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Summary record of the 1098th meeting

Topic:
Representation of States in their relations with international organizations

Extract from the Yearbook of the International Law Commission:-
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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

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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

duty contained in paragraph 1". That amendment would meet the objection, made among others by the United Nations Secretariat (A/CN.4/239, section D.1.II), that the present text did not cover serious abuses which did not constitute grave violations of criminal law.

5. At its twenty-first session, the Commission had concentrated on drafting a provision covering violations of criminal law; it had done so because paragraph 2 was based on a proposal then made by Mr. Kearney, which referred only to "violations of the criminal laws or regulations of the host State".[1]

6. His proposal to introduce into paragraph 2 a specific reference to breaches of the duty specified in paragraph 1 would make the provisions of paragraph 2 much more precise than a reference to abuse of "privileges of residence", which was the language used in section 13 of the United Nations Headquarters Agreement and other similar instruments. It would also be more capable of impartial determination and thus more in keeping with the interests of the sending State itself.

7. The criticisms of the ineffectiveness of the obligation of the sending State to waive immunity, recall the person concerned, terminate his functions or secure his departure, were closely related to the problem of the inconclusive course of the consultations provided for in article 50. There was, of course, a direct connexion between the principle laid down in article 45 and the means of making it effective. It was therefore a sound approach to make provision in the substantive articles for means of making the obligations of the sending State effective, instead of leaving it to the final clauses. At the twenty-first session, he himself had submitted an amendment to the article on consultations which read: "If such consultations fail to achieve a result satisfactory to the parties concerned, the matter shall be submitted to an impartial procedure which shall be established within the Organization".[2] He suggested that that text be taken into account by the Drafting Committee in considering the whole problem.

8. Mr. KEARNEY said that his proposed redraft of paragraph 2 had just been circulated. It read as follows:

> "2. 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. 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."

9. Mr. YASSEEN said he was aware that article 45 had been the subject of long discussions in the Commission and that its wording was the result of a compromise. Nevertheless, he wished to suggest that the words "within either the Organization or the premises of a permanent mission", at the end of paragraph 2, be deleted, because they evoked the obsolete concept of exterritoriality, which was not compatible with recent developments in international law. The essential criterion was that the act should have been performed in carrying out the functions of the permanent mission.

10. Mr. ALCÍVAR said that he had not been a member of the Commission at the time when it had adopted article 45, but he would prefer to abide by that compromise formula. Although there were some elements in text which he did not find satisfactory, he was prepared to accept it, but could go no farther.

11. Article 45 was an attempt to strike a balance between two principles. The first was that the absolute independence of international organizations and of representatives to them must be ensured so that they were guaranteed full freedom of action. The second was that the host State must be protected by laying down the duty of permanent representatives and members of permanent missions to respect its laws and regulations. In his view, the text of the article gave more weight to the second principle than to the first.

12. In bilateral relations, it was possible to declare a diplomatic agent *persona non grata;* that faculty was sometimes used with undue severity, but it was a right granted by the 1961 Vienna Convention on Diplomatic Relations, and was exercised by the receiving State at its discretion. In bilateral relations, however, there was the element of reciprocity and consequently the possibility of counter-action by the sending State. No such possibility existed in multilateral diplomacy.

13. For those reasons, he could not support the text proposed by Mr. Kearney, which went even further than the present text of article 45 in protecting the host State. He agreed with the view that the host State had means of enforcing its laws and regulations and that it was necessary to protect the members of permanent missions against possible abuses by the host State.

14. He did not favour drawing inspiration from the provisions of the United Nations Headquarters Agreement[3] which had been drawn up in 1946, when the only experience available had been that of the League of Nations, a body which had comprised a comparatively small number of members of the international community; the United Nations had a much broader and more nearly universal membership. Experience since 1946 had shown the inadequacies of the provisions of the headquarters agreements, which had led to a number of disputes that had even provoked intervention by the United Nations itself.

15. He supported Mr. Yasseen's suggestion that the Commission should delete the concluding words of paragraph 2, "within either the Organization or the premises of a permanent mission", which revived the obsolete notion of exterritoriality.

[1] See *Yearbook of the International Law Commission, 1969*, vol. I, p. 39, para. 71.

[2] *Ibid.*, p. 195, para. 7.

[3] United Nations, *Treaty Series*, vol. 11, p. 12.

16. Mr. ROSENNE said that a study of the documentation before the Commission produced an impressive list of governments and secretariats of international organizations which had criticized article 45, especially paragraph 2. The list comprised, in the order of arrival of the comments, Israel (A/CN.4/238, section B.2), the Netherlands (*ibid.*, section B3.), Sweden (*ibid.*, section B.7), United States of America (*ibid.*, section B.8), Belgium (A/CN.4/239, section B.1), United Kingdom (*ibid.*, section B.3), Switzerland (*ibid.*, section C), United Nations Secretariat (*ibid.*, section D.1), UNESCO Secretariat (*ibid.*, section D.3), Australia (A/CN.4/240, section B.1) and France (*ibid.*, section B.12). Going through all that documentation, he had been unable to find a single statement in favour of article 45.

17. The Commission was thus faced with a dilemma; it had to decide whether it should adopt a new approach taking into account some, at least, of the criticisms made, or whether it could convincingly explain, in its report to the General Assembly, why it was unable to take those criticisms into account.

18. In his view the Commission had not yet reached the stage where it could take a decision and he would therefore suggest that the Drafting Committee be invited to discuss the problem dispassionately. He was encouraged to make that suggestion by some of the remarks in the first part of paragraph 20 of the Special Rapporteur's observations on article 45 in his sixth report. The Commission's answer to the basic question how to explain the retention of the 1969 text of article 45 would have a decisive effect on the future of the draft articles, at the least.

19. On the substance of the matter, he continued to believe, as he had in 1969, that the host State should be the subject, if not of the first sentence of paragraph 2 from a drafting point of view, at all events of the action from a conceptual point of view, in the sense that its right of initiative was what had to be realistically recognized. Mr. Kearney's proposal should be scrutinized from that point of view.

20. Mr. USTOR said he was fully aware of the difficult situation created by the need to find a solution that would satisfy all the interests involved. The text adopted by the Commission in 1969 had not satisfied many governments and the same was true of several members of the Commission. In the circumstances, he wished to revive a simple suggestion which he had put forward in 1969, namely, that paragraph 2 be dropped altogether.[4]

21. It might be asked whether, after the elimination of paragraph 2, the host State would still have the necessary protection. The provisions of paragraph 1 would safeguard the position of the host State, for they laid down the duty of the persons concerned to respect its laws and regulations. That duty was incumbent not only on the permanent representative and the members of the permanent mission, but also on the sending State itself. Any failure of a member of a permanent mission to respect the laws and regulations of the host State would be a clear breach of the sending State's own obligations, and the breach would give rise to international responsibility of the sending State, which the host State could then hold answerable.

22. One advantage of that approach was that the sending State's obligation would not be restricted to cases of "grave and manifest violation of the criminal law of the host State by a person enjoying immunity". In fact, it would not be appropriate to restrict that obligation even to cases of so-called "abuse of privileges of residence". The obligation was much wider in scope and included not only the duty not to interfere in the internal affairs of the host State, but even duties of courtesy which were part of international practice. The deletion of paragraph 2 would thus give the host State wider rights to make representations to the sending State. The provisions of paragraph 2 belonged to the realm of State responsibility; their elimination from the present draft would not involve any difficulties and would have obvious advantages.

23. Mr. KEARNEY asked whether Mr. Ustor would also be prepared to drop the opening proviso in paragraph 1, "Without prejudice to their privileges and immunities . . ." or whether it was his view that the proviso merely related to individuals and had no bearing on the violation imputed to the sending State.

24. Mr. USTOR said he would not wish to drop the opening proviso in paragraph 1, which could not be interpreted to mean that a person enjoying immunity could invoke that immunity to break the laws and regulations of the host State with impunity. The meaning of the proviso was simply that the privileges and immunities stood, despite any failure on the part of the persons concerned to observe the duty stated in the main clause of the first sentence of paragraph 1.

25. Mr. USHAKOV said that paragraph 1 was based directly on the corresponding provisions in the Conventions on Diplomatic Relations, Consular Relations and Special Missions; but while the meaning of the second sentence was quite clear in the case of bilateral relations, it was not clear in the case of permanent missions to international organizations. Was it to be understood, for example, that criticisms of the policy of the host State expressed within the organization or at a press conference, constituted interference in the internal affairs of the host State? Or what did the sentence mean? It should not be deleted, since it was essential for the protection of the interests of the host State; but its meaning should be expressed very carefully in order to prevent any abuses of power which might be committed by the host State on the basis of an interpretation favourable to itself.

26. The second sentence of paragraph 2 also raised problems of interpretation. It was difficult to understand what was meant by the phrase "in carrying out the functions of the permanent mission within . . . the premises of a permanent mission"; those terms were so vague that the Commission itself would find it difficult

[4] See *Yearbook of the International Law Commission, 1969*, vol. I, p. 218, para. 26 and p. 221, para. 53 *et seq.*

to explain their meaning in its commentary. He agreed with other members of the Commission and certain governments that the words "within either the Organization or the premises of a permanent mission" did not add anything to the provision and were therefore redundant. But, in order to abide by the compromise which had produced those words—however unsatisfactory it might be—he would not propose that they be deleted.

27. Mr. Kearney's proposal, which replaced the words "In case of grave and manifest violation of the criminal law of the host State" by the words "In case of grave abuse of privileges of residence in the host State", was unacceptable for a number of reasons. First, the notion of grave abuse was so vague that it was open to all manner of interpretations. The same was true of the words "privileges of residence". It was true that those words were used in the United Nations Headquarters Agreement, but they had no legal meaning. Lastly, it was not clear who would decide whether there had been a grave abuse of privileges of residence, and by what means.

28. Such a provision would have the effect of giving the host State a completely free hand. Consequently, he could not support it, though the Drafting Committee might possibly be able to produce an acceptable text taking that or other proposals as a basis.

29. Mr. ELIAS said it was important to remember that article 45 was the result of a compromise reached after protracted discussions in 1969. When the Commission had adopted paragraph 2, it had focussed its attention on giving a more precise meaning to the limits of the activities of the permanent mission. The intention had been to exclude civil jurisdiction and an attempt had therefore been made to define those criminal acts which would be regarded as violations of the privileges of the sending State in the host State.

30. The adverse comments on the present text of the article had come from only eight or nine States, though it was true that they included some important host States. It was by no means certain, however, that their views were shared by the States which had not sent in comments.

31. He was not in favour of deleting the opening proviso of paragraph 1, which formed part of the compromise formula of 1969. Nor was he in favour of replacing the formula "grave and manifest violation of the criminal law" by the still less precise language "grave abuse of privileges and residence"; it should be noted that the Commission had not previously drafted any article in those terms. He also had misgivings about the suggestion that the words "unless it waives this immunity" be deleted from paragraph 2.

32. He agreed with the criticism that paragraph 1 did not cover the possibility of abuses by the host State, especially where the important provision on the duty of non-interference in internal affairs was concerned. At the same time, it was possible to over-emphasize the possibility of such abuses.

33. At the opening of the session, when he had reported on the Sixth Committee's discussion on the Commission's last report, he had drawn attention to the complaints by many governments that the Commission had a tendency to minimize the rights of the host State and to exaggerate the rights and privileges of the sending State.[5] The Commission should take those criticisms into consideration.

34. He suggested that the Drafting Committee review article 45, together with Mr. Kearney's proposal, in the light of the discussion and frame the article so as to retain the spirit of the 1969 compromise while improving its formulation.

35. Mr. RAMANGASOAVINA said it was natural that the Commission should include in the draft articles a formal article such as article 45 addressed to all persons enjoying privileges and immunities. But the Commission had not confined itself to stating a general rule: it had seen fit to place the emphasis on certain possible attitudes of members of the permanent mission, insofar as those attitudes were not already covered by the laws and regulations of the host State; that was why it had added the last sentence of paragraph 1 and paragraph 3. But wishing also to prevent violations of those provisions, the Commission had drafted paragraph 2, the desirability of which was still seriously disputed.

36. Two possibilities were now open to it: to delete paragraph 2 and rely on the good faith of the sending State and the members of the permanent mission, or to clarify the meaning of the paragraph by improving the wording.

37. To delete paragraph 2, which was a compromise and contained some essential provisions, was hardly possible. Nor was it possible to introduce into the draft the concept of *persona non grata*, which belonged to bilateral diplomacy.

38. However—and in that context Mr. Kearney's proposal was quite understandable—it was not sufficient to refer only to violations of the criminal law, for those were not the only offences of which members of the permanent mission might be accused. But Mr. Kearney's proposal did not cover all possible violations either, since an abuse was not necessarily a violation, as the United Nations Secretariat had rightly pointed out in its observations (A/CN.4/239, section D.1.II), when it had referred to cases in which members of the permanent mission might abuse their privileges by carrying on activities outside their official capacity in the territory of the host State. It would be better, therefore, to rely on the Drafting Committee to find a formula which would cover both violations of the criminal law and abuses of privileges and immunities.

39. Some people had wondered why the Commission had not tried to provide a counterpart to the possibility of abuses by the host State. But such a counterpart was in fact provided by all the privileges and immunities

[5] See 1087th meeting, paras. 4 and 5.

enjoyed by members of permanent missions, and in any event it would always be possible to have recourse to article 50. If paragraph 2 were deleted, article 50 could be applied whenever a dispute arose, to determine whether there had been an abuse and whether the sending State should take appropriate measures.

40. The words "within either the Organization or the premises of a permanent mission", at the end of the last sentence of paragraph 2, should be deleted. The host State was not of course entitled to concern itself with what went on in the premises of a permanent mission; but it was going too far to deny it even the possibility of making representations over the presence in the country of a person who had committed grave violations. In any case, paragraph 3 provided an adequate safeguard.

41. Mr. ALBÓNICO said that paragraph 1 merely repeated the provisions of article 41 of the 1961 Vienna Convention on Diplomatic Relations and article 55 of the 1963 Vienna Convention on Consular Relations: it neither added to nor took anything away from those provisions. It clearly set forth the duty of the persons concerned to respect the laws and regulations of the host State and to refrain from interfering in the internal affairs of that State; that duty applied both to the official and to the private activities of those persons.

42. He was, however, surprised that paragraph 2 should cover only cases of violations of criminal law and remain silent on other breaches of the duty stated in paragraph 1. Obviously, the Commission had never intended that such other breaches should remain without any remedy, but paragraph 2 did not contain any provision on the steps which the host State might take in the event of abuses of that kind.

43. It was essential to supplement the provisions of paragraph 2 or else to clarify the matter in the commentary. Such breaches of the duty stated in paragraph 1 as violations of tax laws and exchange control regulations, even if they did not constitute crimes, were nevertheless abuses which the host State could not tolerate. The same was true of acts of interference in the internal affairs of the State, many examples of which could unfortunately be cited, though mostly from bilateral diplomacy.

44. It was important to co-ordinate paragraph 2 with paragraph 1 and he supported Mr. Tammes' proposal on that point.

45. Mr. AGO said it was a mistake to think that article 45 as a whole, and paragraph 2 in particular, belonged to the responsibility of States. All violations of the draft articles could raise problems of responsibility, but article 45 raised special problems. The members of the Commission were well aware of the reason for including paragraph 2. If there was no corresponding provision in the Vienna Convention on Diplomatic Relations it was because that Convention contained other provisions which sufficiently protected the interests of the receiving State. Hence, if provision in paragraph 2 did not exist, it would be necessary to invent it. He was therefore in favour of retaining article 45 and, in particular, paragraph 2.

46. However, the wording should be improved. The expression "grave and manifest violation of the criminal law" was unsatisfactory for two reasons. First, there could be grave violations of laws other than criminal laws; and secondly, the fact that there had been a grave and manifest violation of the criminal law was normally established only as the result of a trial. In the present case, however, that fact would have to be established without any legal decision.

47. It was such considerations which had led Mr. Kearney to propose his amendment. But his solution was hardly any better, since it merely replaced the notion of a grave violation, which was itself difficult to define in law, by the even vaguer notion of abuse of a right. The best course, therefore, would be to refer article 45 to the Drafting Committee in the hope that it would be able to find a way of expressing the basic principles more clearly; otherwise, the Commission would have to adhere to the text it had adopted at its twenty-first session.

48. Mr. CASTRÉN said that in order to give effect to Mr. Tammes' proposal that a closer link be established between paragraphs 1 and 2, he proposed that the beginning of paragraph 2 be amended to read: "In case of grave and manifest violation of the obligations prescribed in paragraph 1, the sending State, unless it waives the immunity of the person concerned, shall recall . . .". That formulation was more precise than the wording proposed by Mr. Kearney; and the obligation stated in the second sentence of paragraph 1 would thus be confirmed, which would meet the point made by Mr. Ushakov. The second sentence of paragraph 1 had its place in non-bilateral relations too, since interference in the internal affairs of the host State by high-ranking members of permanent missions could have serious consequences.

49. The last phrase in the second sentence of paragraph 2, "within either the Organization or the premises of a permanent mission", was clear and should be retained. Its meaning had been sufficiently clarified by the Commission's discussions during the first reading.

50. He too was in favour of strengthening article 50; but it was also very desirable to include in the draft, as several governments and certain members of the Commission had proposed, a general provision on the settlement of disputes which might arise out of the application of the articles.

51. Mr. EL-ERIAN (Special Rapporteur) said the discussion had shown that it was essential to adhere to the compromise represented by the present text of article 45, though it was possible to improve the language so as to make it more attractive.

52. At the previous meeting Mr. Kearney had suggested that, unless the article were amended, the whole draft might remain a dead letter.[6] The Commission had done its best to include a number of provisions which compensated for the absence of the remedies available in

[6] See previous meeting, para. 85.

bilateral diplomacy; the provisions of article 45, paragraph 2 were most important in that respect.

53. The text now proposed by Mr. Kearney for paragraph 2 was open to serious objections, connected, in particular, with the interpretation of the expression "privileges of residence", which was not to be found anywhere in the present draft. Mr. Kearney's proposal and the suggestion made by Mr. Tammes should be referred to the Drafting Committee; if that Committee was unable to improve article 45, the 1969 text should be retained, as suggested by Mr. Ago.

54. He agreed to the proposal to delete the concluding words of paragraph 2: "within either the Organization or the premises of a permanent mission". Those words, in addition to injecting an element of ambiguity, might well not be comprehensive enough. The legal criterion was the fact that the act had been performed by the person concerned in carrying out the functions of the permanent mission; the question where those functions had been carried out was not material.

55. A very important point on which he wished to comment was the interpretation of the silence of governments. It had been said during the discussion that not a single government had expressed support for the present text of article 45. In paragraph 2 of the comments on article 45 in his sixth report (A/CN.4/241/Add.3) he had noted that in the Sixth Committee it had been pointed out that article 45 "was the result of a compromise". That statement described the consensus of opinion in the Sixth Committee.

56. The fact that seven or eight governments held strong views against article 45 did not mean that the governments which had not made any comments held similar views. In paragraph 14 of the chapter on preliminary considerations in his sixth report (A/CN.4/241), dealing with the weight to be attached to the absence of specific comments, he had stressed that the problems was one of interpretation—a point which had also been made by Sir Humphrey Waldock in one of his reports on the law of treaties.

57. It should be remembered that the Commission had before it comments by governments on articles 10 and 50, which in a sense formed a single unit with article 45; together, those articles constituted a system designed to make up for the absence of the traditional remedies available in bilateral diplomacy.

58. The CHAIRMAN suggested that article 45 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[7]

ARTICLE 46

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

60.

Article 46

Professional activity

The permanent representative and the members of the diplomatic staff of the permanent mission shall not practise for personal profit any professional or commercial activity in the host State.

61. Mr. EL-ERIAN (Special Rapporteur) said he had rejected the suggestion made in the Sixth Committee regarding teaching activities (A/CN.4/241/Add.3). He had agreed to accept the suggestion of the United Nations Secretariat that the title be amended to read: "Professional or commercial activity".

62. Mr. YASSEEN said he approved of the change in the title of the article.

63. Like the Special Rapporteur, he thought that the suggestion than an exception be made in the case of teaching activities could not be justified. Although the persons covered by article 46 could give lectures, for example, they should not do so for personal profit.

64. The CHAIRMAN suggested that article 46 be referred to the drafting Committee.

It was so agreed.[8]

ARTICLE 47

65. The CHAIRMAN invited the Special Rapporteur to introduce article 47.

66.

Article 47

End of the functions of the permanent representative or of a member of the diplomatic staff

The functions of the permanent representative or of a member of the diplomatic staff of the permanent mission come to an end, *inter alia*:

(*a*) on notification to this effect by the sending State to the Organization;

(*b*) if the permanent mission is finally or temporarily recalled.

67. Mr. EL-ERIAN (Special Rapporteur) said that during the debate in the Sixth Committee it had been suggested that a new sub-paragraph (*c*) be added, reading "in case of death". Comments had been made by the secretariat of the International Atomic Energy Agency (IAEA) and two editorial suggestions had been submitted by the United Nations Secretariat. He had replied to those comments in his observations (A/CN.4/241/Add.3) and proposed a new wording which read:

Article 47

End of the functions of the permanent representative or of a member of the diplomatic staff

The functions of the permanent representative or of a member of the diplomatic staff of the permanent mission shall come to an end, *inter alia*:

(*a*) on notification of their termination by the sending State to the Organization;

(*b*) if the permanent mission is finally or temporarily recalled.

[7] For resumption of the discussion see 1114th meeting, para. 47.

[8] For resumption of the discussion see 1115th meeting, para. 23.

68. Mr. USHAKOV said the new wording for sub-paragraph (*a*) was an improvement, but pointed out that in the French version the word "organization" in sub-paragraph (*a*) should begin with a capital letter. Furthermore, the English and French versions of that sub-paragraph did not quite agree; the Drafting Committee should bring them into line.

69. Mr. EUSTATHIADES said that, quite apart from the fact that the words "*inter alia*" were used, it would be pointless to mention death, as had been suggested in the Sixth Committee, since it was self-evident that the functions came to an end in that case.

70. With regard to Mr. Ushakov's comment concerning the lack of conformity between the English and French versions of sub-paragraph (*a*), he suggested that the English version might begin with the words: "on notification of the termination of these functions".

71. Mr. ELIAS suggested that the words "on notification of their termination" might be replaced by the words "on notification of termination of such functions".

72. The Drafting Committee should also give careful consideration to the point raised by the secretariat of the IAEA (A/CN.4/239, section D.9, para. 6 (*d*).

73. The CHAIRMAN suggested that article 47 be referred to the Drafting Committee.

It was so agreed.[9]

ARTICLE 48

74. The CHAIRMAN invited the Special Rapporteur to introduce article 48.

75.

Article 48

Facilities for departure

The host State shall, whenever requested, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave its territory. It shall, in case of emergency, place at their disposal the necessary means of transport for themselves and their property.

76. Mr. EL-ERIAN (Special Rapporteur) said that one government had criticized the substitution of the words "to leave its territory" for the words "to leave at the earliest possible moment", which appeared in article 44 of the Vienna Convention on Diplomatic Relations. Another had taken the view that the insertion of the words "whenever requested" was likely to be interpreted as placing a greater responsibility on the host State than article 44 of the Vienna Convention on Diplomatic Relations placed on the receiving State. Certain editorial suggestions had also been made by the United Nations Secretariat (A/CN.4/L.162/Rev.1).

77. With regard to the second sentence, one government had stated that "the last sentence of article 48, by requiring the host State to place at the disposal of persons enjoying privileges and immunities the necessary means of transport for their property, would appear to be imposing an unrealistic duty on the host State" and had suggested an alternative wording. He had replied to those comments in his observations (A/CN.4/241/Add.3) and in his working paper on articles 47 and 48 (A/CN.4/L.166).

78. Mr. EUSTATHIADES said that he endorsed the Special Rapporteur's observations. With regard to the proposal that the phrase "at the earliest possible moment", used in article 44 of the Vienna Convention on Diplomatic Relations, should be included, that phrase would be useful for the case of armed conflict. The addition would only be justified, however, if it were intended to meet the case of an armed conflict between the sending State and the host State; but that would be one of the exceptional situations which the Commission had decided to consider at a later stage. It was only if the Commission failed to agree on an article on that exceptional situation, that it might perhaps be necessary to insert the words "at the earliest possible moment" in article 48.

79. Furthermore, the second sentence of article 48 was not intended to cover armed conflicts only, but all kinds of exceptional circumstances, such as natural disasters, epidemics and general strikes. Although of secondary importance, those comments should be borne in mind when the Commission came to consider the consequences of certain exceptional situations.

80. Mr. USTOR asked whether it would not be possible to combine article 27 *bis*, on entry into the host State (A/CN.4/241/Add.3), with article 48, on facilities for departure, since logically they seemed to belong together.

81. Mr. USHAKOV said he doubted whether article 48 was really appropriate. Such a provision was justified in bilateral diplomatic relations, but it was difficult to see in what situations article 48 might apply. The only conceivable case was that of a member State being excluded from an organization with the result that its permanent mission was obliged to leave the territory of the host State. That was the only case in which urgent measures would be required, but it did not concern relations between the sending State and the host State. He would like the Special Rapporteur to clarify that point.

82. Mr. EL-ERIAN (Special Rapporteur), said he was not sure that he could give a fully satisfactory reply to Mr. Ushakov's question, beyond pointing out that article 48 was modelled on previous conventions and that it was useful to provide a suitable provision for departure as well as for entry.

83. He would like to reflect further on Mr. Ustor's suggestion that article 48 might be combined with article 27 *bis*.

84. The CHAIRMAN suggested that article 48 be referred to the Drafting Committee.

It was so agreed.[10]

[9] For resumption of the discussion see 1115th meeting, para. 26.

[10] For resumption of the discussion see 1115th meeting, para. 30.

ARTICLE 49

85. The CHAIRMAN invited the Special Rapporteur to introduce article 49.

86.

Article 49

Protection of premises and archives

1. When the permanent mission is temporarily or finally recalled, the host State must respect and protect the premises as well as the property and archives of the permanent mission. The sending State must take all appropriate measures to terminate this special duty of the host State within a reasonable time.

2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and archives of the permanent mission from the territory of the host State.

87. Mr. EL-ERIAN (Special Rapporteur) said that one government had suggested certain changes in the second sentence of paragraph 1, while another thought the sentence was reasonable and should be retained. The Government of Switzerland had also made a proposal concerning that sentence to which he had replied in paragraph 7 of his observations (A/CN.4/241/Add.3). His proposed new wording of the article reflected his acceptance of the Swiss proposal. It read:

Article 49

Protection of premises, property and archives

1. When the permanent mission is temporarily or finally recalled, the host State shall respect and protect the premises as well as the property and archives of the permanent mission. The sending State shall take all appropriate measures to terminate this special duty of the host State within a reasonable time. In the discharge of its obligations under the present paragraph, the sending State may entrust the custody of the premises, property and archives of the permanent mission to a third State.

2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and archives of the permanent mission from the territory of the host State.

88. Mr. USHAKOV said he was surprised that the words "must respect and protect" should have been replaced by the words "shall respect and protect", although they were similar to the formula used in article 45 of the Vienna Convention on Diplomatic Relations.[11] The third sentence of paragraph 1, added by the Special Rapporteur, was based on article 45, sub-paragraph (*b*) of the same Convention. The latter provision was very different, however, both in form and in substance from that proposed by the Special Rapporteur. In particular, the phrase "acceptable to the receiving State" had not been reproduced, and the words "In the discharge of its obligations under the present paragraph" had been added. That addition was not felicitous because it referred to obligations stated in the same paragraph. Moreover, the concept of "reasonable time", which appeared in the second sentence, did not appear in the third.

89. He suggested that the Drafting Committee should take those comments into account when considering the form of the article.

90. Mr. EUSTATHIADES said that the article proposed by the Special Rapporteur had the merit of mentioning the custody of the premises, property and archives by a third State. With reference to the comments made by Mr. Ushakov on paragraph 1, he would suggest that the words "In the discharge of its obligations under the present paragraph" be simply deleted, and that the third sentence and the second sentence be transposed.

91. The second sentence of paragraph 1 might be interpreted as applying to a temporary recall as well as to the final recall. Logically speaking, it could only apply to the final recall, but that should nevertheless be specified.

92. Mr. ROSENNE said he found the Special Rapporteur's proposed new draft of article 49 in some respects an improvement on the original text, though he still had doubts about the words "special duty" in the second sentence of paragraph 1. What precisely was the meaning of the adjective "special"?

93. He suggested that the Drafting Committee might combine the first and second sentences of paragraph 1 by replacing the full stop after the words "permanent mission" by a semicolon and then continuing "however, the sending State shall take all appropriate measures . . .".

94. He agreed with Mr. Eustathiades' comment about temporary and final recall.

95. Mr. CASTAÑEDA said that if the third sentence of paragraph 1 were to begin with the words: "In the discharge of this obligation", that would solve one of Mr. Ushakov's problems. He doubted, however, whether it was advisable to be so precise and would propose instead that the opening phrase be deleted so that the third sentence would then begin with the words: "The sending State may entrust . . .". The words omitted were no more than an indication of the reason why the sending State might have recourse to a third State and were inappropriate in such an article. Moreover, the sending State might also have other reasons for such action. If the phrase were deleted, every State would be free to determine its reasons for transferring the responsibility to a third State.

96. Mr. YASSEEN said he agreed with Mr. Castañeda.

97. Mr. EL-ERIAN (Special Rapporteur) said that the first sentence of paragraph 1 was based on the first sentence of article 48, paragraph 1 of his 1969 draft, which read: "When the functions of a permanent mission come to an end, the host State must, even in the case of armed conflict, respect and protect the premises as well as the property and archives of the permanent mission".[12] That text was in turn based on article 45, sub-paragraph (*a*) of the Vienna Convention on Diplomatic Relations, which read: "the receiving State must, even

[11] United Nations, *Treaty Series*, vol. 500, p. 122.

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

in case of armed conflict, respect and protect the premises of the mission, together with its property and archives".

98. The words "In the discharge of its obligations", in the second sentence of paragraph 1, referred to the obligation of the sending State to take all appropriate measures to terminate the special duty of the host State to "respect and protect the premises as well as the property and archives of the permanent mission." However, he agreed with Mr. Ushakov and Mr. Eustathiades that the expression was ambiguous.

99. Some criticism had been made of the use of the adjective "special" in the words "special duty of the host State" in the second sentence. He could only refer to an incident before the Second World War, when an Italian general had been killed by terrorists while helping to demarcate the frontier between Greece and Albania. It had then been held that, while a State had a general duty to protect all aliens in itst territory, it had a special duty to do so when an alien was engaged on a politically difficult mission.[13]

100. The CHAIRMAN suggested that article 49 be referred to the Drafting Committee.

It was so agreed.[14]

ARTICLE 39 (Exemption from laws concerning acquisition of nationality)[15]

101. Mr. KEARNEY said that at an earlier meeting he had said he would try to explain exactly what was provided for on the subject of the acquisition of nationality in the laws of his country.[16] Article XIV of the amendments to the Constitution of the United States provided that: "All persons born and naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside . . .". The Supreme Court, however, had never held that that amendment applied to the children of accredited diplomats.

102. In the *Slaughterhouse Cases*,[17] it had been said that the phrase "subject to the jurisdiction thereof" was intended to exclude from the operation of the amendment "children of ministers, consuls and citizens or subjects of foreign States, born within the United States". However, in the case of the *United States* v. *Wong Kim Ark*,[18] the Supreme Court had ruled that that dictum was unsupported by any reference to authority, and that consuls, as such, and unless expressly invested with a diplomatic character in addition to their ordinary powers, were not considered as entrusted with authority to represent their sovereign in his intercourse with foreign States, but were subject to the jurisdiction, civil and criminal, of the courts of the country in which they resided. That ruling, of course, had applied only to consular officials, and there had as yet been no Supreme Court decision concerning the technical and administrative staff of permanent missions, whose status in his country must still be considered unsettled.

103. Mr. USTOR thanked Mr. Kearney for that information and said he hoped that the Secretariat would be able to provide similar information concerning the acquisition of nationality in Switzerland, a country which had no nationality laws based on *jus soli*, but which undoubtedly experienced many problems with respect to mixed marriages.

104. Mr. USHAKOV asked what would be the legal situation of the staff of diplomatic missions in the United States who were not themselves diplomats but served in some other capacity.

105. Mr. KEARNEY replied that their status would be substantially the same as that of administrative and technical staff in permanent missions, though there had never been a ruling on that subject by the Supreme Court. The United States Department of State had on occasion made decisions to the effect that children born of members of the administrative staff of diplomatic missions did not fall within the exemption to which he had referred. Those cases, however, had never been the subject of a court decision.

The meeting rose at 1.5 p.m.

1099th MEETING

Thursday, 13 May 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add 1-6; 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)

[13] See *Official Journal of the League of Nations* (minutes of the Council), 5th year, No. 4, April 1924, p. 524, Question V.

[14] For resumption of the discussion see 1115th meeting, para. 50.

[15] For previous discussion see 1096th meeting, para. 77.

[16] *Ibid.*, para. 99.

[17] 16 Wallace 36 (1873).

[18] 169 US 649 (1898).