be required to give reasons for its refusal.

13. Mr. CASTRÉN said he still supported the principle stated in article 34 and approved of the wording; he did not find it at all ambiguous. The primary obligation to waive immunity was followed by a secondary obligation which came into play where the first was not fulfilled. The terms used clearly showed that the article established obligations and did not merely make recommendations.

14. The clause "when this can be done without impeding the performance of the functions of the permanent mission" had been used in the recommendation annexed to the Vienna Convention on Diplomatic Relations, and similar formulations were to be found elsewhere in the draft articles—in article 40, paragraph 4, for example—as well as in the two Vienna Conventions. In his opinion, it was for the sending State to take a decision in the first instance; article 50 could only come into play as a secondary resort.

15. Though he maintained his support for the proposed article, he recognized that the Drafting Committee could improve the wording.

16. Mr. RAMANGASOAVINA said he endorsed Mr. Castrén's remarks. There was a logical order in the provisions of articles 33 and 34. Article 33 provided that immunity might be waived voluntarily. Article 34 stated that it had to be waived in respect of civil claims, if the sending State thought that that could be done without impeding the performance of the functions of the permanent mission. However, if the sending State did not waive immunity, even though the performance of the functions of the permanent mission would not be impeded thereby, it was obliged to use its best endeavours to bring about a just settlement of the claim. Lastly, if the sending State did not waive immunity and did not use its best endeavours to bring about a just settlement, and if a dispute arose in consequence, article 50 would apply.

17. He was in favour of draft article 34, not only because it stressed the need to find a solution, but also because it established a form of co-operation between the sending State and the host State in the event of difficulties in the application of article 33.

18. Mr. BARTOŠ observed that the Commission had already discussed the problem under consideration many times. It was not difficult to find theoretical solutions for it and to state fixed rules; but it must not be forgotten that in practice States were disinclined to waive an immunity deriving from their sovereignty. In many cases, too, that attitude had enabled them to draw a veil over certain matters.

19. In the present circumstances, it was to be expected that some States would accept the rules stated in article 34, while others would reject them. It was easy to imagine the diplomatic difficulties that would arise when all those States were represented by permanent missions to international organizations.

20. Although he supported the proposed article in theory, he wondered whether the solution it provided was sufficiently clear-cut. He feared that it might raise serious application problems, and he doubted whether the Commission could assume responsibility for the serious consequences which the proposed article was bound to have in practice. The Drafting Committee should consider the matter exhaustively before proposing a final solution.

21. Mr. AGO said he wished to emphasize once again the difference between a recommendation and an obligation laid down in an article. It must not be thought that if the Commission merely included the text of a recommendation in an article the situation would remain unchanged. The recommendation annexed to the Vienna Convention on Diplomatic Relations was based on the idea of abuse of rights. It stated, in substance, that the sending State enjoyed immunity from jurisdiction; it merely recommended that the sending State should waive immunity when that could be done without impeding the performance of the functions of the mission, and that when immunity was not waived, the sending State should try to bring about a just settlement. Changing that recommendation into an obligation changed the

[4] Op. cit., vol. 1, p. 22.

option of waiving immunity into an obligatory act; in other words, States would only enjoy immunity from jurisdiction in cases where the exercise of jurisdiction would impede the perfomance of the functions of the permanent mission.

22. In its present form, article 34 was an innovation, and he wondered whether it might not be a regressive rather than a progressive development of international law.

23. As Mr. Ushakov had pointed out, the tripartite procedure provided for in article 50 could not be of much help, owing to the difficulty of establishing when there was an impediment to the performance of the functions of the permanent mission. Host States would probably tend to allow criteria for determining that question to be established in their jurisprudence; and the tendency would probably be restrictive.

24. Consequently, before requesting the Drafting Committee to review the text of article 34, it was important to know whether the Commission wished to draft an article or a recommendation.

25. Mr. YASSEEN said he too believed that that substantive question should be settled first.

26. With regard to the drafting, he noted a certain incompatibility between the two sentences of article 34. Did the second sentence establish an alternative obligation, or did it impose a sanction on the State which did not waive immunity? Since those points were not clear, be suggested that the Commission should be guided by the attitude taken by the Vienna Conference of 1961 when adopting the Convention on Diplomatic Relations and more recently, in 1969, by the General Assembly when adopting the Convention on Special Missions,[5] and accordingly decide in favour of a resolution on the subject.

27. Mr. BARTOŠ said that in his previous statement he had not considered the possibility of dealing with the question in a recommendation. He fully agreed with the views expressed by Mr. Ago and Mr. Yasseen.

28. Mr. ELIAS said that although the problem had been discussed at great length by the Commission at its twenty-first session in 1969, the division of opinion in the present discussion was still so sharp that the Commission must deal with it before it could refer article 34 to the Drafting Committee. It was for the Commission to decide whether it wished to retain article 34 in the form of a draft article.

29. The idea of turning the article into a recommendation did not appeal to him. That form was appropriate for a resolution adopted by a conference, but the position of the Commission was different. The General Assembly expected guidance from the Commission in the form of draft articles. If the Commission found that article 34 gave rise to undue difficulty, it could place the text in square brackets.

[5] See General Assembly resolution 2531 (XXIV).

Mr. Ago, First Vice-Chairman, took the Chair.

30. Mr. EL-ERIAN (Special Rapporteur) said that there was a division of opinion on whether article 34 should be converted into a recommendation or adopted as a draft article stating legal obligations. An intermediate position had been taken by some members who had said that they might be prepared to accept article 34 if the wording was amended to remove ambiguities.

31. There was also a division of opinion on the procedure to be followed. One suggestion was that the Commission should decide between a resolution and a draft article; another was that the Drafting Committee might assist the Commission to take that decision by reviewing the text; finally, it had then suggested that the text be placed in square brackets or transferred to the commentary.

32. He suggested that the article be referred to the Drafting Committee, which could help the Commission to take a decision by reviewing the wording of the article.

33. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 34 to the Drafting Committee for review in the light of the discussion.

It was so agreed.[6]

ARTICLE 35

34. The CHAIRMAN invited the Special Rapporteur to introduce article 35.

35.

Article 35

Exemption from social security legislation

1. Subject to the provisions of paragraph 3 of this article, the permanent representative and the members of the diplomatic staff of the permanent mission shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the host State.

2. The exemption provided for in paragraph 1 of this article shall also apply to persons who are in the sole private employ of the permanent representative or of a member of the diplomatic staff of the permanent mission, on condition:

(*a*) that such employed persons are not nationals of or permanently resident in the host State; and

(*b*) that they are covered by the social security provisions which may be in force in the sending State or a third State.

3. The permanent representative and the members of the diplomatic staff of the permanent mission who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the host State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the host State provided that such participation is permitted by that State.

[6] For resumption of the discussion see 1113th meeting, para. 71.

5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

36. Mr. EL-ERIAN (Special Rapporteur) said that the comments of governments on article 35 were summarized in paragraphs 1 to 9 of the section of his sixth report dealing with that article and his replies in paragraphs 10 to 17 (A/CN.4/241/Add.3). In reply to the comment by the secretariat of the International Atomic Energy Agency (IAEA) regarding the exemption from social security legislation of the employer of the permanent representative and the diplomatic staff, he had pointed out that the employer in that case was the sending State, which enjoyed immunity under general international law, so that there was no need to make any specific reference to such immunity in the context of the provisions of article 35.

37. In the light of the government comments relating to paragraph (3) of the commentary[7] he proposed that paragraph 5 of article 35 be dropped as being unnecessary in view of the provisions of articles 4 and 5.

38. The CHAIRMAN invited the Commission to comment on article 35 paragraph by paragraph.

Mr. Tsuruoka resumed the chair.

Paragraph 1

39. Mr. USTOR said he fully agreed with the Special Rapporteur's reply to the point raised by the IAEA secretariat.

40. He wished to raise a question concerning paragraph 1, though he did so with some diffidence, because article 35 was based on the precedents of the corresponding provisions of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on Special Missions.

41. The social security legislation of some host countries imposed on both employers and employees the obligation to make certain contributions to a fund or State agency. Paragraph 1 exempted the permanent representative and the members of the diplomatic staff of the permanent mission from that obligation and the exemption clearly applied also to the sending State, which was the employer. It could happen, however, that the sending State employed as a member of the technical and administrative staff of the mission a person who was a national of, or a permanent resident in, the host State and was therefore obliged to participate in the social security system of that State and make the appropriate contributions. The question then arose whether the mission also had an obligation to contribute under the social security legislation of the host State. The practice in many contries, including his own, was that in such cases the mission voluntarily undertook to pay the employer's contributions.

42. He had read carefully the provisions both of article 35, paragraph 1 and of article 41, on nationals of the host State and persons permanently resident in the host State, but found that the case was not covered. He therefore suggested that a provision be included in article 35 specifying that, whenever the sending State employed in its permanent mission a person who was subject to the social security legislation of the host State because he was a national of or permanently resident in that State, the sending State should pay the employer's social security contribution.

43. Mr. USHAKOV asked why, in the text now proposed by the Special Rapporteur in his report (A/CN.4/241/Add.3, paragraph 17 under article 35) the words "which may be" had been deleted from the phrase "which may be in force in the host State" in paragraph 1. Those words were included in article 33, paragraph 1, of the Convention on Diplomatic Relations[8] and in article 48, paragraph 1, of the Convention on Consular Relations.[9] The point was not of any great importance, but it should be explained in the commentary.

44. Mr. ROSENNE said that the point raised by Mr. Ustor might well be covered by the structure of the whole draft and by the provisions of article 41, especially in the revised form proposed by the Special Rapporteur in his report.

45. Mr. EL-ERIAN (Special Rapporteur) said that he would give careful consideration to the important question raised by Mr. Ustor, which should be the subject of at least a recommendation.

46. He had agreed to drop the words "which may be" before "in force in the host State" in response to a drafting suggestion by the United Nations Secretariat (A/CN.4/L.162/Rev.1). However, in view of the comments made during the discussion, he would recommend that the Drafting Committee revert to the previous text.

Paragraphs 2 to 5

47. The CHAIRMAN, noting that there were no comments on paragraphs 2, 3 or 4, invited the Commission to comment on paragraph 5.

48. Mr. CASTRÉN said he thought that the paragraph should be deleted, for the reasons given by the Special Rapporteur.

49. Mr. KEARNEY said he agreed to the proposal to delete paragraph 5.

50. Mr. USTOR said he also agreed to that proposal.

51. Incidentally, the wording of article 5 would need to be revised, since the reference to "the representatives of States" would no longer be sufficient.

52. Mr. SETTE CÂMARA said that the Special Rapporteur had been right in accepting the government suggestions that paragraph 5 be deleted; the paragraph was unnecessary because it dealt with matters already covered by articles 4 and 5.

[7] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 214.

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

[9] Op. cit., vol. 596, p. 300.

53. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 35 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[10]

ARTICLE 36

54. The CHAIRMAN invited the Special Rapporteur to introduce article 36.

55.

Article 36

Exemption from dues and taxes

The permanent representative and the members of the diplomatic staff of the permanent mission shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(*a*) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(*b*) dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the permanent mission;

(*c*) estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 42;

(*d*) dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State;

(*e*) charges levied for specific services rendered;

(*f*) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 26.

56. Mr. EL-ERIAN (Special Rappoteur) said that the comments on article 36 were all of a drafting character; he had replied to them in his observations in his report (A/CN.4/241/Add.3). His conclusion was that article 36 should be retained in its present form.

57. Mr. KEARNEY said that he supported the suggestion made by one government that sub-paragraph (*d*), which was taken from the coresponding sub-paragraph of article 34 of the 1961 Vienna Convention on Diplomatic Relations, should be replaced by the more satisfactory language of sub-paragraph (*d*) of article 49 of the 1963 Vienna Convention on Consular Relations (A/CN.4/238/Add.1, section B.4).

58. The difference was that the 1963 text eliminated an ambiguity. The 1961 text, which was reproduced in sub-paragraph (*d*) of the present article 36, could be read as covering only taxes on income and capital taxes on investments "made in commercial undertakings" in the host State. In fact, there were other kinds of capital gains, such as gains on real estate, which could attract taxation. He therefore disagreed with the Special Rapporteur and urged that the 1963 text be adopted as being considerably clearer than the 1961 text which was now proposed.

59. Mr. SETTE CÂMARA said that the Special Rapporteur's replies to the comments suggesting amendments to the wording of article 35 were all in favour of retaining the text as it stood. Those suggestions, mostly of a drafting character, would entail departures from the text of the Vienna Convention on Diplomatic Relations, which should be respected.

60. Immunity from taxation was a key subject in section 2 of Part II of the draft and parallelism with the Vienna Convention on Diplomatic Relations was important in that connexion, in which controversies and disputes between the host State and diplomatic and permanent missions were likely to be frequent. There was no advantage in adopting different language to cover identical situations. On the contrary, differences in formulation would promote doubts concerning interpretation and favour the occurrence of loopholes in the texts of the various conventions.

61. He therefore supported the Special Rapporteur's suggestion that the previous text be retained, subject to any editorial improvements that might be proposed by the Drafting Committee.

62. Mr. ALCÍVAR said he would like to know whether the exception in sub-paragraph (*a*) covered a municipal sales tax of the kind levied in New York City. Members of permanent missions in New York were issued with a card by the Mayor, to ensure that they obtained exemption from that tax. He was anxious to avoid any possible confusion.

63. Mr. USTOR suggested that the Drafting Committee consider whether the title of article 36, or the opening paragraph of the article, ought to specify that the dues and taxes in question were those levied by the host State.

64. Mr. ROSENNE said that the point was valid in principle, but care should be taken in the Drafting, because the host State could also have a permanent mission.

65. The CHAIRMAN suggested that article 36 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[11]

ARTICLE 37

66. The CHAIRMAN invited the Commission to consider article 37.

67.

Article 37

Exemption from personal services

The host State shall exempt the permanent representative and the members of the diplomatic staff of the permanent mission from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

[10] For resumption of the discussion see 1114th meeting, para. 8.

[11] For resumption of the discussion see 1114th meeting, para. 15.

68. The CHAIRMAN said that no government or international organization had made any comment on article 37; the Special Rapporteur had no observations to make either. He therefore suggested that article 37 be referred to the Drafting Committee.

It was so agreed.[12]

69. The CHAIRMAN invited the Special Rapporteur to introduce article 38.

70.

Article 38

Exemption from customs duties and inspection

1. The host State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

(*a*) articles for the official use of the permanent mission;

(*b*) articles for the personal use of the permanent representative or a member of the diplomatic staff of the permanent mission or members of his family forming part of his household, including articles intended for his establishment.

2. The personal baggage of the permanent representative or a member of the diplomatic staff of the permanent mission shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. Such inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

71. Mr. EL-ERIAN (Special Rapporteur) said he proposed that the present text of article 38 be retained, subject only to the drafting changes referred to in paragraphs 5 and 7 of his observations (A/CN.4/241/Add.3), namely, the deletion of the words "or members of his family forming part of his household", in paragraph 1 (*b*) and the replacement of the word "Such", at the beginning of the last sentence of paragraph 2, by the words "In such cases".

72. Mr. SETTE CÂMARA said that the Special Rapporteur was justified in deleting the reference to "members of his family", because the members of the family were covered by article 40, paragraph 1.

73. The amendment to paragraph 2 suggested by the Secretariat improved the text and reconciled article 38 with article 35 of the Convention on Special Missions.[13]

74. Mr. ROSENNE said he wished to suggest to the Secretariat that they follow, in the presentation of the Commission's articles, the decision of the Vienna Conference on the Law of Treaties to the effect that sub-paragraphs of an article which did not form a grammatically complete sentence should, for grammatical reasons, commence with a small letter. That applied, for instance, to sub-paragraphs (*a*) and (*b*) of article 38 and would apply generally in other articles.

75. Mr. EL-ERIAN (Special Rapporteur) said he would accept that suggestion.*

76. The CHAIRMAN suggested that article 38 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[14]

ARTICLE 39

77. The CHAIRMAN invited the Special Rapporteur to introduce article 39.

78.

Article 39

Exemption from laws concerning acquisition of nationality

Members of the permanent mission not being nationals of the host State, and members of their families forming part of their household, shall not, solely by the operation of the law of the host State, acquire the nationality of that State.

79. Mr. EL-ERIAN (Special Rapporteur) said that article 39 had given rise to some controversy in the Sixth Committee where a number of representatives had agreed that "the subject-matter of article 39 should be dealt with in the draft articles themselves and not be relegated to an optional protocol". Others had considered, however, that "the article required further refinement and had expressed doubts as to whether it was compatible with legislation which allowed persons to avoid the application of nationality laws by an act of personal will (option or repudiation)".[15]

80. He drew attention to the comments of governments, particularly the Government of Switzerland (A/CN.4/239, section C.II), and the editorial suggestions of the Secretariat (A/CN.4/L.162/Rev.1). He agreed with the latter suggestions, but thought that otherwise the article should remain unchanged.

81. Mr. KEARNEY said that the method of dealing with the problem of acquisition of nationality by an optional protocol[16] had been adopted at the United Nations Conference on Diplomatic Intercourse and Immunities because several countries had had constitutional difficulties which made it seem inadvisable to deal with the matter in the Convention itself. He could understand the difficulty where the mere fact of birth within the territory of a State automatically conferred nationality, but almost all States now recognized an exception for children of diplomats. Article 39, however, seemed to go rather further than that and to imply that it would also be applicable to members of the administrative and technical staff of the mission. Some mention of the problem should be made in the commentary.

82. Mr. SETTE CÂMARA said that the question was whether the indisputable principle laid down in article 39

[12] For resumption of the discussion see 1114th meeting, para. 20.

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

* This suggestion has been adopted throughout the present volume of the *Yearbook*.

[14] For resumption of the discussion see 1114th meeting, para. 22.

[15] See *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (*b*), document A/7746, paragraph 49.

[16] United Nations, *Treaty Series*, vol. 500, p. 224.

should be included in the convention itself or in an optional protocol. In his opinion, the Special Rapporteur had rightly decided in favour of the former approach, in accordance with the directive given in paragraph (3) of the Commission's commentary.[17]

83. Mr. ROSENNE said that there seemed to be general support for the course taken by the Special Rapporteur. But since article 39 dealt with the kind of situation in which the concept of reservations might be invoked, he suggested that the Drafting Committee recommend a sentence or two for inclusion in the commentary which would hint that a reservation on the ground of constitutional difficulties would not necessarily be incompatible with the objects and purposes of the draft articles.

84. Mr. ALBÓNICO said he was favour of retaining article 39 in its present form; in his opinion, however, the words "members of the permanent mission" should apply only to the permanent representative and the members of the staff of the permanent mission, as defined in article 1, sub-paragraphs (*f*) and (*g*).

85. Mr. CASTRÉN said he did not think it was necessary to specify in article 39, as Mr. Albónico had requested, that the provision did not apply to all categories of the staff of the mission, since that question was settled in article 40.

86. He was in favour of retaining article 39 as part of the draft. In the commentary it had adopted at its twenty-first session, the Commission had clearly explained the reasons why it considered that in the case of permanent missions exemption from the operation of the local laws of nationality should be made a matter of express provision and not relegated to an optional protocol.

87. Mr. KEARNEY said he was not sure whether Mr. Castrén had meant to imply that article 40 eliminated the broad language of article 39. He did not think that that would be a correct interpretation of article 40, which related to articles 30 to 38 and did not cover article 39.

88. Mr. ALBÓNICO said he supported Mr. Kearney's view.

89. Mr. CASTRÉN said that there might be differences of opinion about the interpretation of articles 39 and 40, but it was certain that article 39 stated an exception, and thus a privilege, whereas article 40 stated the privileges and immunities of persons other than the permanent representative and members of the diplomatic staff. Consequently, those other persons were not entitled to the privilege stated in article 39.

90. Mr. RAMANGASOAVINA said he had difficulty in understanding the effect of article 39. It stated that members of the permanent mission not being nationals of the host State would not, solely by the operation of the law of the host State, acquire the nationality of that State. But laws on nationality varied from country to country. Most States made the grant of nationality dependent on residence or birth in their territory. Others conferred it on persons whose family came from the country. Consequently, the phrase "solely by the operation of the law of the host State" applied to the acquisition of nationality both by *jus soli* and by *jus sanguinis*. Hence it might be wondered how persons on whom the laws of their State of origin conferred nationality by virtue of family ties could acquire that nationality if, although originating from the said country, they had not been resident in it for a long time, but returned to it through employment in the permanent mission of a foreign country. They would not even be able to obtain that nationality by applying for naturalization, like ordinary aliens. Thus it was clear that article 39 might have very far-reaching implications unless further particulars were included.

91. Mr. BARTOŠ said that the main purpose of article 39 was to state the now generally accepted rule that children born of parents on diplomatic service in a foreign country did not *ipso facto* acquire the nationality of that country solely by the operation of its laws.

92. In addition, it was intended to exempt certain categories of persons from *ex lege* naturalization in countries where residence for a certain number of years was a sufficient qualification for acquiring the nationality of the country. It was clear, therefore, that article 39 did not exclude the acquisition of nationality by petition.

93. Nevertheless, the Drafting Committee might perhaps be able to find a more explicit formula to express the idea that birth or residence were not sufficient to confer the nationality of the host State.

94. Mr. USTOR said that he, like, Mr. Kearney, did not think that the Commission should try to construe article 39 in the way suggested by Mr. Castrén. The Drafting Committee might, however, consider reversing the order of articles 39 and 40.

95. In view of the misgivings voiced by Mr. Kearney and by the Swiss Government, it would be useful to know exactly what the legal situation was with respect to the acquisition of nationality in the two main host countries, the United States of America and Switzerland, before the Commission began drafting.

96. Mr. EL-ERIAN (Special Rapporteur) said that it was not the Commission's task to decide whether the principle embodied in article 39 should be included in the convention itself or in an optional protocol. After all, at the Vienna Conference on Diplomatic Intercourse and Immunities, the Commission had submitted that same principle in the form of a draft article, but the Conference had decided that it should be expressed in an optional protocol.

97. He agreed with Mr. Castrén and Mr. Ustor that the Drafting Committee should reflect on the possibility of transposing articles 39 and 40.

98. He did not, however, think that the Commission should go into the question of interpreting article 39 in its commentary. If a government made reservations

[17] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 216.

to the article, that in itself would be an interpretation to which reference could be made.

99. Mr. KEARNEY said that at a later meeting he would try to explain exactly what was provided for on the subject of nationality in the laws of his country.

100. The CHAIRMAN suggested that article 39 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[18]

ARTICLE 40

101. The CHAIRMAN invited the Special Rapporteur to introduce article 40.

102.

Article 40

Privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff

1. The members of the family of the permanent representative forming part of his household and the members of the family of a member of the diplomatic staff of the permanent mission forming part of his household shall, if they are not nationals of the host State, enjoy the privileges and immunities specified in articles 30 to 38.

2. Members of the administrative and technical staff of the permanent mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 30 to 37, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 32 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1 of article 38, in respect of articles imported at the time of first installation.

3. Members of the service staff of the permanent mission who are not nationals of or permanently resident in the host State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in article 35.

4. Private staff of members of the permanent mission shall, if they are not nationals of or permanently resident in the host State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the permanent mission.

103. Mr. EL-ERIAN (Special Rapporteur) said that the view had been expressed in the Sixth Committee that it was desirable to state that the privileges and immunities granted must be used for the sole purpose of assisting the persons enjoying them "in the performance of their duties". His reply had been based on the assumption that that comment referred exclusively to the members of the administrative and technical staff, the service staff and the private staff dealt with in paragraphs 2, 3 and 4 of article 40, and did not concern the members of the family dealt with in paragraphs 1 and 2.

104. His reply to the criticism of one government that the phrase "or permanently resident in the host State" was not included in paragraph 1, was that he would consider the inclusion of that phrase an unwarrantable departure from the Vienna Convention on Diplomatic Relations.

105. He proposed that article 40 be retained in its present form, subject to the drafting change at the end of paragraph 3 suggested by the Secretariat, namely, that the word "contained" be replaced by the words "provided for" (A/CN.4/L.162/Rev.1).

106. Mr. KEARNEY said he would like to draw the Commission's attention to the United States Government's observations on article 40, which read: "The United States believes the privileges and immunities accorded members of the mission should only be accorded to the class of people defined in section 16 of the Convention on Privileges and Immunities of the United Nations. We think it excessive to accord 'the administrative and technical staff...together with members of their families forming part of their respective household' all the same privileges and immunities. Nor is this necessary for the effective functioning of the mission. If immunities are to be granted, they should only relate to members of the administrative and technical staff, not to members of their families, and immunities granted should only be in respect of acts performed in the course of their official duties" (A/CN.4/238/Add.2, section B.8).

107. He thought it would be hard to defend the view that the personal inviolability of the children of technical or administrative staff or the inviolability of the residence of a clerk was essential for the proper functioning of a permanent mission. It might therefore be questioned whether the application of articles 30, 31 and 36 was really necessary.

108. Mr. USHAKOV said that, taken as a whole, article 40 was indispensable. It was clear that all the privileges and immunities listed there should be granted to the persons to whom the article related, in the interests of the efficient functioning and the prestige of the permanent mission, which was analogous to a diplomatic mission because it represented the State to the organization, that was to say, to another subject of international law. The basic principle of article 40 was thus the same in the case of diplomatic missions and of permanent missions to international organizations.

109. However, there was no justification for referring *en bloc*, as in paragraphs 1 and 2, to articles 30 to 38 and 30 to 37, for articles 33 and 34 were not concerned with the privileges and immunities of members of the permanent mission, but with the right of the sending State to waive those privileges and immunities.

110. Moreover, since there was already a reference to article 40 in paragraph 3 of article 33, it was unnecessary to refer back to article 33 in article 40. That mistake had been made in the three preceding Conventions, but

[18] For resumption of the discussion see 1098th meeting, para. 101.

there was no reason to repeat it. He therefore asked that the Drafting Committee should consider whether it would be possible to delete the reference to articles 33 and 34 in paragraphs 1 and 2 of article 40.

111. Mr. EL-ERIAN (Special Rapporteur) replying to Mr. Kearney, said that the Convention on the Privileges and Immunities of the United Nations[19] had been drafted with the representatives of States in mind and that in 1946 the institution of permanent missions to international organizations had not yet been developed. The Commission had already explained in its commentary[20] that it could not depart from the Vienna Convention on Diplomatic Relations with respect to the privileges and immunities of administrative and technical staff, because they had status analogous to that of diplomatic agents.

112. He thought Mr. Ushakov's observation could usefully be taken into consideration by the Drafting Committee with a view to improving the text of article 40.

113. In its commentary to article 40 the Commission had drawn attention to the fact that, while not including any mention of the privileges and immunities of certain members of the permanent mission, it had proceeded on the basic assumption that practice in regard to them would be in conformity with the rules of inter-State diplomacy. He emphasized that no international organization had taken exception to that assumption.

114. The CHAIRMAN suggested that article 40 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[21]

The meeting rose at 6 p.m.

[19] United Nations, *Treaty Series*, vol. 1, p. 16.

[20] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 216.

[21] For resumption of the discussion see 1114th meeting, para. 26.

1097th MEETING

Tuesday, 11 May 1971, at 10.5 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; A/CN.4/L.166)

[Item 1 of the agenda]

(continued)

ARTICLE 41

1. The CHAIRMAN invited the Special Rapporteur to introduce article 41.

2.

Article 41

Nationals of the host State and persons permanently resident in the host State

1. Except in so far as additional privileges and immunities may be granted by the host State, the permanent representative and any member of the diplomatic staff of the permanent mission who are nationals of or permanently resident in that State shall enjoy immunity from jurisdiction, and inviolability, only in respect of official acts performed in the exercise of their functions.

2. Other members of the staff of the permanent mission and persons on the private staff who are nationals of or permanently resident in the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those members and persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

3. Mr. EL-ERIAN (Special Rapporteur) said that during the debate in the Sixth Committee of the General Assembly it had been pointed out that paragraph 1 of article 41 contained a drafting mistake which had appeared in the French version of the 1961 Vienna Convention on Diplomatic Relations, but had been corrected in the 1963 Vienna Convention on Consular Relations. In their written comments, two Governments had made similar observations concerning the English version of paragraph 1. He had considered those comments justified and had accordingly changed the English text by moving the word "only" to a position immediately following the words "shall enjoy", so that the last part of the sentence would read ". . . shall enjoy only immunity from jurisdiction, and inviolability in respect of official acts performed in the exercise of their functions" (A/CN.4/241/Add.3).

4. He had not, however, been convinced by the editorial suggestions of the United Nations Secretariat (A/CN.4/L.162/Rev.1).

5. Mr. SETTE CÂMARA said it was clear that permanent representatives and members of the diplomatic staff who were nationals of the host State or permanently resident therein were entitled to immunities only in respect of official acts performed in the exercise of their functions. That limitation was a wise one, since otherwise they would be given a privileged status in relation to other nationals of the host State, thus violating the principle that all citizens are equal before the law.

6. In paragraph 2 it was left to the host State to determine the extent to which other members of the staff