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Summary record of the 1097th meeting

Topic:
Representation of States in their relations with international organizations

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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 Nations¹⁹ 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 commentary²⁰ 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. Barotoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tames, 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

of the permanent mission and persons on the private staff who were nationals of or permanently resident in the host State would enjoy privileges and immunities, although the host State was called upon to restrict its jurisdiction in such a manner as not to interfere unduly with the performance of their functions.

7. In his opinion, the Special Rapporteur had had good reasons for disregarding the other suggestions for changes; the present text, which corresponded to that of article 38 of the Vienna Convention on Diplomatic Relations,¹ should be referred to the Drafting Committee.

8. Mr. KEARNEY referring to the drafting problem in paragraph 1—the position of the word “only”—said he agreed that the previous formulation had caused difficulties, but the Special Rapporteur’s proposed new wording still contained an element of ambiguity, since it raised the question whether the reference to official acts modified only “inviolability” or whether it modified both “immunity from jurisdiction” and “inviolability”. It was difficult to work out a clause that did not contain some element of ambiguity as long as the word “only” was used, but the new text might be clarified if the words “enjoy only” were replaced by “shall be limited to” and the comma after “jurisdiction” deleted.

9. The CHAIRMAN suggested that article 41 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*²

ARTICLE 42

10. The CHAIRMAN invited the Special Rapporteur to introduce article 42.

11.

Article 42

Duration of privileges and immunities

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the host State by the Organization or by the sending State.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the permanent mission, immunity shall continue to subsist.

3. In case of the death of a member of the permanent mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the permanent mission not a national of or permanently resident in the host State or of a member of his family forming part of his household, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property

acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the host State was due solely to the presence there of the deceased as a member of the permanent mission or as a member of the family of a member of the permanent mission.

12. Mr. EL-ERIAN (Special Rapporteur) referring to paragraph 1, said that one government had expressed the opinion that the corresponding article in the Vienna Convention on Diplomatic Relations³ was more precise and therefore preferable. In its editorial suggestions, the Secretariat of the United Nations had expressed the view that in the fourth line of paragraph 1 it would be better to say “if *he is* already in its territory” instead of “if already in its territory”.

13. One government had regretted the omission from paragraph 2 of the expression “but shall subsist until that time, even in case of armed conflict”, which appeared in article 39, paragraph 2 of the Vienna Convention on Diplomatic Relations. During the debate in the Sixth Committee, the use of the expression “a reasonable period” in paragraphs 2 and 3 had been criticized on the ground that it was too imprecise.

14. With regard to paragraph 4, one government had commented that: “It is understood that the movable property of member of the permanent mission or a member of his family referred to in paragraph 4 does not include ‘property of an investment nature’”.

15. His replies to those comments were to be found in paragraphs 13-22 of his observations on article 42 (A/CN.4/241/Add.3). He had introduced a number of changes into the article, his proposed new text of which read :

Article 42

Duration of privileges and immunities

1. Every member of the permanent mission entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State on proceeding to take up his post or, if he is already in its territory, from the moment when his appointment is notified to the host State by the Organization or by the sending State.

2. Members of the family of a member of the permanent mission forming part of his household and members of his private staff shall receive the privileges and immunities to which they are entitled from the date from which he enjoys privileges and immunities in accordance with paragraph 1 of this article or from the date of their entry into the territory of the host State or from the date of their becoming a member of such family or private staff, whichever is the latest.

3. When the functions of a member of the permanent mission have come to an end, his privileges and immunities and those of a member of his family forming part of his household or a member of his private staff shall normally cease at the moment when the person concerned leaves the territory of the host State or on the expiry of a reasonable period in which to do so, whichever is sooner. In the case of the persons referred to in paragraph 2 of this article, their privileges and immunities shall come to an end when they cease to belong to the household

¹ United Nations, *Treaty Series*, vol. 500, p. 118.

² For resumption of the discussion see 1114th meeting, para. 31.

³ Article 39, para. 1; United Nations, *Treaty Series*, vol. 500, p. 118.

or to the private staff of a member to the permanent mission provided, however, that if such persons intend leaving the territory of the host State within a reasonable period thereafter, their privileges and immunities shall subsist until the time of their departure.

4. However, with respect to acts performed by a member of the permanent mission in the exercise of his functions, immunity [from jurisdiction] shall subsist [without limitation of time].

5. In case of the death of a member of the permanent mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the territory of the host State.

6. In the event of the death of a member of the permanent mission not a national of or permanently resident in the host State or of a member of his family forming part of his household, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in its territory, the export of which was prohibited at the time of his death. Estate, succession and inheritance duties, shall not be levied on movable property which, at the time of the death of a member of the permanent mission or of a member of the family of a member of the permanent mission, was in the host State solely because of the presence there of the deceased.

16. Mr. SETTE CÂMARA said that the expression "a reasonable period", used in paragraph 3 of the Special Rapporteur's next text, was indeed very vague and should be referred to the Drafting Committee.

17. Paragraph 4 contained a very extensive provision for immunity with respect to acts performed by a member of a permanent mission in the exercise of his functions. That too was a very vague clause and it would be difficult to decide what acts really were performed in the exercise of official functions. Traditional diplomatic usage was to confine such immunity to official pronouncements, speeches and the like, and not to grant it for all acts performed by a member of the mission.

18. Mr. USHAKOV said he was not convinced of the advisability of some of the drafting changes made by the Special Rapporteur in article 42. In paragraph 1, the expression "Every person" had been replaced by the expression "Every member of the permanent mission", and that had made it necessary to draft a second paragraph concerning "Members of the family of a member of the permanent mission forming part of his household and members of his private staff". He wondered, too, whether it was possible to speak of members of the private staff of a member of a permanent mission, and whether what was meant was not rather persons in the private service of a member of a permanent mission, which was something quite different.

19. Paragraph 2 of the French version of the new text proposed by the Special Rapporteur contained a new expression: the paragraph applied to members of the family of a member of the permanent mission "forming part of his household", and the French version now spoke of them as "*vivant à son foyer*", whereas the expression normally used by the Commission was "*qui fait partie de son ménage*". Paragraph 2 also applied to members of the private staff of members of the perma-

nent mission. In his view, persons in the private service of a member of the permanent mission were themselves members of the permanent mission. The new paragraph 2 laid down three dates, from the latest of which the persons to whom it applied would receive privileges and immunities. But the first two dates mentioned—the date from which the member of the mission "enjoys privileges and immunities in accordance with paragraph 1" and the date of "their entry into the territory of the host State"—were the same. The third date—that of "their becoming a member of such family or private staff"—was not a precise date. In his opinion, therefore the division of the original paragraph 1 into two paragraphs was not satisfactory.

20. The new paragraph 3 proposed by the Special Rapporteur no longer referred to the "functions of a person enjoying privileges and immunities", but to the "functions of a member of the permanent mission", which considerably restricted the field of application of the paragraph.

21. In the new paragraph 4, the Special Rapporteur had inserted the words "from jurisdiction" in square brackets after the word "immunity". It seemed, however, that the provision referred not only to immunity from jurisdiction, but also to other immunities, such as personal inviolability and inviolability of the residence and property. The phrase "without limitation of time", which had also been included in square brackets, was not necessary, since the use of the word "subsist" adequately conveyed the idea of permanence.

22. The Drafting Committee should carefully re-examine the wording of the article and perhaps revert to the previous version, at least for paragraph 1.

23. Mr. REUTER observed that the points raised by Mr. Ushakov would oblige the Drafting Committee to review the text of article 42 as a whole.

24. He himself had noted a certain lack of symmetry between the two possibilities contemplated in paragraph 1, with regard to the effects of notification of the appointment to the host State. If notification was not necessary in the first case, but was necessary in the second, it was probably because the host State was considered to be aware of the status of the person concerned as soon as he entered its territory. If that were so, there would be a choice between two solutions: either to dispense with the requirement of notification in the second case also and to stipulate that the privileges were retrospective to the time when they had been accorded, or to extend the requirement of notification to the first case. Without asking the Commission to decide on either solution, he wished to draw its attention to that point, which was not just a matter of drafting.

25. Mr. ROSENNE said that, with all respect, he did not consider that paragraph 13 of the Special Rapporteur's observations on article 42 was an adequate reply to the comment of the government which had suggested that the immunities of the members of the permanent mission should begin from the moment when their appointment was notified to the Ministry for Foreign

Affairs, as provided in article 39, paragraph 1, of the Vienna Convention on Diplomatic Relations (A/CN.4/238, section B.2). In general, the principle of the recognition of diplomatic status by the host State was controlled through the Ministry for Foreign Affairs of the host State and only exceptionally by some other authority. That was the standard practice at United Nations Headquarters in New York and at the Office of the United Nations at Geneva. That was a question of principle which had first arisen in connexion with article 17⁴ and to which he thought the Drafting Committee should give careful consideration.

26. He was not sure whether paragraph 1 of the proposed new text dealt adequately with the case of a member of a delegation to the General Assembly, who would normally remain at Headquarters for only three or four months under the Headquarters Agreement, but who during that time was appointed a member of the permanent mission.

27. The Special Rapporteur had proposed a large number of changes in article 42, which he found it difficult to evaluate. The language of the report was often confusing; such references as "one government" or "another government" did not facilitate a dispassionate study of the subject.

28. With regard to the new paragraph 4, he thought that the hypothesis presented by the Special Rapporteur was absolutely correct, since it was supported by many years of jurisprudence. He fully agreed that that hypothesis should be embodied in a separate paragraph, but the present drafting was not entirely satisfactory and he hoped the Drafting Committee would give it due consideration.

29. Mr. ELIAS said that of all the articles which the Commission had to consider at the present session, article 42 seemed to have undergone the greatest metamorphosis. Some of the Special Rapporteur's changes were undoubtedly improvements, but others were difficult to accept, because they raised questions of substance as well as of drafting.

30. Like Mr. Ushakov, he was not entirely satisfied with the elimination of the original paragraph 1, though he thought that the substitution of the words "every member" for "every person" was a definite improvement.

31. Paragraph 2 was a necessary result of the decision to include a provision concerning the members of the family of a member of the permanent mission, which had not been included by the original draft. He was not sure that the Special Rapporteur had succeeded in blending the relevant provisions of the original article, but he did believe that the principle was one which should be clearly stated.

32. Paragraph 3 had undergone extensive revision in view of various difficulties which had been pointed out by a number of governments. It had been suggested that the words "whichever is sooner" introduced an element of uncertainty; the same could, of course, be

said of the words "whichever is the latest" in paragraph 2.

33. In paragraph 4, as Mr. Ushakov had rightly pointed out, it seemed hardly appropriate to limit the immunity to immunity from jurisdiction. The words "from jurisdiction", in square brackets, should be deleted; the member of the permanent mission would then continue to enjoy the customary immunities after the termination of his functions. He believed, however, that the Special Rapporteur had been right to place the last sentence of the original paragraph 2 in a separate paragraph, since to subordinate it to the idea of the cessation of functions would not do justice to the principle involved.

34. He hoped that the Drafting Committee would give careful consideration to paragraphs 2, 3 and 4 of the new draft, particularly paragraph 4.

35. Mr. ALBÓNICO, referring to paragraph 1, said that he agreed with the government which had suggested that every member of a permanent mission should enjoy privileges and immunities from the moment when his appointment was notified to the Ministry of Foreign Affairs of the host State, as provided in article 39, paragraph 1 of the Vienna Convention on Diplomatic Relations.

36. Mr. AGO said that the Drafting Committee would have to reconsider article 42 paragraph by paragraph and try to find a solution for each of the problems raised. Several of them were probably due to the fact that the sending State had to notify appointments to the host State through the organization, a system to which he had raised objections during the consideration of article 17.⁵

37. In trying to cover a wide variety of possible situations, the Special Rapporteur had unfortunately ended by producing an article which was even more complex than the corresponding provision in the Convention on Diplomatic Relations, and might give rise to practical difficulties not only between the sending State and the host State, but also between those two States and the organization. He hoped, therefore, that the Drafting Committee would be able to simplify the present text of article 42 without, however, reverting to the wording of article 39 of the Vienna Convention on Diplomatic Relations.

38. Mr. USTOR said he agreed with Mr. Rosenne that the new paragraph 4 embodied a well-established rule of international law and should be retained. It was in accordance with the theory that acts in the exercise of official functions were, in fact, acts of the sending State and that the immunity applied not to the person of the member of the mission, but to the sending State itself and so could not be restricted. It should be made clear, therefore, that the immunity of the member of the mission would subsist even if he left the host State and returned to it later as a private person. In that case, he might be indicted for acts formerly committed in his private capacity, but he would still enjoy immunity for all acts performed in the exercise of his official functions.

⁴ See 1092nd meeting, para. 16.

⁵ *Ibid.*, paragraphs 22, 23, 33, 44 and 45.

39. Mr. EL-ERIAN (Special Rapporteur) said that just as he had been led to make changes in article 42 by the comments of governments and of the Secretariat, so he had now been persuaded of the need to make further changes by the comments of members. He wished to emphasize, however, that all the draft articles had been painstakingly prepared and that governments and organizations had been in general agreement on his basic approach. He had not found it an easy task to cover all the 116 articles in the time available, but he could assure the Commission that there was not a single observation by a government which had not been taken into account. If he had not always referred to governments by name, that did not imply any lack of objectivity. He had made specific references to Switzerland and to the United States of America because both were host States with a good deal of practice in relations with international organizations.

40. Mr. Ushakov had objected to the division of the original paragraph 1 into two separate paragraphs; however, he (the Special Rapporteur) had thought, like Mr. Elias, that that would clarify the position of the family of a member of the permanent mission. Moreover, he had thought that a specific reference in paragraph 2 to members of the private staff would be appropriate, since the private staff was not included in the definition of "members of the permanent mission" given in article 1. In the light of the debate, he now had doubts about that question and would try to merge the two paragraphs.

41. As to the notification of appointment in paragraph 1, referred to by Mr. Reuter, that provision was contained both in the Vienna Convention on Diplomatic Relations⁶ and in the Convention on Special Missions,⁷ and he would be reluctant to depart from it. He did not consider it really necessary that the appointment should be notified to the Ministry for Foreign Affairs, as suggested by one government, since the situation was not the same as in bilateral diplomacy; but perhaps some mention of that point might be made in the commentary.

42. He agreed with Mr. Ustor and Mr. Ushakov that in paragraph 4 the words "from jurisdiction" in square brackets should be deleted. His original hypothesis had been that the member of the permanent mission had already left the territory of the host State, so that the question of any immunity other than that from jurisdiction would not really arise.

43. There appeared to be no difficulties with paragraphs 5 and 6, but he agreed with Mr. Ago that the article had become more complicated than it had been before.

44. He suggested that the Commission should leave the revision of article 42 to the Special Rapporteur and the Drafting Committee.

45. The CHAIRMAN suggested that article 42 be

referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.⁸

ARTICLE 43

46. The CHAIRMAN invited the Special Rapporteur to introduce article 43.

47.

Article 43

Transit through the territory of a third State

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

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

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

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

48. Mr. EL-ERIAN (Special Rapporteur) said that the comments of governments and of the United Nations Secretariat on paragraphs 1, 2 and 4 were summarized in his report (A/CN.4/241/Add.3). He had accepted editorial suggestions by the Secretariat (A/CN.4/L.162/Rev.1) and had introduced them into the amended text he now proposed for the article, which read:

Article 43

Transit through the territory of a third State

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

⁶ United Nations, *Treaty Series*, vol. 500, p. 118, article 39.

⁷ See General Assembly resolution 2530 (XXIV), Annex, article 43.

⁸ For resumption of the discussion see 1114th meeting, para. 34.

enjoying privileges or immunities who are accompanying one of the persons referred to in this paragraph, whether travelling with him or travelling separately to join him or to return to their country.

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

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

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

49. Mr. USHAKOV said that the changes made did not seem to affect the substance of the article. On the other hand, some of them did not appear to be really necessary. For example, at the beginning of the second sentence in the French version of paragraph 1, the words "*L'Etat tiers*" had been replaced by the pronoun "*Il*". In view of the complexity of the preceding sentence, that simplification seemed ill-advised.

50. In the same sentence, the Special Rapporteur had replaced the words "who are accompanying the permanent representative or member of the diplomatic staff of the permanent mission" by the words "who are accompanying one of the persons referred to in this paragraph". That change did not alter the meaning of the provision, but it did make it less clear; moreover, the former version had been modelled on the corresponding provisions of the Vienna Conventions on Diplomatic and Consular Relations. With the exception of those two drafting points, article 43 as a whole was satisfactory.

51. Mr. ELIAS said he agreed with the view expressed by Mr. Ushakov. He found it difficult to accept the editorial changes proposed by the Secretariat, which appeared to be of a pedantic nature; almost all of them should be rejected by the Drafting Committee. In his opinion, the original article 43 was better from the point of view of both substance and grammar.

52. Mr. EUSTATHIADES said he doubted whether the guarantee of immunities should be made subject to the grant of a passport visa. It was true that some States would wish to require a transit visa before they considered themselves obliged to guarantee immunities, but the facts of the situation could not be disregarded either. The fundamental rule of transit, as established by general international law in bilateral relations, applied all the more in the case contemplated in article 43, which involved international collaboration. It was therefore inadvisable to emphasize passport visas in that way.

53. Mr. BARTOŠ said that he too thought the question of passport visas should be given as little prominence

as possible in article 43, if the Commission wished to take account of the facts of the situation. Yugoslavia, for example, had entered into agreements with a large number of States to abolish visa formalities reciprocally; and it was impossible to imagine that in spite of such general abolition of visas the formalities would be maintained for permanent representatives and members of the staff of permanent missions. Very few countries now required visas, and some did not even insist on reciprocity. It was true that the situation depended on political factors and that visas might one day be re-introduced, but in the present circumstances the Commission should not give the impression that it supported the visa system and believed that the enjoyment of immunities was dependent on the grant of a visa.

54. Mr. EL-ERIAN (Special Rapporteur), replying to Mr. Eustathiades and Mr. Bartoš, pointed out that paragraph (4) of the commentary to article 43 contained an elaborate clarification of that question in its opening passage, which read: "During the discussion in the Commission the question was raised of deleting the sentence 'which has granted him a passport visa if such visa was necessary' in paragraph 1 of article 43. It was noted, however, that when the Commission had drafted the corresponding articles of the Vienna Convention on Diplomatic Relations and of the draft on special missions, it had not intended to lay down an obligation for third States to grant transit, but merely wished to regulate the status of diplomatic agents in transit. Doubts were expressed as to whether such an obligation would be a positive rule at present and as to whether States would be prepared to accept it as *lex ferenda*."

55. He was prepared to accept the drafting suggestions which had been made concerning that article.

56. The CHAIRMAN suggested that article 43 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁰

ARTICLE 44

57. The CHAIRMAN invited the Special Rapporteur to introduce article 44 on non-discrimination.

58.

Article 44

Non-discrimination

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

59. Mr. EL-ERIAN (Special Rapporteur) said that there had been two groups of comments on article 44: those relating to the underlying principle of the article and those relating to the wording.

60. In the Sixth Committee it had been suggested that article 44 should be moved to the end of the draft;

⁹ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 218.

¹⁰ For resumption of the discussion see 1114th meeting, para. 36.

he had dealt with that suggestion in his observations on the contents and title of Part I (A/CN.4/241, paragraphs 29-31). Article 44 formed part of the general provisions which he proposed to place at the end of the whole draft.

61. The comments on certain exceptional situations were dealt with in a working paper he had prepared for consideration by the Commission in connexion with articles 47 and 49 (A/CN.4/L.166).

62. Some governments had suggested that the principle of reciprocity should be mentioned in article 44 and he had replied (A/CN.4/241/Add.3) by referring to paragraphs (4) and (5) of the Commission's commentary,¹¹ which explained why the rules of reciprocity applicable to bilateral diplomacy were not relevant to relations with international organizations.

63. He had explained his reasons for not adopting certain drafting suggestions (*ibid.*) and proposed that the article be retained in the form in which the Commission had adopted it in 1969.

64. Mr. KEARNEY said he wished to draw attention to the comments of the United States Government (A/CN.4/238/Add.2, section B.8) in which the understanding was expressed that the provision of draft article 44 did not prohibit distinctions based on rational grounds, which were warranted in certain instances. For example, with regard to the special duty of protection laid down in article 25, paragraph 2, different circumstances could require different grades of protection, and distinctions of that kind would not violate the provisions of article 44. He suggested that the Special Rapporteur should prepare a passage dealing with that problem for inclusion in the commentary of article 44.

65. Mr. EUSTATHIADES said he thought the Commission might well refer article 44 to the Drafting Committee. Of the two main questions which had given rise to comments by governments, one—reciprocity—had already been considered and settled by the Commission at the first reading, and the other—the exceptional situation created by the absence of recognition—would be considered by the Commission when it came to examine the possible effects of such exceptional situations on the representation of States to international organizations.

66. Mr. ROSENNE said he was in general agreement with the Special Rapporteur's conclusions.

67. The position of article 44 was important for its wording. The article referred to the application of the provisions of the "present articles", whereas the corresponding article 75 in Part III and article 111 in Part IV¹² referred to the application of the provisions "of the present part". If, as he hoped, the Drafting Committee combined those three provisions into one, in the form of a general provision applicable to the whole draft, care would be needed in the drafting.

68. Mr. EL-ERIAN (Special Rapporteur) said that the valid point raised by Mr. Kearney would be dealt with in the commentary.

69. If the Drafting Committee retained article 44 in its present position it would have to refer to the application of the articles in Part II. But article 44 might be replaced by a general provision on non-discrimination, so worded as to apply to all the draft articles.

70. Mr. ROSENNE said that articles 75 and 111 were correctly worded if they were left in their present places. The drafting of a general provision could have the effect of extending the principle of non-discrimination rather further than appeared at first sight.

71. The CHAIRMAN suggested that article 44 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹³

ARTICLE 45

72. The CHAIRMAN invited the Commission to consider section 3: Conduct of the permanent mission and its members, beginning with article 45, on respect for the laws and regulations of the host State.

73.

Article 45

Respect for the laws and regulations of the host State

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

2. In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from criminal jurisdiction, the sending State shall, unless it waives this immunity, recall the person concerned, terminate his functions with the mission or secure his departure, as appropriate. This provision shall not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission within either the Organization or the premises of a permanent mission.

3. The premises of the permanent mission shall not be used in any manner incompatible with the exercise of the functions of the permanent mission.

74. Mr. EL-ERIAN (Special Rapporteur) said that the provisions of article 45 were the result of a compromise and the comments on the article simply showed that the text had all the merits and defects of a compromise.

75. In the discussions in the Sixth Committee, the opinion had been expressed that the rule in paragraph 1 might be misinterpreted to mean that failure to respect the laws and regulations of the host State would absolve that State from its obligation to respect the immunity of the person concerned.¹⁴ In reply, he had pointed out

¹³ For resumption of the discussion see 1114th meeting, para. 38.

¹⁴ See *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 55.

¹¹ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 219.

¹² *Op. cit.*, 1970, vol. II, document A/8010/Rev.1, chapter II.

that the opening proviso, "Without prejudice to their privileges and immunities . . .", precluded any such interpretation.

76. There had been numerous comments on the question of remedies, in view of the fact that the host State could not declare a member of a permanent mission *persona non grata*, which was the remedy available in bilateral relations when a diplomatic agent failed to respect the laws and regulations of the receiving State.

77. The comments on paragraphs 2 and 3 of article 45 were summarized in his report (A/CN.4/241/Add.3) and followed by his replies.

78. Mr. KEARNEY said that article 45 was of fundamental importance to the acceptability of the whole draft: if it was to become a generally acceptable convention, a suitable formulation of the article must be found. It was significant that the States which were hosts to international organizations unanimously opposed the present text.

79. The United Kingdom Government had stated that "some means must be found to deal with the case where the host State cannot tolerate, for reasons of public order or national security, the presence on its territory of a particular representative" (A/CN.4/239, section B.3).

80. The Government of Switzerland had pointed out a number of drawbacks in article 45 and had suggested two possible alternative texts to replace it. The first was a general provision on the protection of the security of the host State similar to the provision included in several headquarters agreements, beginning with the words: "Nothing in these articles shall affect the right of the host State to take the necessary precautions in the interest of its security" (*ibid*, section C). The second alternative was to include a provision on the procedure to be followed in the event of expulsion, on the lines of section 13 of the United Nations Headquarters Agreement.¹⁵

81. The United Nations Secretariat had urged that paragraph 2 should be replaced by the language of section 13 (b) of the United Nations Headquarters Agreement, in which reference was made to the "case of abuse of such privileges of residence" (*ibid*, section D.1.II). The 1947 Convention on the Privileges and Immunities of the Specialized Agencies referred to the "abuse of privileges of residence" committed outside official functions as grounds for expulsion.¹⁶

82. The United States Government had pointed out that, if privileges and immunities were to be granted on the broad basis provided for in the draft articles, it was essential to afford some corresponding protection to the host State (A/CN.4/238/Add.2, section B.8).

83. The Government of France, also a host State, had expressed the view that article 45, and the corresponding articles in Parts III and IV of the draft, provided for

exceptions which seemed "difficult to explain in law, since they are apparently based on a principle of extritoriality which is no longer recognized". It had therefore expressed the hope that the Commission would reconsider the matter, and had pointed out one serious omission in the draft: it did not contain any provision concerning the possible expulsion of the persons whose immunities it defined, although a provision to that effect was essential in order to strike a fair balance between the interests of the host State and those of the sending State (A/CN.4/240/Add.5, section B.12).

84. The position taken by host States clearly showed that there was general dissatisfaction with article 45 in its present form, which did not take full account of the right of the host State to its fair share of protection. He realized that article 45 was the result of a difficult compromise, but it was evident that the compromise was not going to prove effective, since it was unacceptable to the States most directly concerned. He therefore urged that the Commission reconsider the wording of paragraph 2. As a first step, he would suggest that the first sentence might be reworded to incorporate the substance of the corresponding provision of the United Nations Headquarters Agreement, on the following lines:

"In case of grave abuse of privileges of residence in the host State by a person enjoying privileges and immunities under these articles, the sending State shall recall the person concerned, terminate his functions with the mission or secure his departure, as appropriate."

85. It must be realized that, unless the justified concern of the host States was met, the proposed convention would remain a dead letter.

86. Mr. CASTRÉN said that article 45 had already given rise to a long discussion at the first reading and its present wording was the result of a compromise. Unfortunately that compromise did not seem to satisfy the host States and the new wording now proposed by Mr. Kearney departed from it considerably. For instead of specifying the circumstances which could lead the sending State to take the various steps mentioned in paragraph 2, he had made the very general proposal that, in case of abuse of privileges and immunities, the host State should be entitled to demand the recall of the person concerned. That was going too far in defence of the host State's interests. In the first place, to speak of abuse in general was too vague a formula and, in the second, the present text was more flexible in that it allowed the sending State to choose one of several measures.

87. For all those reasons he could not accept Mr. Kearney's proposal at first hearing; he hoped that the Commission and the Drafting Committee would manage to draft another compromise text somewhere between the present text and Mr. Kearney's proposal.

88. Mr. USHAKOV said he could not give an opinion on Mr. Kearney's proposal until he had seen it in writing. Generally speaking, he had the following comments to make on article 45.

¹⁵ United Nations, *Treaty Series*, vol. 11, p. 22.

¹⁶ *Op. cit.*, vol. 33, p. 278, section 25, para. 1.

89. Paragraph 1 clearly stated the principle, already established in the earlier conventions, that it was the duty of persons enjoying privileges and immunities to respect the laws and regulations of the host State and not to interfere in the internal affairs of that State. Such were the essential obligations of the sending State, and they ought to satisfy any host State.

90. Some speakers maintained that it was not sufficient to lay down that general rule and that it was also necessary to lay down a particular rule to prevent possible abuse of privileges and immunities by the sending State. He did not share that view.

91. On the contrary, considering that the sending State was in a position of inferiority in relation to the host State, which was all-powerful with respect to it, in order to keep the article in balance, appropriate measures should be specified to prevent any abuse of power by the host State. It was unfair to lay down as a principle that only the sending State was liable to commit abuses and to leave the host State free to prevent them in whatever way it pleased. At the very least, the sending State should also be granted the right to defend itself and, for that purpose, to engage in consultations with the host State and the organization under article 50, or even to have recourse to other measures, since its position was weaker than that of the host State.

92. He was ready to consider any formula for safeguarding the interests of the host State, provided that it took account of the principles of reciprocity and of the equality of States.

93. Mr. EUSTATHIADES said that at the present stage he would confine himself to one point in Mr. Kearney's proposal: the deletion of the words "unless it waives this immunity" in paragraph 2. If that change was made, the sending State would have no other choice, in case of a grave and manifest violation of the criminal law of the host State by a person enjoying immunity from criminal jurisdiction, but to recall the person concerned, terminate his functions or secure his departure. To omit the phrase in question would be tantamount to saying that one would have nothing more to do with persons compromised by a grave and manifest violation.

94. If the text covered cases of grave violation only, there would be no objection to eliminating the possibility of waiving immunity, but the violation could also be "manifest". At the first reading, the Commission had deliberately decided to use that term in order to cover cases where a violation of the criminal law of the host State had not yet been subject of a judicial decision. In that context, it might therefore be better to leave the sending State the option of waiving immunity. It was obviously difficult to draft a provision which would cover both a grave and established violation and a violation which, though manifest, was not yet *res judicata*. The best course would be to deal with the two cases in two separate provisions and it would then be well to adopt Mr. Kearney's proposal, which, moreover, included another change consisting in making provision for cases of grave abuse of privileges of residence.

95. He reserved the right to revert later to the other aspects of Mr. Kearney's proposal, which had the merit of taking into account the observations of host States, which were anxious to be able to deal with grave abuses of privileged status and might otherwise not be prepared to accept the future convention.

The meeting rose at 1 p.m.

1098th MEETING

Wednesday, 12 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 to 3; A/CN.4/L.162/Rev.1; A/CN.4/L.166)

[Item 1 of the agenda]

(continued)

ARTICLE 45 (Respect for the laws and regulations of the host State (continued))

1. The CHAIRMAN invited the Commission to continue consideration of article 45 in the Special Rapporteur's sixth report (A/CN.4/241/Add.3).
2. Mr. TAMMES said that the governments and secretariats of international organizations which had submitted comments on article 45 had all, without exception, declared themselves opposed to it. The governments concerned included both host States and States less directly interested in the draft articles.
3. The criticisms made had been of two kinds, the first directed mainly to the words "grave and manifest violation of the criminal law", in paragraph 2, and the second to the ineffectual character of the obligation imposed on the sending State.
4. In order to meet the first type of criticism he suggested, for the consideration of the Drafting Committee, that a closer link be established between paragraphs 1 and 2 by replacing the opening words of paragraph 2, "In case of grave and manifest violation of the criminal law of the host State", by the words "In case of violation of the