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Summary record of the 996th meeting

Topic:
Representation of States in their relations with international organizations

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certain national insurance laws than to confirm inequalities in regard to such situations.

66. The CHAIRMAN, speaking as a member of the Commission, said he approved of the text proposed by the Special Rapporteur, having regard, in particular, to the provision in article 33 of the draft, which had been adopted by the 1961 Vienna Conference in its resolution II,¹⁰ but had not been included in the text of the Vienna Convention on Diplomatic Relations. In his view, that provision would be sufficient to solve the problems raised by traffic accidents.

67. Mr. EL-ERIAN (Special Rapporteur) said that the question of traffic accidents had given rise to a good deal of controversy at the 1961 Vienna Conference, which had not incorporated any provision on the subject in the Convention on Diplomatic Relations, but had passed a resolution recommending that the sending State should waive immunity in order to facilitate the settlement of claims for damages arising out of such accidents.

68. In the present draft, he had included an article 33 relating to civil claims in general. That article required the sending State to waive immunity in respect of civil claims in the host State "when this can be done without impeding the performance of the functions of the permanent mission". The article added that "when immunity is not waived, the sending State shall use its best endeavours to bring about a just settlement of the claims". Those provisions would establish an obligation, instead of making a mere recommendation like the resolution adopted by the 1961 Vienna Conference.

69. The difficulties to which Mr. Kearney had drawn attention were very real; insurance problems could be extremely complex, and followed no uniform pattern. The general opinion was that no exception should be made to the principle stated in article 31, and he noted that that opinion was shared by six out of the nine members who had spoken during the present discussion.

70. He suggested that, considering the provisions of articles 33 and 44, article 31 should be retained without the proposed addition.

71. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 31 to the Drafting Committee.

*It was so agreed.*¹¹

The meeting rose at 6.5 p.m.

¹⁰ See *United Nations Conference on Diplomatic Intercourse and Immunities, 1961, Official Records*, vol. II, p. 90.

¹¹ For resumption of the discussion, see 1018th meeting, para. 7.

996th MEETING

Wednesday, 11 June 1969, at 10.10 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eusta-

thiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

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

[Item 1 of the Agenda]

(continued)

ARTICLE 25 (Exemption of the premises of the permanent mission from taxation)¹ (*resumed from the previous meeting*)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's fourth report (A/CN.4/218). Before it took up article 32, Mr. Ustor, who had been unable to be present when the Commission had discussed article 25, wished to state his views on that article.²

2. Mr. USTOR said he was aware that article 25 was modelled on the corresponding provision of the 1961 Vienna Convention on Diplomatic Relations³ and that it broadly reflected existing international practice in the matter. Nevertheless, he wished to draw attention to the inequality which would result from the provisions of paragraph 2 of the article, as between a State which was able to buy property to house its mission or mission staff, and a State which was obliged to lease premises for that purpose.

3. If the sending State had sufficient funds to purchase premises for its mission, they would be exempt from taxation under article 25. But paragraph 2 of the article ruled out such exemption if the premises were leased, since in most countries it was the owner who was liable for the tax, no matter whether he occupied the premises himself or leased them to another person. Consequently, the owner of premises leased to a sending State or to the head of its permanent mission would naturally take the tax into account when fixing the rent, so that the poorer sending States would indirectly pay a tax which was not paid by the richer ones. The Commission should consider whether it was possible to incorporate in article 25 an element of progressive development which would eliminate that unsatisfactory inequality.

4. In the Commission's 1958 draft on diplomatic intercourse and immunities, the article on exemption of mission premises from tax had consisted of only one paragraph which made it clear that the exemption applied to the premises "whether owned or leased".⁴ A similar text had been adopted as article 32 in the

¹ See 994th meeting, para. 58.

² See previous meeting, para. 14.

³ United Nations, *Treaty Series*, vol. 500, p. 108, article 23.

⁴ *Yearbook of the International Law Commission, 1958*, vol. II, p. 96, article 21.

Commission's 1960 draft on consular intercourse and immunities, and the following explanation had been attached in paragraph (2) of the commentary: "The exemption to which this article relates is an exemption *in rem* affecting the actual building acquired or leased by the sending State... In point of fact, if this provision was interpreted as according exemption from taxation only to the sending State and head of consular post, but not to the building as such, the owner could charge these taxes and dues to the sending State or head of post under the contract of sale or lease, and the whole purpose which this exemption sets out to achieve would in practice be defeated."⁵

5. Unfortunately, the 1961 Vienna Conference had taken a different stand and had adopted the amendment which had become paragraph 2 of article 23 of the Vienna Convention on Diplomatic Relations. The same course had been followed by the 1963 Vienna Conference and a similar provision had been included in the corresponding article of the Vienna Convention on Consular Relations.⁶ The poor States had thus been treated worse than the rich ones.

6. It was interesting to note, however, that the inequality in question did not represent a universal practice. In Vienna, the Austrian authorities and the legal advisers of the International Atomic Energy Agency appeared to have reached a more liberal solution, to judge from the following passage in paragraph (3) of the Special Rapporteur's commentary on article 35: "In the case of IAEA, no taxes are imposed by the host State on the premises used by missions or delegates, including rented premises and parts of buildings."

7. For those reasons, he wished to place on record his opposition to paragraph 2 of article 25 and suggested that the Special Rapporteur consider the point after having made, with the aid of the Secretariat, a study of the real situation in such cities as New York, Geneva and Vienna. The Commission might consider at a later stage whether the situation could be corrected.

8. Mr. EL-ERIAN (Special Rapporteur) said he would consider the point carefully and try to decide whether additional information should be sought and whether article 25 should be amended or its commentary supplemented.

9. Mr. KEARNEY said it might assist the Special Rapporteur if he mentioned his only personal experience of any refund or rebate of tax in respect of premises leased. When serving with the United States Embassy in London, he had found that a diplomatic agent who leased an apartment could make a claim to the local tax authorities and receive a refund of the tax included in the rental paid by him under his lease. It would be desirable to ascertain whether that practice was general.⁷

⁵ *Op. cit.*, 1960, vol. II, pp. 163 and 164.

⁶ United Nations, *Treaty Series*, vol. 596, p. 288, article 32.

⁷ For resumption of the discussion, see 1016th meeting, para. 42.

ARTICLE 32

10.

Article 32

Waiver of immunity

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

2. Waiver must always be express.

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

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

11. Mr. NAGENDRA SINGH proposed that article 32 be referred to the Drafting Committee.

12. The CHAIRMAN, speaking as a member of the Commission, asked why the words "permanent representatives" and "permanent missions" were in the plural in paragraph 1; it would have been more natural to have put them in the singular. In paragraph 3, it would be better to say "by the permanent representative" than "by a permanent representative".

13. Mr. USTOR asked whether he was correct in assuming that the rule in paragraph 2 that waiver must always be express applied also to article 31, paragraph 2, which exempted the permanent representative and the members of the diplomatic staff of the permanent mission from the obligation to give evidence as witnesses.

14. Mr. EL-ERIAN (Special Rapporteur) said that that assumption was correct, although perhaps the privilege provided for in article 31, paragraph 2, might not strictly come under the heading of immunity from jurisdiction. He would include a passage in the commentary to explain the point.

15. The drafting points raised by the Chairman could be referred to the Drafting Committee.

16. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 32 to the Drafting Committee.

*It was so agreed.*⁸

ARTICLE 33

17.

Article 33

Consideration of civil claims

The sending State shall waive the immunity of any of the persons mentioned in paragraph 1 of article 32 in respect of civil claims in the host State when this can be done without impeding the performance of the functions of the permanent

⁸ For resumption of the discussion, see 1019th meeting, para. 45.

mission, and when immunity is not waived, the sending State shall use its best endeavours to bring about a just settlement of the claims.

18. Mr. EL-ERIAN (Special Rapporteur) said that he had already explained the purpose of article 33 during the discussion on claims arising out of traffic accidents.⁹ He had also explained his decision to include an article on the subject, instead of a recommendation such as had been adopted by the 1961 Vienna Conference in its resolution II.¹⁰

19. Mr. EUSTATHIADES said he noticed that the French version of article 33 followed the French version of article 42 of the draft on special missions. Whereas resolution II of the Vienna Conference on Diplomatic inter course and Immunities said, "*l'Etat accréditant applique tous ses efforts à obtenir un règlement équitable du litige*", the two articles to which he had referred provided that "*l'Etat d'envoi s'efforcera d'aboutir à un règlement équitable du litige*". The latter translation of the English expression "shall use its best endeavours" was weaker than the Vienna translation and in his view it would be better to adopt the Vienna version.

20. Mr. EL-ERIAN (Special Rapporteur) said he was grateful to Mr. Eustathiades for drawing attention to the fact that article 33 was in fact modelled on article 42 of the draft on special missions.¹¹

21. In view of his decision, which he considered justified, to treat the matter in an article rather than in a resolution, he had thought that the language should be that of a provision in a convention rather than a recommendation.

22. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 33 to the Drafting Committee.

*It was so agreed.*¹²

ARTICLE 34

23.

Article 34

Exemption from social security legislation

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

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

(a) That such employed persons are not nationals of or permanently resident in the host State, and

⁹ See previous, meeting, para. 67 *et seq.*

¹⁰ See *United Nations Conference on Diplomatic Intercourse and Immunities, 1961, Official Records, vol. II, p. 90.*

¹¹ See *Yearbook of the International Law Commission, 1967, vol. II, p. 365.*

¹² For resumption of the discussion, see 1020th meeting, para. 6.

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

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

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

5. The provisions of the present article do not affect bilateral and multilateral agreements on social security which have been previously concluded and do not preclude the subsequent conclusion of such agreements.

24. Mr. TABIBI said that article 34 was modelled on article 33 of the Vienna Convention on Diplomatic Relations. He suggested that it be referred to the Drafting Committee.

*It was so agreed.*¹³

ARTICLE 35

25.

Article 35

Exemption from dues and taxes

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

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

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

(c) Estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 41;

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

(e) Charges levied for specific services rendered;

(f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 25.

26. Mr. KEARNEY said he was aware that the wording of sub-paragraph (f) was taken from the corresponding provision of the Vienna Convention on Diplomatic Relations,¹⁴ but he found the final proviso, "subject to the provisions of article 25", somewhat confusing. All his efforts to read the sub-paragraph in conjunction with article 25 had not enabled him to ascertain which dues and taxes were covered by the exemption and which were not. Nor had he been able to determine the exact relationship between the provision in sub-paragraph (f) and that in sub-paragraph (e); in the matter of mortgage dues, it was possible to go back

¹³ For resumption of the discussion, see 1020th meeting, para. 24.

¹⁴ United Nations, *Treaty Series*, vol. 500, p. 114, article 34.

and forth between the provisions of article 25 and those of article 35 without being able to determine whether those dues were payable or not.

27. Mr. EL-ERIAN (Special Rapporteur) said he would examine the point raised by Mr. Kearney and try to include a suitable passage on it in the commentary.

28. Mr. CASTAÑEDA said that article 35 raised problems of legal drafting. The article dealt with an exception to the general rule, but itself contained an exception to the exception and that made its structure very complicated. Perhaps the Drafting Committee could find a simpler way of putting it.

29. Mr. YASSEEN said that, even though the drafting was not wholly satisfactory, every effort should be made to adopt texts which closely followed those already adopted at Vienna.

30. The CHAIRMAN suggested that article 35 be referred to the Drafting Committee.

*It was so agreed.*¹⁵

ARTICLE 36

31. *Article 36* *Exemption from personal services*

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

32. Mr. YASSEEN said that article 36 was based on article 35 of the Vienna Convention on Diplomatic Relations. He suggested that it be referred to the Drafting Committee.

*It was so agreed.*¹⁶

ARTICLE 37

33. *Article 37* *Exemption from Customs duties and inspection*

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

(a) Articles for the official use of the permanent mission;

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

2. The personal baggage of a permanent representative or a member of the diplomatic staff of the permanent mission shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by

¹⁵ For resumption of the discussion, see 1020th meeting, para. 28.

¹⁶ For resumption of the discussion, see 1020th meeting, para. 39.

the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. Such inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

34. Mr. EL-ERIAN (Special Rapporteur) said that article 37 was based on article 36 of the Vienna Convention on Diplomatic Relations. In paragraphs (3) and (4) of the commentary he had cited the provisions of the United States Code of Federal Regulations and the Swiss Customs Regulations which dealt with the exemption from Customs duties and inspection of permanent representatives to the United Nations at New York Headquarters and at the Geneva Office. In paragraph (5) he had given some information on the position at FAO and UNESCO headquarters.

35. The CHAIRMAN suggested that article 37 be referred to the Drafting Committee.

*It was so agreed.*¹⁷

ARTICLE 38

36. *Article 38* *Acquisition of nationality*

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

37. Mr. EL-ERIAN (Special Rapporteur) said that exemption from the automatic operation of the nationality laws of the host State had been the subject of an article in the 1958 draft on diplomatic intercourse and immunities.¹⁸ The 1961 Vienna Conference, however, had decided not to include an article on the subject in the Convention, but to deal with it in a separate Optional Protocol.¹⁹

38. He had thought it desirable to include an article on the subject in the present draft, without prejudging the question whether its provisions should be retained in the convention or put into an optional protocol. That point could be decided by the conference or other body which would ultimately adopt the convention.

39. Mr. YASSEEN said that the article was essential and should form an integral part of the convention, despite the fact that the Vienna Conference had preferred to deal with the matter in a separate protocol. It should not be possible for the host State, by its own legislation, to impose its nationality on persons who, with their families, were in its territory only to perform an international function.

40. It was a matter that could affect not only members of the permanent representative's family, but the

¹⁷ For resumption of the discussion, see 1020th meeting, para. 49.

¹⁸ See *Yearbook of the International Law Commission, 1958*, vol. II, p. 101, article 35.

¹⁹ See *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vol. II, pp. 88 and 89.

permanent representative himself. Such a situation might arise where the laws of the host State provided that, after a specified period of residence, a person would recover the nationality of that State when he had lost it as a result of having voluntarily acquired another nationality.

41. Mr. CASTAÑEDA said it might perhaps be desirable to have a longer and more explicit commentary on the article. The soundness of the rule was not in doubt, but it would be wise to specify the circumstances in which the problem had arisen or might arise, and thus provide an explanation of why it had been thought necessary to include the rule in the text of the convention itself.

42. Mr. RUDA said he supported the Special Rapporteur's proposal for an article on the acquisition of nationality. But since the point had given rise to extensive discussion at both the 1961 and the 1963 Vienna Conferences, the commentary should be expanded to explain the Commission's reasons for including the article.

43. Mr. BARTOŠ said that the Special Rapporteur had been right to make into a mandatory rule a principle which previously had merely been embodied in an optional protocol, but the Commission ought to explain why it considered that step necessary, since there might still be some people who opposed it. The commentary should draw attention to the way the principle had gained ground since the adoption of the Optional Protocol to the Vienna Convention on Diplomatic Relations. For instance, it might say how many States had signed the Optional Protocol and how many had ratified it. That would make it clear that the Protocol had already acquired a certain standing in international law and that, in proposing that the principle be adopted as an actual legal rule, the Commission was merely giving added force to an idea that was already accepted in practice.

44. Mr. RAMANGASOAVINA said that questions of nationality could arise, for example, in cases of State succession. When part of a territory was incorporated in a new State, that State might confer its nationality by law on all persons resident there at the time of the incorporation. The article was useful, but the commentary should be expanded to provide a full explanation of the problem.

45. Mr. CASTRÉN said he agreed with the previous speakers. At the 1961 Vienna Conference most delegations had been prepared to include the rule in the text of the Convention itself. It had only been because of the opposition of certain countries, mainly Latin American, that the Conference had decided to put it in a separate Protocol.

46. Mr. IGNACIO-PINTO said he agreed that the Commission should now go a step further. It should base its article on the 1961 Optional Protocol, but should explain in the commentary why it had decided that the rule should be included as an article of the draft convention itself. It was not right that a diplomat should be at the mercy of local law.

47. Mr. EL-ERIAN (Special Rapporteur) said that the important principle stated in article 38 was evidently acceptable to all members. There was also general agreement that it should be stated in the form of an article and that the commentary should be expanded.

48. He would therefore draft a commentary reproducing the explanations given by the Commission in its commentary on the corresponding article of the 1958 draft on diplomatic intercourse and immunities, and giving an account of the circumstances in which the 1961 Vienna Conference had decided to adopt the separate Optional Protocol concerning Acquisition of Nationality. The commentary would state that the Optional Protocol had entered into force on 24 April 1964, and would list the States parties to it.

49. In support of the Commission's recommendation that the provision should form an integral part of the draft, he would include in the commentary an argument based on the difference between the Convention on Diplomatic Relations and the present draft with regard to the scope of application. The Optional Protocol concerning Acquisition of Nationality was intended to apply to bilateral relations between the more than sixty States parties to the 1961 Vienna Convention on Diplomatic Relations. The provisions of article 38, on the other hand, were intended to apply only to the small number of States which were hosts to international organizations. The need for flexibility to accommodate certain countries, which had induced the 1961 Vienna Conference to adopt a separate Optional Protocol, did not arise in the present instance.

50. He proposed that article 38 be referred to the Drafting Committee on the understanding that the commentary would be expanded as he had suggested.

51. The CHAIRMAN said that, if there were no further comments, he would assume that the Commission agreed to adopt the Special Rapporteur's proposal.

*It was so agreed.*²⁰

ARTICLE 39

52.

Article 39

Persons entitled to privileges and immunities

1. The members of the family of a permanent representative or of a member of the diplomatic staff of the permanent mission forming part of his household shall, if they are not nationals of the host State, enjoy the privileges and immunities specified in articles 29 to 37.

2. Members of the administrative and technical staff of the permanent mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 29 to 36, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in article 37, paragraph 1, in respect of articles imported at the time of first installation.

²⁰ For resumption of the discussion, see 1020th meeting, para. 53.

3. Members of the service staff of the permanent mission who are not nationals of or permanently resident in the host State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in article 34.

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

53. Mr. EL-ERIAN (Special Rapporteur) said he would like to draw particular attention to paragraphs (2) and (3) of his commentary on article 39.

54. Mr. NAGENDRA SINGH said he was glad the Special Rapporteur had not used the term "private servants", which was objectionable and was not as comprehensive as "private staff".

55. He entirely agreed with the text of the article, which rightly followed that of article 37 of the Vienna Convention, and he proposed that it be referred to the Drafting Committee.

56. Mr. EUSTATHIADES said that the effect of article 39, which was modelled on article 37 of the 1961 Vienna Convention, was to extend the range of persons enjoying privileges and immunities. Although that had been done in the case of multilateral diplomatic relations, it was doubtful whether such an extension was equally appropriate for permanent missions, whose privileges and immunities were solely a matter for the State in which the headquarters of the organization was situated. Efforts should therefore be made to ascertain more precisely the existing practice of host States in the matter and the views of States regarding the extension of the régime of privileges and immunities.

57. Mr. USTOR said that Mr. Eustathiades had made a sound point, inasmuch as international practice in the matter was not so precisely developed as was assumed in the article. Apart from that consideration, however, the Commission should retain article 39, since it was engaged not only in the codification but also in the progressive development of international law. It was desirable to assimilate the staff of permanent missions to the staff of diplomatic missions and to adopt a provision which would allow members of the family of the permanent representative to enjoy the same privileges and immunities as members of the family of a diplomatic representative.

58. Mr. EL-ERIAN (Special Rapporteur) said that the important point raised by Mr. Eustathiades had given rise to controversy in the Commission on earlier occasions. In going further than the Commission with respect to the privileges and immunities of administrative staff, the Conference on Diplomatic Intercourse and Immunities had shown a trend towards more generous treatment. Some countries which had acceded to the Vienna Convention had made reservations to article 37, while others had entered objections to those reserva-

tions. He agreed with Mr. Ustor, however, that the Commission should take a firm stand and retain the present text of article 39, even if objections were to be expected from certain Governments.

59. Mr. CASTAÑEDA said that article 39 enhanced the importance of article 38 by providing that the privileges and immunities specified in articles 29 to 37 were granted to the persons entitled to claim them "if they are not national of the host State". If it were not for article 38, the children of permanent representatives born in the host State and considered to be its nationals would not be able to enjoy privileges and immunities. Where multilateral diplomatic relations were concerned, it was possible to avoid appointing a diplomat to a country where he might find himself in a difficult situation for that reason, but the same was not true of permanent delegations to international organizations, whose headquarters were permanently established in one country. The Special Rapporteur had therefore been right in proposing the rules set out in article 39.

60. The CHAIRMAN suggested that the Commission refer article 39 to the Drafting Committee.

*It was so agreed.*²¹

ARTICLE 40

Article 40

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, a permanent representative or a member of the diplomatic staff of the permanent mission who is a national or a permanent resident of that State or is, or has been, its representative, shall enjoy immunity from jurisdiction, and inviolability, only in respect of official acts performed in the exercise of his functions.

2. Other members of the staff of the permanent mission and private staff who are nationals or permanent residents of 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 persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

62. Mr. EL-ERIAN (Special Rapporteur) said that article 40 reproduced article 38 of the Vienna Convention on Diplomatic Relations, with the necessary drafting changes. He drew the Commission's attention to paragraph (2) of his commentary on the article, in which he referred to the note on nationality of members of a permanent mission contained in his third report.²²

63. The CHAIRMAN suggested that the Commission refer article 40 to the Drafting Committee.

*It was so agreed.*²³

²¹ For resumption of the discussion, see 1022nd meeting, para. 1.

²² See *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/203, chapter II, part II, section I, following article 9.

²³ For resumption of the discussion, see 1022nd meeting, para. 45.

ARTICLE 41

64.

*Article 41**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.

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, but shall subsist until that time, even in case of armed conflict. 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 or permanent resident of the host State or 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.

65. Mr. KEARNEY said he found no particular difficulties in article 41, although the English text of paragraph 4 might be improved. He was, however, concerned about the fact that so far the draft articles did not contain any clause which specified when the functions of the person enjoying privileges and immunities came to an end, as mentioned in paragraph 2.

66. Mr. EL-ERIAN (Special Rapporteur) said that article 46 (A/CN.4/218/Add.1) explained when the functions of a permanent representative or a member of the diplomatic staff of the permanent mission came to an end. The question could be taken up in connexion with that article.

67. The CHAIRMAN, speaking as a member of the Commission, said that the words "from the moment when his appointment is notified to the host State", at the end of paragraph 1, should be replaced by the words "from the moment when the organization has notified his appointment to the host State." Article 17, adopted by the Commission in 1968,²⁴ provided that notifications were to be made by the sending State to the organization and that the organization was then to transmit those notifications to the host State. The article did say that the sending State might also transmit notifications to the host State, but that was purely optional.

68. Mr. AGO said he thought it might be possible to cover both direct and indirect notifications by using some

flexible form of words such as "from the moment when the appointment has been brought to the knowledge of the host State", or whatever other wording the Drafting Committee might decide to adopt.

69. Mr. EL-ERIAN (Special Rapporteur) said he agreed with Mr. Ago.

70. Mr. STAVROPOULOUS (Legal Counsel) said that in his experience it had never been the practice for the sending State to notify the host State when it despatched a permanent representative to an international organization in the territory of the host State. In the case of the United Nations, the sending State notified the Secretary-General, and the latter then notified the competent authorities of the host State.

71. Mr. EL-ERIAN (Special Rapporteur) suggested that, since the point related to article 17 concerning notifications, it should be dealt with at the second reading of that article.

72. Mr. STAVROPOULOUS (Legal Counsel) pointed out that article 17, paragraph 4 provided that "The sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article". Accordingly, while the sending State was permitted to notify the host State, it did not appear that it was under any obligation to do so.

73. Mr. AGO said that if the sending State was required to send notifications to the organizations, then the date on which the privileges and immunities would take effect should be the date on which the notification was communicated by the organization to the host State. The Legal Counsel should send his comments on the point to the Commission, so that it could take them into account during the second reading.

74. Mr. RUDA said that paragraph (4) of the Commission's commentary on article 17 quoted the "Decision of the Swiss Federal Council concerning the legal status of permanent delegations to the European Office of the United Nations and to other international organizations having their headquarters in Switzerland", of 31 March 1948. Paragraph 4 of that Decision provided that: "The establishment of a permanent delegation and the arrivals and departures of members of permanent delegations are notified to the Political Department by the diplomatic mission of the State concerned at Berne. The Political Department issues to members of delegations an identity card (*carte de légitimation*) stating the privileges and immunities to which they are entitled in Switzerland." But since paragraph (5) of the commentary went on to say that the practice of the specialized agencies regarding the procedure for notification varied and was far from systematized, it was obvious that the problem was one that called for reflection on the part of the Commission.

75. Mr. BARTOŠ said that in his view the article should provide for both possibilities—notification through the organization and direct notification—so as to allow for differences in practice between one country and another, for instance, the United States of America and the Swiss Confederation.

76. Mr. USTOR said that the main point of article 41 was in paragraph 1, which stated that every person-

²⁴ See *Yearbook of the International Law Commission, 1968*, vol. II, Report of the Commission to the General Assembly, chapter II, section E.

entitled to privileges and immunities was to enjoy them from the moment he entered the territory of the host State. Enjoyment of those privileges and immunities would therefore seem to be independent of any kind of notification. There was, to be sure, a minor problem if the person appointed as permanent representative was already resident in the host State, since it was obvious that the latter could not accord any privileges and immunities to him until it had received notification of his appointment. Mr. Ago's suggestion should satisfy the majority of the Commission.

77. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the situation of a person arriving from abroad and the situation of a person already in the territory of the host State were different, because the former enjoyed privileges and immunities from the moment of his arrival, whereas the latter could not enjoy them until the organization had notified his appointment to the host State, and that formality could be a source of delay. The two situations should be placed on the same footing.

78. Mr. EL-ERIAN (Special Rapporteur) said that if the Commission agreed, he would prepare a fresh draft of article 41 taking account of that point.

79. The CHAIRMAN suggested that the Commission authorize the Special Rapporteur to prepare a fresh draft of article 41 and refer it to the Drafting Committee.

*It was so agreed.*²⁵

80. Mr. AGO said he would like to ask the Legal Counsel what happened in practice when a person appointed to a permanent mission arrived in the host State before the organization had notified his appointment to that State.

81. Mr. STAVROPOULOUS (Legal Counsel) said that the United Nations had always maintained that permanent representatives should enjoy their privileges and immunities from the moment of their arrival, even if notification of their appointment was not received until later. Permanent representatives always arrived bearing credentials addressed to the Secretary-General, who subsequently notified the host State and requested that the necessary privileges and immunities be accorded to them. Such notification was merely a matter of practical convenience and was not a legal obligation of the organization. In the case of United Nations headquarters, of course, the host State was aware of the appointment of permanent representatives because, under its regulations, they were required to apply for a visa before entering United States territory.

82. Mr. BARTOŠ said that in practice few difficulties arose. Even so, the article would have to be drafted with great care.

83. Mr. KEARNEY said that Mr. Bartoš had pointed out the practical problems involved in determining the time when privileges and immunities commenced. Regardless of what the Commission decided to include

in article 41, as a practical matter the host State would be unable to assure certain privileges and immunities until the permanent representative and the organization had complied with the necessary formalities. Exemption from sales tax was an obvious example.

84. The host State would, to some extent, be aware of the arrival of a member of a permanent mission when he passed through immigration controls or the like, but if he was already resident in its territory there was no practical way, except notification, by which the host State could begin to accord him privileges and immunities. He hoped that the Special Rapporteur would bear those problems in mind.

85. Mr. EL-ERIAN (Special Rapporteur) said that the Drafting Committee would take all those problems into consideration.

The meeting rose at 1.5 p.m.

997th MEETING

Thursday, 12 June 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/218 and Add.1; A/CN.4/L.118)

[Item 1 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to consider article 42 in the Special Rapporteur's fourth report (A/CN.4/218).

ARTICLE 42

2.

Article 42

Duties of third States

1. If a 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 enjoying privileges or immunities who are accompanying

²⁵ For resumption of the discussion, see 1023rd meeting, para. 53.