

Document:-  
**A/CN.4/L.168 and Corr.2 and 3**

**Text of articles adopted by the Drafting Committee: articles 6-27, 27 bis, 28-33, 35-44 and 46-49 - reproduced in document A/CN.4/SR.1110 to SR.1116**

Topic:  
**Representation of States in their relations with international organizations**

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**1110th MEETING**

Tuesday, 1 June 1971, at 3.5 p.m.

Chairman: Mr. Senjin TSURUOKA

*Present:* Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

**Relations between States and international organizations**

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168 and Add.1)

[Item one of the agenda]

(continued)

**ARTICLE 114**

1. The CHAIRMAN invited the Commission to consider article 114, on the end of the functions of a member of a delegation. He drew attention to the drafting amendment recommended by the Special Rapporteur (A/CN.4/241/Add.6) which consisted in replacing the words "on notification to this effect", in sub-paragraph (a), by the words "on notification of their termination".

2.

*Article 114**End of the functions of a member of a delegation*

The functions of a member of a delegation to an organ or to a conference shall come to an end, *inter alia*:

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

(b) upon the conclusion of the meeting of the organ or the conference.

3. Mr. BARTOŠ requested that the Drafting Committee should consider whether the article as drafted would not prevent a member of a delegation from ending his functions by resignation, as he should have the right to do.

4. The CHAIRMAN suggested that article 114 should be referred to the Drafting Committee for consideration in the light of the Special Rapporteur's report (A/CN.4/241/Add.6) and the question just raised by Mr. Bartoš.

*It was so agreed.*<sup>1</sup>

**ARTICLE 115**

5. The CHAIRMAN invited the Commission to consider article 115, on facilities for departure, to which the Special Rapporteur had proposed no change.

6.

*Article 115**Facilities for departure*

The provisions of article 48 shall also apply in the case of a delegation to an organ or to a conference.

7. Sir Humphrey WALDOCK observed that article 115 would appear in a slightly different form on its return from the Drafting Committee, since it referred back to article 48 which had already undergone some minor changes (A/CN.4/L.168).

8. Mr. ROSENNE said he took it that the Drafting Committee would consider the Special Rapporteur's recommendations as a whole, including his proposed new article Z (A/CN.4/241/Add.6).

9. The CHAIRMAN suggested that article 115 should be referred to the Drafting Committee for consideration in the light of the Special Rapporteur's report and of the comments made.

*It was so agreed.*<sup>2</sup>

**ARTICLE 116**

10. The CHAIRMAN invited the Commission to consider article 116, on the protection of premises and archives.

11.

*Article 116**Protection of premises and archives*

1. When the meeting of an organ or a conference comes to an end, the host State must respect and protect the premises of a delegation so long as they are assigned to it, as well as the property and archives of the delegation. 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 the archives of the delegation from the territory of the host State.

12. The CHAIRMAN drew attention to the amendments recommended by the Special Rapporteur (A/CN.4/241/Add.6), which consisted in the replacement of the word "must" by the word "shall" in both sentences of paragraph 1, and the addition to that paragraph of a final sentence reading:

"[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 delegation to a third State."

13. Mr. ALBÓNICO suggested that the Drafting Committee should take into account the United States Government's observations (A/CN.4/240/Add.4, section B.11), which reflected the general practice in regard to delegations to organs and conferences.

14. Mr. EUSTATHIADES said that the phrase in square brackets in the Special Rapporteur's proposal should be deleted; as had been observed when the Commission had considered the corresponding article on

<sup>1</sup> For resumption of the discussion see 1127th meeting, para. 22.

<sup>2</sup> For resumption of the discussion see 1127th meeting, para. 18.

permanent missions,<sup>3</sup> it only introduced an element of confusion.

15. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission was prepared to refer article 116 to the Drafting Committee for consideration in the light of the observations of governments and the Special Rapporteur's report (A/CN.4/241/Add.6).

*It was so agreed.*<sup>4</sup>

16. The CHAIRMAN said that the Commission had concluded its consideration of the draft articles submitted by the Special Rapporteur with the exception of the general provisions. He suggested that it should next consider the draft articles proposed by the Drafting Committee. In the absence of Mr. Ago, the Chairman of the Drafting Committee, he invited Mr. Ushakov to introduce those articles.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE  
PART II. *Permanent missions to international organizations*

17. USHAKOV, speaking on behalf of the Drafting Committee, drew attention to document (A/CN.4/L.168), containing the texts adopted by the Drafting Committee for articles 6 to 27, 27 *bis*, 28 to 33, 35 to 44 and 46 to 49. The Drafting Committee had adopted those texts only provisionally, subject to any changes which might prove necessary when it examined the draft as a whole.

ARTICLE 6

18. Turning to article 6, he said that the Drafting Committee considered it important for the host State to be informed without delay of the establishment of a permanent mission, since it might have steps to take in the interests of the sending State and of the organization, even before it had received the notifications mentioned in article 17. The Committee had therefore added a second paragraph to the article, which now read:

*Article 6*

*Establishment of permanent missions*

1. Member States may establish permanent missions to the Organization for the performance of the functions provided for in article 7 of the present articles.

2. The Organization shall notify to the host State the establishment of a permanent mission.

19. Mr. EUSTATHIADES noted with satisfaction that the Drafting Committee had adopted the idea he had put forward during the consideration of article 17 on notifications,<sup>5</sup> namely, that the host State should be informed in good time of the appointment of the member of a permanent mission and *a fortiori* of the establishment of such a mission. He proposed that the words "without delay" should be inserted in paragraph 2 after

the words "host State"; that would give the host State time to state its opinion. The most appropriate place for those words was perhaps in article 17, but if they were to appear there, they should also appear in article 6.

20. Mr. BARTOŠ observed that the Commission could take only provisional decisions on the articles submitted to it by the Drafting Committee, since it might have to make further changes when it examined the general provisions.

21. The question arose whether the notification provided for in paragraph 2 was to be made before or after the permanent mission was established. If it was to be made before, that amounted to saying that the establishment of the permanent mission was subject to the condition of notification, which was an impossible condition because a person could not be appointed to a mission which did not yet exist. If it was to be made afterwards, it was simply a matter of reporting an already accomplished fact which had to be notified as quickly as possible. His own opinion was that the notification had to be made after the mission was established. But since ideas on the time to be allowed for notification might differ from one State to another, it might perhaps be better, subject to the approval of all the members of the Drafting Committee, to specify, if only in the commentary, that the notification and the establishment of the mission should be simultaneous.

22. Mr. ROSENNE thanked Mr. Ushakov for his presentation of article 6 and noted that the articles proposed by the Drafting Committee would be dealt with by the Commission on a provisional basis, pending completion of the revised introductory and general articles.

23. It was to be hoped that the new paragraph 2 of article 6 would be applied and interpreted with reasonable flexibility and that notification would not be regarded as a prerequisite for the establishment of a permanent mission. He doubted whether it would be necessary to introduce even a vague reference to time into that paragraph; that factor could best be dealt with in the commentary. The question might be one of real practical importance, since a State which did not maintain a permanent mission at the seat of an international organization might decide to designate one of its neighbouring diplomatic or consular missions as its permanent mission to that organization. In such a case, the attribution of the quality of a permanent mission to the diplomatic or consular mission could not be made dependent on notification of the host State, which was in any case already protected by the existing law concerning the activities of such missions.

24. Sir Humphrey WALDOCK suggested that the English text of paragraph 1 would be closer to the French if the words "provided for" were replaced by the word "mentioned".

25. Mr. KEARNEY said that the Drafting Committee had decided to add a similar new paragraph 2 to article 52, on the establishment of permanent observer missions. The part played by that paragraph would be different in the context of article 52; in the case of

<sup>3</sup> See 1098th meeting, para. 87 *et seq.*

<sup>4</sup> For resumption of the discussion see 1127th meeting, para. 35.

<sup>5</sup> See 1092nd meeting, para. 51 *et seq.*

article 6, the host State would know the membership of the organization, whereas in the case of article 52 the potential number of permanent observer missions was indefinite.

26. Mr. USHAKOV, speaking on behalf of the Drafting Committee, thanked Sir Humphrey Waldox for indicating a drafting change which should be made in paragraph 1 of the English text. The replacement of the word "indiquées" by "visées" in the French text was justified, because article 7 did not, strictly speaking, set forth the functions performed by a permanent mission, but only listed some of them.

27. As to Mr. Bartoš' comment concerning notification, the Drafting Committee's idea was that the notification should be made beforehand, but it could hardly be said that the organization should notify the intention of a sending State to establish a permanent mission. The question of the time of notification could be clarified in the commentary.

28. The insertion of the words "without delay" in paragraph 2, as proposed by Mr. Eustathiades, would give the impression that the notification was subsequent to the establishment of the permanent mission, which was contrary to the Drafting Committee's intention.

29. Mr. ROSENNE said that, in view of what Mr. Ushakov had just said, he hoped that the commentary on the new paragraph 2 would not be worded in unduly categorical terms. For the reason given by Mr. Kearney, he did not see any analogy between the establishment of permanent missions by member States and the establishment of permanent observer missions by non-member States.

30. Mr. ALBÓNICO said that if the words "provided for" in paragraph 1 were replaced by the word "mentioned", as proposed by Sir Humphrey Waldox, a parallel change should be made in the Spanish text.

31. With regard to the proposed new paragraph 2, he thought that the notification by the organization to the host State should be made after the permanent mission had been established, and that that should be made clear.

32. After a procedural discussion in which Mr. ROSENNE, Mr. USHAKOV, Sir Humphrey WALDOCK, Mr. BARTOŠ, and Mr. ELIAS took part, the CHAIRMAN suggested that the Commission should provisionally approve the text of article 6 adopted by the Drafting Committee, subject to amendment of the English text as proposed by Sir Humphrey Waldox.

*It was so agreed.<sup>6</sup>*

#### ARTICLE 7

33. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Drafting Committee proposed the following text for article 7:

#### Article 7

##### *Functions of a permanent mission*

The functions of a permanent mission consist *inter alia* in:

- (a) ensuring representation of the sending State to the Organization;
- (b) maintaining the necessary liaison between the sending State and the Organization;
- (c) negotiating with or in the Organization;
- (d) ascertaining activities in the Organization and reporting thereon to the Government of the sending State;
- (e) promoting co-operation for the realization of the purposes and principles of the Organization.

34. In sub-paragraph (a) the Drafting Committee had replaced the words "Representing the sending State in" by the words "ensuring representation of the sending State to". In sub-paragraph (b) the word "Keeping" in the English text had been replaced by the word "maintaining". In sub-paragraph (c) the words "Carrying on negotiations" had been replaced by the word "negotiating". In sub-paragraph (d) the Drafting Committee had deleted the words "and developments" as redundant. As the Commission would see, the changes made were purely drafting amendments.

35. Mr. ALBÓNICO proposed that the words "ensuring representation of" in sub-paragraph (a) should be replaced by the word "representing". He further proposed that, in the Spanish text of sub-paragraph (c), the words "del marco" should be deleted. He was not sure who were to be the participants in the co-operation referred to in sub-paragraph (e).

36. Mr. ROSENNE questioned the replacement of the original words "in the Organization" in sub-paragraph (a) by the words "to the Organization". The English text of that sub-paragraph would have to be given close consideration after the adoption of the relevant definition and the corresponding articles on permanent observer missions.

37. Mr. EUSTATHIADES said that the previous text of sub-paragraph (a) had been more elegant and more accurate. When the Commission had examined article 7, all the members had stressed the importance of the function of representation, so he did not see why it should not retain the words "representing the sending State in the Organization".

38. Mr. CASTAÑEDA said he shared the views of Mr. Albónico and Mr. Eustathiades concerning sub-paragraph (a). It could be said that the presence of the permanent mission would "ensure representation of the sending State", but surely its function would be simply that of "representing the sending State".

39. Sir Humphrey WALDOCK inquired what the Drafting Committee had had in mind proposing that change.

40. Mr. USHAKOV, speaking on behalf of the Drafting Committee, explained that the purpose of the change had been to make it clear that the organization could deal directly with ministerial departments and other organs of the sending State. The permanent mission

<sup>6</sup> For resumption of the discussion see 1118th meeting, para. 22.

would ensure representation in cases where the sending State had no other means of being represented to or in the organization. The shade of meaning was a delicate one, however, and perhaps it would be enough to say "representing".

41. The question which English preposition—"in", "at" or "to"—should be used, both in article 7, sub-paragraph (a) and in article 53, the corresponding provision for permanent observer missions, was a matter for the English-speaking members of the Commission to decide. In French, the words "*auprès de*" should be used.

42. Sir Humphrey WALDOCK said that in article 7, sub-paragraph (a), he could accept either "to" or "in". Article 53, on the functions of a permanent observer mission, used the preposition "at", but the difference between the two articles was that the permanent mission took an active part in the work of the organization while the permanent observer mission did not.

43. Mr. KEARNEY suggested that the problem might be solved by adding the words "and participating in its activities" at the end of sub-paragraph (a). The words "ascertaining activities in the Organization", in sub-paragraph (d), could then be deleted. As to the remainder of that sub-paragraph, he was not sure that it was essential to mention the function of "reporting".

44. Mr. ROSENNE urged members of the Commission to go cautiously. Participation in the activities of an organization, such as the proceedings of the General Assembly at United Nations Headquarters, was carried on through delegations. Members of delegations might be members of a permanent mission, but the latter had an element of permanent or residual representation not possessed by the ordinary delegation. That distinction should be maintained in the present draft.

45. Mr. CASTAÑEDA said that he could accept Mr. Kearney's suggestion, which would make sub-paragraph (a) clearer and more complete.

46. Mr. YASSEEN said it would be wrong to delete sub-paragraph (d), since ascertaining activities in the organization was one of the functions of a permanent mission. Making provision for that function placed the secretariat under an obligation to co-operate with the mission in that respect. On the other hand it was unnecessary to say that the permanent mission reported thereon to the government of the sending State; that was solely a matter of relations between the mission and the State it represented.

47. In sub-paragraph (a), it would be more correct to say that the permanent mission ensured "the" representation of the sending State; that was its main function. It would be more open to question to say that the mission as such participated in the activities of the organization. The head of the mission himself only participated in those activities if he had special powers; in most cases his function was rather to inform his government of the meetings to be held and to notify the organization of the names of the delegates who would be attending them.

48. The CHAIRMAN, speaking as a member of the Commission, drew attention to article 13, paragraph 2, as adopted by the Drafting Committee (A/CN.4/L.168); the Commission should be careful to avoid any contradiction between article 7 and article 13.

49. Mr. ELIAS said he thought the Commission might be attaching too much importance to the subject of participation introduced by Mr. Kearney. However, it could draw useful conclusions from what Mr. Rosenne and Mr. Yasseen had said on that subject.

50. Mr. USHAKOV, speaking on behalf of the Drafting Committee, observed that the Commission was going into questions of substance concerning the functions of the permanent mission, instead of examining the changes proposed by the Drafting Committee. The change proposed for sub-paragraph (a) reflected the situation of the permanent mission more accurately, but it was purely a drafting amendment. The Drafting Committee had made no change in the list of the permanent mission's functions.

51. Speaking as a member of the Commission, he said that a distinction should be made between the functions of the permanent mission as such, and the powers and competence of the permanent representative. The permanent representative could represent the sending State without special powers in accordance with article 13; but in that case it was he, not the permanent mission, who provided the representation. Article 7, as drafted by the Commission in 1968<sup>7</sup> and as now proposed by the Drafting Committee, was correct. The wording could still be changed, but not the substance.

52. He therefore proposed that the article should be referred to the Drafting Committee again.

53. Sir Humphrey WALDOCK observed that the present wording of article 7 was close enough to what ought to be said. He doubted whether anything could be gained by referring the article back to the Drafting Committee. He could accept Mr. Yasseen's proposal that the word "the" would be inserted before the word "representation" in sub-paragraph (a).

54. Mr. ELIAS said that he too could accept Mr. Yasseen's proposal.

55. Mr. SETTE CÂMARA supported Mr. Yasseen's proposal and Mr. Albónico's proposal that the words "ensuring representation" should be replaced by the word "representing".

56. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said he was prepared to accept Mr. Yasseen's proposal.

57. Mr. TESLENKO (Deputy Secretary to the Commission) said that the Special Rapporteur would have to justify, in his commentary any drafting changes that might be made. It was relatively easy to explain why the words "ensuring representation of the sending State" had been preferred to "representing the sending State"; but

<sup>7</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, p. 200.

it would be more difficult to justify the change proposed by Mr. Yasseen. It might therefore be better to revert to the text proposed by the Special Rapporteur.

58. Sir Humphrey WALDOCK said that, as he saw it, the point of using the word “ensuring” was to allow for the possibility that, when a delegation was present, the function of representation might take a somewhat different form.

59. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Chairman of the Drafting Committee had proposed two alternative texts for the beginning of sub-paragraph (a): “ensuring representation” and “ensuring the representation”. The Drafting Committee had adopted for the first alternative, but in view of the objections raised in the Commission, he could accept the second.

60. Mr. BARTOŠ said that, in practice, a permanent mission generally confined itself to ensuring representation of the sending State. It was responsible for notifying who was to represent the sending State, not for deciding, on behalf of that State, who would represent it. Often, it provided liaison between the organization and the sending State: it asked the government of the sending State who would be authorized to represent it, and communicated its reply to the organization. If the sending State did not expressly appoint a representative, the mission itself was entitled to represent it. In the light of current practice, therefore, he was not in favour of the expression “ensuring the representation of the sending State”.

61. Mr. EUSTATHIADES said that the functions listed in article 7 were not performed exclusively by the permanent mission itself. However, he would not oppose the use of the expression “ensuring the representation of the sending State”, if the Commission preferred it to the expression “representing the sending State”.

62. After a procedural discussion in which Mr. ALBÓNICO, Mr. CASTAÑEDA, the CHAIRMAN, Mr. USHAKOV, Mr. ROSENNE, Mr. YASSEEN and Mr. ELIAS took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission provisionally approved article 7 as proposed by the Drafting Committee and amended by Mr. Yasseen.

*It was so agreed.<sup>8</sup>*

The meeting rose at 5.30 p.m.

<sup>8</sup> For resumption of the discussion see 1132nd meeting, para. 67.

## 1111th MEETING

Wednesday, 2 June 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

### Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168 and Add.1)

[Item 1 of the agenda]

(continued)

### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the draft articles proposed by the Drafting Committee (A/CN.4/L.168 and Add.1).

#### ARTICLE 8

2. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that article 8, paragraph 1, as adopted by the Commission in 1968<sup>1</sup> had provided *in fine* that the sending State might assign a permanent representative “as a member” of another of its permanent missions. That expression included administrative and technical staff and service staff. The Drafting Committee had taken the view that, to avoid offending anyone, the scope of the provision should be confined to the assignment of a permanent representative to the diplomatic staff of another mission. It had therefore inserted the words “of the diplomatic staff” after the words “as a member”.

3. For similar reasons the Drafting Committee had inserted the word “diplomatic” before the word “staff” in the first part of paragraph 2. In view of that addition it had revised the second part of the paragraph to make it clear that it applied to members of the staff of the permanent mission.

4. In addition, the Drafting Committee had noted that the words “other international organizations” in paragraph 2 had no antecedent. It had therefore inserted the expression “international organizations” in the first phrase of the paragraph.

5. The Committee had made a consequential amendment to the title of the article.

<sup>1</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, p. 201.

6. With those changes the text proposed by the Drafting Committee for article 8 read:

*Article 8*

*Appointment or accreditation to two or more international organizations or assignment to two or more permanent missions*

1. The sending State may accredit the same person as permanent representative to two or more international organizations or assign a permanent representative as a member of the diplomatic staff of another of its permanent missions.

2. The sending State may accredit a member of the diplomatic staff of a permanent mission to an international organization as permanent representative to other international organizations or assign a member of the staff of a permanent mission as a member of the staff of another of its permanent missions.

7. Mr. ROSENNE said he found the text adopted by the Drafting Committee extremely restrictive. He did not understand why the Committee had departed so significantly from the conception of article 8 as adopted by the Commission in 1968; he suggested that the Commission should seriously consider reverting to that conception of the article.

8. Mr. ALBÓNICO supported the text adopted by the Drafting Committee, which introduced into the second part of paragraph 1 and the first part of paragraph 2 the useful clarification that those provisions related to members of the diplomatic staff.

9. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that, as the Committee saw it, article 8 did not provide for an obligation, but merely a faculty and hence was not restrictive.

10. Mr. ROSENNE said that, if the sending State was free to appoint or to assign anyone to the posts mentioned in article 8, he saw no reason why only diplomatic staff should be covered by the last part of paragraph 1 and the first part of paragraph 2.

11. The two principles involved were, first, the basic freedom of appointment and secondly, the rule that the same person could be accredited as permanent representative to more than one organization or assigned to more than one permanent mission. Since that rule applied in all cases, he saw no reason to restrict any of the provisions of article 8 to diplomatic staff.

12. Mr. USTOR explained that the Drafting Committee had made the change of wording in article 8 because in practice a permanent representative would only be assigned to the diplomatic staff of another permanent mission and, similarly, only a member of the diplomatic staff of a permanent mission to an international organization would normally be accredited as permanent representative to another international organization. He did not believe that there was any case on record in which a permanent representative had been assigned as a member of the administrative and technical staff of another permanent mission, or in which a member of that staff had been accredited as a permanent representative.

13. The CHAIRMAN, speaking as a member of the Commission, said it need only be made clear in the com-

mentary that the Drafting Committee regarded article 8 as optional. The commentary should also explain that article 8, like many other provisions, dealt with normal cases and not with extreme cases which constituted exceptions. With those explanations in the commentary, article 8 would seem to be well-balanced and could be approved.

14. Mr. ROSENNE said he still had misgivings about the text adopted by the Drafting Committee and could not support it.

15. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission provisionally approved the text of article 8 proposed by the Drafting Committee.

*It was so agreed.<sup>2</sup>*

ARTICLE 9

16. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had made several changes in article 9.

17. First, the Committee had considered that article 9 should not mention assignment to temporary functions such as those of a member of a special mission. On the other hand, it was necessary to mention accreditation as a permanent observer and assignment as a member of a permanent observer mission. The Committee had amended paragraph 1 accordingly.

18. For the reasons he had stated in connexion with article 8, it should not be provided in article 9 that the head of a permanent mission might be assigned as a member of the administrative and technical staff or the service staff of a diplomatic mission or that a member of the administrative and technical staff or the service staff of a permanent mission might be accredited as the head of a diplomatic mission. Paragraph 2 reflected those considerations.

19. The Committee had had to draft a new paragraph 3 to cover the case of members of the staff of a permanent mission in general. The former paragraph 3 had become paragraph 4.

20. The Committee had considered that the provisions of the former paragraph 4 adopted by the Commission in 1968<sup>3</sup> were redundant, because they stated a self-evident truth. It had therefore deleted that paragraph, but thought that the reasons for its deletion should be explained in the commentary to article 9.

21. The text proposed by the Drafting Committee for article 9 read:

*Article 9*

*Accreditation, assignment or appointment of a member of a permanent mission to other functions*

1. The permanent representative of a State to an international organization may be accredited as head of the diplomatic mission

<sup>2</sup> For resumption of the discussion see 1132nd meeting, para. 75.

<sup>3</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, p. 202.

of that State to the host State or to another State or as permanent observer to another international organization. He may also be assigned as a member of the diplomatic staff of the diplomatic mission of his State to the host State or to another State or as a member of the diplomatic staff of a permanent mission to another international organization.

2. A member of the diplomatic staff of a permanent mission of a State to an international organization may be accredited as head of the diplomatic mission of that State to the host State or to another State or as a permanent observer to another international organization.

3. A member of the staff of the permanent mission of a State to an international organization may be assigned as a member of the staff of the diplomatic mission of that State to the host State or to another State or as a member of the staff of the permanent observer mission of that State to another international organization.

4. A member of a permanent mission of a State to an international organization may be appointed as a member of a consular post of that State in the host State or in another State.

22. Mr. EUSTATHIADES said he acknowledged that paragraph 4 of the former text added nothing of substance to the provisions of article 9, but it did help to make the article clear by adding some useful particulars. It might not be advisable to delete it.

23. Mr. USTOR pointed out that, when article 9 had been drafted, the Commission had not had Part IV, on delegations, before it, so that no reference had been made to the possibility of a member of a permanent mission being appointed a member of a delegation. That possibility went without saying, but perhaps the same was true of most of the provisions of article 9. It was true that the article would later be considered for incorporation in a general article applicable to the whole draft, but in the meantime the possibility of appointing a member of a permanent mission as a member of a delegation ought to be mentioned, at least in the commentary. With that proviso he was prepared to support article 9 as proposed by the Drafting Committee.

24. Mr. ROSENNE observed that the original intention had been to leave all temporary missions outside the scope of article 9. But if the Commission finally decided to include delegations, which were temporary missions to international organizations, it would also have to consider including the other form of temporary missions, namely, special missions.

25. He associated himself with the remarks made by Mr. Eustathiades regarding the former paragraph 4 of article 9. In that connexion he assumed that the provisions of article 59, paragraph 2, on the retention of privileges and immunities in cases of dual function would be made applicable to the whole draft.

26. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee intended to prepare a general provision clearly stating that the privileges and immunities of persons appointed to several posts were not affected by the plurality of functions. That was why the Committee was not proposing any provision to that effect in the part of the draft concerning permanent missions.

27. The CHAIRMAN suggested that, with that explanation and taking into account the comments made by some members, the Commission should be able provisionally to approve article 9 as proposed by the Drafting Committee.

*It was so agreed.*<sup>4</sup>

#### ARTICLE 10

28. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had decided to insert a reference to article 8 in article 10 (A/CN.4/L.168), but had reconsidered that decision.

29. The text now proposed was that adopted by the Commission in 1968, which read:

##### *Article 10*

##### *Appointment of the members of the permanent mission*

Subject to the provisions of articles 11 and 16, the sending State may freely appoint the members of the permanent mission.

30. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved the text of article 10 proposed by the Drafting Committee.

*It was so agreed.*<sup>5</sup>

#### ARTICLE 11

31. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had made no change in the text of article 11 adopted by the Commission in 1968, which read:

##### *Article 11*

##### *Nationality of the members of the permanent mission*

The permanent representative and the members of the diplomatic staff of the permanent mission should in principle be of the nationality of the sending State. They may not be appointed from among persons having the nationality of the host State, except with the consent of that State which may be withdrawn at any time.

32. Mr. ALBÓNICO asked whether the approval of an article also implied approval of the 1968 commentary attached to it.

33. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said it was the Commission's practice to give final approval to the articles with their commentaries when it adopted its report to the General Assembly. The commentaries would appear in the Commission's report.

34. Mr. EUSTATHIADES observed that during the Commission's discussions members had often withdrawn amendments to the text of an article on the understanding that their ideas would be recorded in the commentary;

<sup>4</sup> For resumption of the discussion see 1132nd meeting, para. 78.

<sup>5</sup> For resumption of the discussion see 1132nd meeting, para. 82.

provided that the Special Rapporteur or the Commission saw no objection, those ideas were regarded as expressing the Commission's general opinion on the article in question. Whenever the Commission approved an article, therefore, it would be well to recall what was to appear in the commentary on particular points.

35. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said he had undertaken to mention any suggestions which the Committee wished to make to the Commission concerning the commentaries to the articles. That need not prevent members of the Commission from making other proposals regarding the commentaries.

36. Mr. BARTOŠ stressed the importance of the commentaries and their close relationship to the text of the articles. The Commission's practice was to draft the articles and the commentaries separately. The points requiring explanation emerged in the course of discussion, so that the commentary could not be completed until the text of an article was finally settled. Moreover, the acceptance of an article by a particular member of the Commission was often subject to a passage in the commentary clarifying its meaning. It was obvious, therefore, that if the Commission amended the text of an article, it must also amend the commentary accordingly. Adopting the articles and the commentaries separately was a double precaution, which provided an opportunity of checking both the text of the article and the interpretation of it given in the commentary. Thus each member of the Commission could influence the meaning of an article by having his ideas recorded in the commentary, and that might cause other members to withdraw their approval of the article.

37. To enable the Special Rapporteur to prepare complete commentaries it was necessary to inform him, through the Drafting Committee, of what the members of the Commission wished to be included. When the Commission examined the texts of the articles proposed by the Drafting Committee, it would also be well to remind members of what it had already been decided to include in the commentary during the debate preceding reference of each article to the Drafting Committee. When the Commission had the commentaries drafted on that basis before it, it could still make any necessary changes, and the revised text finally adopted would then be a genuine expression of the Commission's wishes, which would be communicated to the General Assembly in its report.

38. Mr. KEARNEY said that during the previous discussion of article 11<sup>6</sup> the question had been raised whether a specific reference should be made to article 50. The text of article 11 was the outcome of the Commission's discussions on the relationship between article 50 and the draft as a whole, and on the possibility of improving the language and coverage of article 50. It was a matter for regret that the Commission was now reviewing the draft articles without having a revised text of article 50 before it so that it could determine the relationship between the various articles and the method to be

proposed for settling any disputes arising out for their provisions.

39. However, it had been established at the previous meeting that all decisions taken by the Commission on the various articles were contingent on the final form of article 50 and the other general provisions.<sup>7</sup>

40. The CHAIRMAN said that, if there were no objections, he would take it that the Commission provisionally approved article 11 as proposed by the Drafting Committee, subject to all the comments made during the discussion.

*It was so agreed.*<sup>8</sup>

#### ARTICLE 12

41. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that during the previous discussion of article 12,<sup>9</sup> some members of the Commission had supported the Special Rapporteur's proposal that the words "by another competent minister" should be replaced by the words "by another competent authority A/CN.4/241/Add.2, para. 161). The Drafting Committee had not acted on the proposal. It had taken the view that since the intention was to lay down a general rule from which international organizations and States could derogate under articles 3, 4 and 5, it was preferable to provide that credentials must be issued by an organ of the government. The Committee had considered that the words "competent minister" did not refer to a minister in the strict sense of the term, since in many countries the government also included the chairmen of certain committees.

42. Other members had expressed concern that article 12 might be laying down a rule, binding on States, on the question who was competent under internal law to issue credentials.<sup>10</sup> The Drafting Committee had considered that fear unfounded. It was the internal law of each sending State that determined whether there was, in addition to the Minister for Foreign Affairs, another minister competent to issue credentials to a permanent representative. In order to dispel any doubts on the subject, the Committee had inserted the words "of the sending State" after the words "another competent minister". It further proposed that the explanation he had just given should be included in the commentary.

43. The text proposed by the Drafting Committee read:

#### *Article 12*

##### *Credentials of the permanent representative*

The credentials of the permanent representatives shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent minister of the sending State if that is allowed by the practice followed in the Organization, and shall be transmitted to the competent organ of the Organization.

<sup>7</sup> See previous meeting, paras. 17, 20 and 22.

<sup>8</sup> For resumption of the discussion see 1135th meeting, para. 37.

<sup>9</sup> See 1091st meeting, para. 13 *et seq.*

<sup>10</sup> *Ibid.*, para. 46.

<sup>6</sup> See 1090th and 1091st meetings.

44. Mr. BARTOŠ said he could not support the proposed text. In some countries authorities other than ministers were competent to perform certain acts. The words "another competent minister" expressed an idea of hierarchy, not of functions, an idea of personal, not of collegiate competence. The explanation given by Mr. Ushakov was not applicable to Yugoslavia, where the chairmen of certain councils for particular sectors were not members of the Government, or to many other countries where certain powers were held by organs whose decisions were taken collectively and whose members were not in the Government. That was why he and other members of the Commission had been in favour of the words "or by another competent authority". As proposed by the Drafting Committee, the article was not in conformity with the practice of many organizations, which left it to each State to decide what authority should issue the credentials of a permanent representative.

45. Moreover, he could not approve of the mixing of internal law with international law. Rules of international law took precedence over rules of internal law, so it could not be said that the latter would modify what was laid down in a rule of international law.

46. Mr. EUSTATHIADES said that the views of the Drafting Committee, as expressed by Mr. Ushakov, accurately reflected the Commission's discussions and intentions, but the text proposed for article 12 did not.

47. It would be right to explain in the commentary that it was for the sending State to decide what authority was competent under its internal law to issue credentials to a permanent representative, but the commentary could not cover the point made by Mr. Bartoš, namely, that that authority might not be a minister. In an international text listing the organs which could issue credentials to a permanent representative, there was no reason why other authorities should not be mentioned, since there were countries in which they were competent to issue credentials. There really seemed to be no reason why the words "or by another competent authority" should not be added after the words "by another competent minister", since the phrase would in any case be qualified by the proviso "if that is allowed by the practice followed in the Organization". He therefore proposed that those words should be inserted in the text of the article.

48. Mr. ELIAS said that in the Drafting Committee he had been one of those who had maintained that the words "or by another competent minister of the sending State" were not accurate in law. That point had also been made in a number of governments' comments and had been emphasized in the Commission before the article had been referred to the Drafting Committee. The majority of the Committee had decided in favour of the phrase, but he still considered that the words "competent minister" should be replaced by the words "competent authority". It was for the law of the country concerned to say whether that authority was a minister or, say, the chairman of a committee. Under the normal rules of interpretation, the words "another competent authority", coming after the references to the

Head of State, the Head of Government and the Minister for Foreign Affairs, could only be taken to mean an authority of high rank.

49. Mr. USHAKOV, speaking as a member of the Commission, observed that the Commission's own view was that the competence of the organ empowered to issue credentials to a permanent representative depended not only on the sending State, but also on the international organization concerned. Under international law the Head of State, the Head of Government and the Minister for Foreign Affairs were always competent, but other ministers or organs were competent only if accepted by the practice of the organization. Hence it would be a mistake to say in the commentary that it was for the sending State alone to decide which was the competent organ. If the Commission was called upon to take a decision on the words "or by another competent minister" or on the words "or by another competent authority", he would abstain.

50. Mr. ROSENNE said he shared Mr. Elias's views on the right wording for article 12.

51. Mr. USTOR said that article 12 was an innovation inasmuch as none of the conventions concluded on diplomatic relations, consular relations and special missions contained an article specifying which authority was entitled to issue credentials to a permanent representative. To replace the words "another competent minister" by the words "another competent authority" would have the effect of reducing the importance of the article to a quite general statement. In his opinion the Drafting Committee had been right in preferring the word "minister" to the word "authority", as being more consistent with the importance of having the credentials issued by high authorities. He was prepared to support the article as it stood.

52. Mr. KEARNEY said he agreed with Mr. Elias in preferring the word "authority" to the word "minister"; it was less restrictive.

53. Mr. SETTE CÂMARA said he preferred the word "minister", because the formal character of the issue of credentials should be stressed in order to discourage any undue proliferation of "authorities". He was, however, prepared to accept Mr. Elias's suggestion provided that the matter was dealt with in the commentary.

54. Mr. YASSEEN said he was not opposed to the retention of the words "or by another competent minister" in article 12, but he reserved his position with regard to the corresponding provisions in other parts of the draft, where the words "or by another competent authority" should be used.

55. Mr. USHAKOV speaking as a member of the Commission, observed that one disadvantage of using the words "or by another competent authority" would be the implication that that other authority was placed on an equal footing with the Head of State, the Head of Government and the Minister for Foreign Affairs, whose competence under general international law to issue credentials to permanent representatives was far above that of any other authority.

56. Mr. BARTOŠ said that the Drafting Committee had completely distorted the Commission's thinking. Reference to "another competent authority" would cover cases in which, under the constitutional law of the sending State, it was not a minister who was competent but, for example, a collegiate body. In many countries where the principle of self-management was applied, the credentials of permanent representatives were not issued by a minister, but by an organ in which the trade unions were represented. That case was not covered by the present wording of article 12. If the omission was merely a mistake by the Drafting Committee, it should be corrected; it was intentional, the Drafting Committee's attitude was unacceptable.

57. The point at issue was not merely a matter of drafting and could not be settled by interpretation, since an authority of the kind he was referring to could not be assimilated to a minister.

58. Mr. REUTER said he thought that article 12 should be referred back to the Drafting Committee, for it was inadvisable to deal with four different possibilities in a single sentence. The competence of the Head of State, the Head of Government and the Minister for Foreign Affairs to issue credentials derived solely from international law. If the Commission wished to allow a fourth possibility, and to make it subject both to the constitutional law of the sending State and to the practice followed in the Organization, it should adopt a liberal attitude and not restrict the provision to cases in which a person of ministerial rank was competent under the constitutional law of a State. The present wording would oblige States to amend their constitutional law, and any organizations established in the future would be prevented from adopting a practice by which they would recognize the competence of a collegiate body.

59. If the Drafting Committee did not redraft article 12 as a whole, it should at least replace the phrase "another competent minister" by "another competent authority".

60. The CHAIRMAN observed that general agreement seemed to be emerging; he suggested that article 12 should be referred back to the Drafting Committee for reconsideration in the light of the discussion.

*It was so agreed.*<sup>11</sup>

#### ARTICLE 13

61. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that only drafting changes had been made in article 13. In paragraph 1 the Committee had replaced the word "submitted" by "transmitted", which was the word used in article 12. In paragraph 2 it had made a change in the French text only: the words "*il n'est pas prescrit*" had been replaced by the words "*il n'existe pas*".

62. The text proposed for article 13 read:

<sup>11</sup> For resumption of the discussion see 1114th meeting, para. 2.

#### Article 13

##### *Accreditation to organs of the Organization*

1. A member State may specify in the credentials transmitted in accordance with article 12 that its permanent representative shall represent it in one or more organs of the Organization.

2. Unless a member State provides otherwise its permanent representative shall represent it in the organs of the Organization for which there are no special requirements as regards representation.

63. Mr. ROSENNE said he was not sure that paragraph 1 was necessary. At all events, if the Commission wished to emphasize the representative character of the permanent mission, and in particular what had been termed its "residual representative quality", the Drafting Committee might do well to consider reversing the order of paragraphs 1 and 2.

64. Mr. TESLENKO (Deputy Secretary to the Commission) replying to a comment made by Mr. Eustathiades, explained that, in the French text of paragraph 2, the words "*ne stipule autrement*" had been replaced by the words "*n'en décide autrement*", because the verb "*stipuler*" could not be used intransitively.

65. The CHAIRMAN said that, if there were no objections, he would take it that the Commission provisionally approved article 13 as proposed by the Drafting Committee.

*It was so agreed.*<sup>12</sup>

#### ARTICLE 14

66. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that in view of the definition given in article 1, sub-paragraph (c), the Committee had replaced the words "the international organization to which he is accredited", wherever they appeared in article 14, by the words "the Organization".

67. Sharing the opinion expressed by Mr. Castrén,<sup>13</sup> the Committee had considered that the last part of paragraph 2 should be more closely modelled on article 7, paragraph 1 (b), of the Vienna Convention on the Law of Treaties,<sup>14</sup> and had accordingly replaced the words "unless it appears from the circumstances" by the words "unless it appears from the practice of the Organization, or from other circumstances".

68. As the Netherlands Government had noted in its observations (A/CN.4/221, section B.7), the text of article 14 referred to only one type of treaty, namely, treaties concluded with international organizations, whereas the title of the article referred to the conclusion of treaties in general. To eliminate that inconsistency, the Drafting Committee had amended the title.

<sup>12</sup> For resumption of the discussion see 1132nd meeting, para. 87.

<sup>13</sup> See 1091st meeting, para. 71.

<sup>14</sup> *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 290 (United Nations publication, Sales No.: E.70.V.5).

69. The text proposed for article 14 read:

*Article 14*

*Full powers in the conclusion of a treaty with the Organization*

1. A permanent representative in virtue of his functions and without having to produce full powers is considered as representing his State for the purpose of adopting the text of a treaty between that State and the Organization.

2. A permanent representative is not considered in virtue of his functions as representing his State for the purpose of signing a treaty (whether in full or *ad referendum*) between that State and the Organization unless it appears from the practice of the Organization, or from other circumstances, that the intention of the parties was to dispense with full powers.

70. Mr. REUTER said that, in the French version, the words "*les pleins pouvoirs*", at the end of paragraph 2, should be replaced by "*de pleins pouvoirs*"; that wording would be more consistent with paragraph 1 and closer to the English text.

71. The CHAIRMAN suggested that the text might be improved if the brackets in paragraph 2 were deleted.

72. Mr. ROSENNE said he welcomed the change which the Drafting Committee had made in paragraph 2. Provision had now been made for practice like that of the International Atomic Energy Agency, which did not expect full powers from permanent representatives in bilateral relations, because it did not issue them to its own representatives.

73. If the Commission decided to delete the words in brackets in paragraph 2, some reference to the two different modes of signature provided for in the Vienna Convention on the Law of Treaties should be made in the commentary.

74. Mr. NAGENDRA SINGH considered that the words in brackets should be deleted, but agreed with Mr. Rosenne that some mention of the two modes of signature should be made in the commentary.

75. Mr. EUSTATHIADES pointed out that the parties referred to at the end of paragraph 2 were the sending State and the organization. The present wording could give the impression that the State might require its representative to produce full powers, whereas that could only be done by the organization. Perhaps in the French text the use of the verb "*requérir*", which also applied to the sending State, contributed to the lack of clarity.

76. Mr. TESLENKO (Deputy Secretary to the Commission) pointed out that the verb "*requérir*" was used in the corresponding provision of the Vienna Convention on the Law of Treaties, article 7, paragraph 1 (b).

77. Mr. USHAKOV, speaking as a member of the Commission, said that the sending State as well as the organization could have the intention to dispense with full powers. He therefore accepted the final phrase of article 14.

78. The CHAIRMAN said that, if there were no objections, he would take it that the Commission provisionally approved article 14 as proposed by the Drafting

Committee, with the amendment to the French text proposed by Mr. Reuter.

*It was so agreed.*<sup>15</sup>

ARTICLE 15

79. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that only a minor change in the French text had been made to article 15: the words "*En plus du*" had been replaced by the word "*Outre*".

80. The text proposed for article 15 read:

*Article 15*

*Composition of the permanent mission*

In addition to the permanent representative, a permanent mission may include members of the diplomatic staff, the administrative and technical staff and the service staff.

81. The CHAIRMAN said that, if there were no objections, he would take it that the Commission provisionally approved article 15 as proposed by the Drafting Committee.

*It was so agreed.*<sup>16</sup>

ARTICLE 16

82. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that only a drafting change in the French text had been made to article 16: the word "*existant*" had been inserted between the word "*conditions*" and the words "*dans l'Etat hôte*".

83. The text proposed for article 16 read:

*Article 16*

*Size of the permanent mission*

The size of the permanent mission shall not exceed what is reasonable and normal, having regard to the functions of the Organization, the needs of the particular mission and the circumstances and conditions in the host State.

84. Mr. ALBÓNICO said he could accept article 16 provided that it was made clear in the commentary that any difficulty or problem which might arise in connexion with the number of members of a permanent mission would be subject to the provisions of article 50, on consultations between the sending State, the host State and the organization, to which he attached great importance.

85. Mr. REUTER, replying to a comment by Mr. Yasseen, said that the expression "*circonstances et conditions*" was very bad French, but was based on precedents. It was a little less ugly when followed by the word "*existant*".

86. Mr. EUSTATHIADES suggested that, in view of Mr. Reuter's comment, the Drafting Committee should perhaps not retain the expression "*circonstances et conditions*".

87. Mr. USHAKOV, speaking as a member of the Commission, stressed that there were precedents for the

<sup>15</sup> For resumption of the discussion see 1132nd meeting, para. 97.

<sup>16</sup> For resumption of the discussion see 1132nd meeting, para. 101.

expression, though the formula used in article 11, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations<sup>17</sup> was slightly different, the words "*qui règnent*" being used instead of the word "*existent*". He preferred the wording proposed by the Drafting Committee.

88. The CHAIRMAN said that, if there were no objections, he would take it that the Commission provisionally approved article 16 as proposed by the Drafting Committee.

*It was so agreed.*<sup>18</sup>

The meeting rose at 12.55 p.m.

### 1112th MEETING

Thursday, 3 June 1971, at 10.5 a.m.

Chairman: Mr. Senjin TSURUOKA

*Present:* Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

#### Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168 and Add.1)

[Item 1 of the agenda]

(continued)

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the draft articles proposed by the Drafting Committee.

#### ARTICLE 17

2. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that, as suggested by the United Nations Secretariat (A/CN.4/L.162/Rev.1) the Committee had aligned paragraph 1 (a) of article 17 with the corresponding sub-paragraph of article 89, which was more concise.

<sup>17</sup> United Nations, *Treaty Series*, vol. 500, p. 103.

<sup>18</sup> For resumption of the discussion see 1132nd meeting, para. 104.

3. In paragraph 1 (b) the Committee had brought the English and French texts into line with the Spanish, by replacing the words "of a person" by the words "of any person" and the words "*d'une personne*" by the words "*de toute personne*". The same change would have to be made in paragraph 1 (b) of article 89. The new wording seemed to the Committee to be more consistent with normal legal usage.

4. Paragraph 1 (d), as adopted by the Commission in 1968, read:

"(d) The engagement and discharge of persons resident in the host State as members of the permanent mission or persons employed on the private staff entitled to privileges and immunities".

The Drafting Committee had considered that the expression "engagement and discharge" was too narrow; for instance, it did not cover the case of the death of one of the persons referred to. The Committee had therefore replaced that expression by the words "the beginning and the termination of the employment". Furthermore, in the case of a permanent representative that notification would duplicate the transmittal of credentials provided for in article 12. The Committee had therefore inserted the words "of the staff" between the words "members" and "of the permanent mission", so as to exclude permanent representatives. The Committee had also noted that under article 41, paragraph 2, persons on the private staff who were resident in the host State would enjoy privileges and immunities only to the extent admitted by the host State. It had therefore replaced the words "entitled to privileges and immunities" by "enjoying privileges and immunities".

5. The Drafting Committee had also made a few other minor changes in the English, French and Spanish texts. Although they were all merely drafting amendments, they would have to be explained in the commentary, because the text of article 17 now differed from the corresponding provisions of previous conventions.

6. The new text proposed for article 17 read:

#### Article 17

##### Notifications

1. The sending State shall notify the Organization of:

(a) the appointment, position, title and order of precedence of the members of the permanent mission, their arrival and final departure or the termination of their functions with the permanent mission;

(b) the arrival and final departure of any person belonging to the family of a member of the permanent mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the permanent mission;

(c) the arrival and final departure of persons employed on the private staff of members of the permanent mission and the fact that they are leaving that employment;

(d) the beginning and the termination of the employment of persons resident in the host State as members of the staff of the permanent mission or as persons employed on the private staff enjoying privileges and immunities.

2. Where possible, prior notification of arrival and final departure shall also be given.

3. The Organization shall transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

4. The sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

7. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved article 17 as proposed by the Drafting Committee.

*It was so agreed.<sup>1</sup>*

#### ARTICLE 18

8. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that at first the Committee had seen no need to alter article 18; consequently the text in document A/CN.4/L.168 was identical with that adopted by the Commission in 1968. On reflection, however, and after examining the corresponding articles concerning permanent observer missions, the Committee had found that the last phrase of article 18 seemed to dissociate the sending State from the permanent representative, who was, after all, an organ of that State. The Drafting Committee therefore proposed that the last phrase, after the words "to the Organization", should be deleted; the essential point was that the notification should be given, no matter who gave it.

9. The text proposed for article 18 read:

##### *Article 18*

##### *Chargé d'affaires ad interim*

If the post of permanent representative is vacant, or if the permanent representative is unable to perform his functions, a *chargé d'affaires ad interim* shall act as head of the permanent mission. The name of the *chargé d'affaires ad interim* shall be notified to the Organization.

10. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved article 18 as proposed by the Drafting Committee.

*It was so agreed.<sup>2</sup>*

#### ARTICLE 19

11. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had accepted the opinion expressed by the Government of the United States of America in its written observations (A/CN.4/221/Add.1, section B.10) and supported by Mr. El-Erian, Mr. Nagendra Singh and Mr. Sette Câmara.<sup>3</sup> It had accordingly deleted the words "or according to the time and date of the submission of their credentials to the competent organ of the Organization". After that deletion, the words "in accordance with the practice estab-

lished in the Organization" had referred only to the words "alphabetical order", and the Committee had considered that, for the sake of clarity, it would be better to delete them and substitute the words "of the names of member States used in the Organization".

12. The text proposed for article 19 read:

##### *Article 19*

##### *Precedence*

Precedence among permanent representatives shall be determined by the alphabetical order of the names of member States used in the Organization.

13. Mr. ALBÓNICO said he found the new text, with its single criterion, an improvement on the former draft.

14. Sir Humphrey WALDOCK said he understood the word "used" to refer to the alphabetical order and not to the names of member States. He suggested that, in order to bring the English text closer to the French, that word should be replaced by the words "in use".

15. Mr. KEARNEY suggested that the article might be clearer if it was amended to read: "Precedence among permanent representatives shall be determined by the alphabetical order, in use in the Organization, of the names of member States."

16. Mr. ELIAS said he would prefer either the present wording or the text as amended by Sir Humphrey Waldock.

17. Mr. USHAKOV, speaking on behalf of the Drafting Committee, pointed out that a phrase similar to that proposed by the Drafting Committee for article 19 was used in the English text of article 16, paragraph 1, of the Convention on Special Missions.<sup>4</sup>

18. Mr. TESLENKO (Deputy Secretary to the Commission) suggested that the phrase in question should be amended to read: ". . . by the alphabetical order of the names of member States as it is used in the Organization".

19. After a short discussion in which Sir Humphrey WALDOCK, Mr. ELIAS and Mr. KEARNEY took part, the CHAIRMAN suggested that the Commission should adopt article 19 provisionally, in the form in which it was proposed by the Drafting Committee.

*It was so agreed.<sup>5</sup>*

#### ARTICLE 20

20. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that in the Committee's opinion paragraph 2 of article 20, as adopted by the Commission in 1968,<sup>6</sup> related to a wholly exceptional situation with which it seemed unnecessary to deal in the draft articles.

<sup>1</sup> For resumption of the discussion see 1132nd meeting, para. 107.

<sup>2</sup> For resumption of the discussion see 1132nd meeting, para. 110.

<sup>3</sup> See 1092nd meeting, para. 69 *et seq.*

<sup>4</sup> See General Assembly resolution 2530 (XXIV), Annex.

<sup>5</sup> For resumption of the discussion see 1132nd meeting, para. 114.

<sup>6</sup> See *Yearbook of the International Law Commission, 1968*, vol. II, p. 212.

The establishment of an office presupposed the existence of a permanent mission, and the Committee had found it difficult to imagine in what circumstances a State having a permanent mission in the territory of a host State would wish to establish an office of that mission in the territory of another State. The Committee had therefore deleted paragraph 2.

21. Accepting the suggestion made by Mr. Kearney during the previous discussion of the article,<sup>7</sup> the Drafting Committee had taken the view that paragraph 1 should be limited to the establishment of offices in the territory of the host State. It had therefore inserted the words "within the host State" after the word "localities". It had then decided to put the words "offices" and "localities" in the singular, since the paragraph was concerned with the establishment of the office of the mission, even if that office was spread over several buildings or premises.

22. The text proposed for article 20 read:

*Article 20*

*Offices of permanent missions*

The sending State may not, without the prior consent of the host State, establish an office of the permanent mission in a locality within the host State other than that in which the seat or an office of the Organization is established.

23. Mr. REUTER replying to a comment made by Mr. USTOR, said that he found no fault with the expression "*établir de bureau*" in the French text.

24. Sir Humphrey WALDOCK said that in the context of article 20 it was better to speak of "an office" than of "offices". The title of the article should also be put in the singular in order to correspond to that of article 15: "Composition of the permanent mission".

25. Mr. USHAKOV, speaking as a member of the Commission, said he thought the Commission should provisionally approve article 20, but that when the corresponding articles in the other parts of the draft had been considered, the Drafting Committee might perhaps have to align the wording with that of article 12 of the 1961 Vienna Convention on Diplomatic Relations<sup>8</sup>

26. The CHAIRMAN said that, if there were no objections, he would take it that the Commission provisionally approved article 20 as proposed by the Drafting Committee, taking note of Sir Humphrey Waldock's amendment to the title and Mr. Ushakov's comment.

*It was so agreed.<sup>9</sup>*

ARTICLE 21

27. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had made no change in article 21, the text of which read:

*Article 21*

*Use of flag and emblem*

1. The permanent mission shall have the right to use the flag and emblem of the sending State on its premises. The permanent representative shall have the same right as regards his residence and means of transport.

2. In the exercise of the right accorded by this article, regard shall be had to the laws, regulations and usages of the host State.

28. The CHAIRMAN said that if there were no comments, he would take it that the Commission provisionally approved article 21 as proposed by the Drafting Committee.

*It was so agreed.<sup>10</sup>*

ARTICLE 22

29. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the only change made in article 22 was a drafting amendment to then English text: in the first sentence, the words "full facilities" had been replaced by "all facilities". That change was a deliberate departure from the corresponding provision in article 25 of the Vienna Convention on Diplomatic Relations, in which the expression "full facilities" was used in English, "*toutes facilités*" in French and "*toda clase de facilidades*" in Spanish. The same wording had been used in the text of article 22 adopted by the Commission in 1969. On reflection, the Drafting Committee had decided that "all facilities" was a better rendering of the idea expressed by the French and Spanish texts.

30. The text proposed for article 22 read:

*Article 22*

*General facilities*

The host State shall accord to the permanent mission all facilities for the performance of its functions. The Organization shall assist the permanent mission in obtaining those facilities and shall accord to the mission such facilities as lie within its own competence.

31. The CHAIRMAN said that, if there were no objections, he would take it that the Commission provisionally approved article 22 as proposed by the Drafting Committee.

*It was so agreed.<sup>11</sup>*

ARTICLE 23

32. Mr. ALBÓNICO suggested that article 27 *bis* should be placed before article 23.

33. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said he thought the Commission should not consider the order of the articles until it had provisionally approved the whole draft. For the time being,

<sup>7</sup> See 1092nd meeting, para. 85.

<sup>8</sup> United Nations, *Treaty Series*, vol. 500, p. 104.

<sup>9</sup> For resumption of the discussion see 1132nd meeting, para. 119.

<sup>10</sup> For resumption of the discussion see 1132nd meeting, para. 123.

<sup>11</sup> For resumption of the discussion see 1132nd meeting, para. 127.

it would be better to leave article 27 *bis* where it had been placed by the Special Rapporteur.

34. Introducing article 23, he said that, as pointed out by the United Nations Secretariat (A/CN.4/L.162/Rev.1), the title adopted by the Commission at first reading was "Accommodation of the permanent mission and its members", whereas the text of the article referred to premises for the permanent mission and accommodation for its members, and the corresponding article in Part IV—article 93—was entitled "Premises and accommodation". In the interests of correctness and consistency, the Drafting Committee had therefore entitled article 23 "Premises and accommodation". In the French version of the title it had put the word "*logements*" in the plural, and intended to do the same in the title of article 93. At a later stage in its work, the Committee intended to review the titles of all the articles in order to ensure uniformity.

35. The Committee had also made a few drafting changes in the English, French and Spanish texts of the article itself.

36. The text proposed for article 23 read:

*Article 23*

*Premises and accommodation*

1. The host State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for the latter's permanent mission or assist the sending State in obtaining accommodation in some other way.

2. The host State and the Organization shall also, where necessary, assist permanent missions in obtaining suitable accommodation for their members.

37. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved article 23 as proposed by the Drafting Committee.

*It was so agreed.*<sup>13</sup>

ARTICLE 24

38. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that in article 24 the Committee had made only minor drafting changes to the Spanish text.

39. The Committee had noted that, logically speaking the article should be placed at the end of the section dealing with facilities, privileges and immunities. It would examine the position of each article and the general arrangement of the draft at the last stage of its work.

40. The text proposed for article 24 read:

*Article 24*

*Assistance by the Organization in respect of privileges and immunities*

The Organization shall, where necessary assist the sending State, its permanent mission and the members of the permanent mission in securing the enjoyment of the privileges and immunities provided for by the present articles.

<sup>12</sup> For resumption of the discussion see 1132nd meeting, para. 130.

41. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved article 24 as proposed by the Drafting Committee.

*It was so agreed.*<sup>13</sup>

ARTICLE 25

42. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that in view of the change it had made in the title of article 23, the Committee had deleted the words "of the permanent mission" from the title of article 25.

43. In the body of the article, the provision which the Commission had discussed at the greatest length, both in 1969 and at the present session, was the last sentence of paragraph 1. That sentence did not appear in the Vienna Convention on Diplomatic Relations, but a similar provision, though differently worded, had been included in the Vienna Convention on Consular Relations.<sup>14</sup> The provision in article 25, as adopted by the Commission in 1969, was based on a text which had been submitted as an amendment by the Argentine delegation in the Sixth Committee, and had become the last sentence of article 25, paragraph 1, of the Convention on Special Missions.<sup>15</sup>

44. On 5 May 1971, after a fairly long discussion, the Commission had referred to the Drafting Committee a proposal by Mr. Elias "that the idea embodied in the third sentence of paragraph 1 should be retained, subject to the Drafting Committee's being able to improve the wording in order to make it more generally acceptable."<sup>16</sup>

45. Acting on that proposal the Drafting Committee had replaced the words "and only in the event that it has not been possible to obtain the express consent of the permanent representative" by the word "and only in the event that it has not been possible to contact the permanent representative in order to obtain his express consent". The Committee had considered that the wording adopted in 1969 might be open to the tendentious interpretation that refusal of consent constituted impossibility of obtaining consent. The Committee itself could not accept that interpretation, but had thought it advisable to amend the text as he had indicated. The Committee considered that the reasons for the amendment should be stated in the commentary, which should also state that no change had been made in the substance of the article. It further considered that the commentary should specify that, in the context of article 25, the words "permanent representative" were to be understood to mean any person authorized to act on behalf of the mission.

<sup>13</sup> For resumption of the discussion see 1132nd meeting, para. 133.

<sup>14</sup> United Nations, *Treaty Series*, vol. 596, p. 288, article 31, para. 2.

<sup>15</sup> General Assembly resolution 2530 (XXIV), Annex.

<sup>16</sup> See 1093rd meeting, paras. 64 and 93.

46. The text proposed for article 25 read:

*Article 25*

*Inviolability of the premises*

1. The premises of the permanent mission shall be inviolable. The agents of the host State may not enter them, except with the consent of the permanent representative. Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to contact the permanent representative in order to obtain his express consent.

2. The host State is under a special duty to take all appropriate steps to protect the premises of the permanent mission against any intrusion or damage and to prevent any disturbance of the peace of the permanent mission or impairment of its dignity.

3. The premises of the permanent mission, their furnishings and other property thereon and the means of transport of the permanent mission shall be immune from search, requisition, attachment or execution.

47. Mr. KEARNEY asked whether he was right in understanding that the change proposed by the Drafting Committee in the last sentence of paragraph 1 meant that in the event of a fire on the premises of a permanent mission, wherever they might be situated, the authorities of the host State could not take the necessary measures to extinguish the fire if the permanent representative refused to allow them to enter those premises.

48. Mr. USHAKOV, speaking as a member of the Commission, said he thought that Mr. Kearney's interpretation was correct. The corresponding provision in article 25 of the Convention on Special Missions was open to the same interpretation. The Drafting Committee had merely improved the wording without changing the substance of the article.

49. Mr. ALBÓNICO said that to subordinate the safety of the premises of the permanent mission and any premises surrounding them to the express consent of the permanent representative was contrary to the real needs of practical life and to the rule of international law which had always affirmed the possibility of exceptions in cases of *force majeure*. He was entirely opposed to the final clause in the last sentence of paragraph 1 as proposed by the Drafting Committee; in his opinion, that sentence should be modelled on the second sentence in article 31, paragraph 2, of the Vienna Convention on Consular Relations.

50. Mr. EUSTATHIADES endorsed Mr. Albónico's remarks. In view of the texts of the previous Conventions, the Commission had a variety of possible solutions to choose from. The present text might give the impression that, by his refusal, the permanent representative could prevent the authorities from intervening. The principle that the express consent of the permanent representative was required must be subject to an exception when he was consulted and refused his consent even though public safety was endangered. Public safety and fire prevention must take precedence, for the paramount consideration was the common good—of the neighbours, of the host State, of the mission itself—not

the rule of consent, which could be assumed in such cases.

51. The wording proposed by the Drafting Committee had the disadvantage of being a fourth version, following the three which appeared in the existing Conventions. He would therefore prefer the wording used in article 31 of the Convention on Consular Relations.

52. Mr. REUTER, supported by Mr. YASSEEN, suggested that the word "contacter", in the French text of paragraph 1, should be replaced by the words "entrer en rapport avec".

53. Mr. TESLENKO (Deputy Secretary to the Commission) welcomed that suggestion; the word "contacter" had slipped into the text of article 25 in the heat of the Drafting Committee's debate.

54. Mr. KEARNEY said he fully agreed with Mr. Albónico. If he, as a lawyer, were asked to give legal advice to a host State, he would advise it to enter a reservation concerning article 25, paragraph 1, if it was worded in any way differently from the corresponding article in the Vienna Convention on Consular Relations. He could not accept the language proposed by the Drafting Committee.

55. Mr. ALCÍVAR said he could not agree to any provision which would limit the inviolability of the premises of the permanent mission. He preferred the language of article 22, paragraph 1, of the Vienna Convention on Diplomatic Relations.<sup>17</sup>

56. Sir Humphrey WALDOCK said that he would start from the position taken by Mr. Albónico, namely, that in the last resort it was a question of human rights—the fundamental right of persons to life and to freedom from personal injury. He realized, of course, that the article as originally framed might conceivably provide the basis for an abusive intervention by the host State, but it was necessary to state the rule in terms which assumed good faith in its application. In serious cases of fire or other disaster, the right of inviolability of the premises should not preclude the ultimate right of entry of the host State. There was obviously a conflict of principles, but he was reluctant to accept the text proposed by the Drafting Committee, which differed from the text adopted by the General Assembly in the Convention on Special Missions and might seem to weaken that Convention.

57. Mr. USTOR said he felt sure the Commission could agree that there was a basic rule that, if a fire broke out, all concerned must do their best to extinguish it. He did not know of any case in which that rule did not apply: it was an extreme, indeed an absurd, possibility, for which the Commission should not attempt to legislate. He submitted, therefore, that the best and simplest solution would be to follow the provisions of article 22, paragraph 1, of the Vienna Convention on Diplomatic Relations.

58. Mr. ELIAS said he was inclined to share Mr. Albónico's preference for a text which would not hamper

<sup>17</sup> United Nations, *Treaty Series*, vol. 500, p. 106.

the host State in discharging its responsibility towards the local community. He therefore favoured the language of article 31 of the Vienna Convention on Consular Relations, as being more in line with the realities of practical life. He proposed that article 25 should be referred back to the Drafting Committee with a request for reconsideration of the last sentence of paragraph 1 in the light of the observations made during the debate.

59. Mr. USHAKOV speaking as a member of the Commission, pointed out that the wording of article 25 of the Convention on Special Missions was a compromise that had been arrived at with great difficulty. Some members were now proposing that the Commission should attack a well-established principle of international law which was stated in article 25, paragraph 1: the principle of inviolability of the premises. To disregard the compromise adopted would be to flout reality.

60. Sir Humphrey WALDOCK explained that he was not in favour of going back to the formula used in article 31, paragraph 2, of the Vienna Convention on Consular Relations. That formula had been included by the Commission in article 25 of its 1967 draft articles on special missions<sup>18</sup> as the last sentence of paragraph 1. When the Sixth Committee had examined the draft articles, however, it had replaced that formula by what was now the last sentence in article 25, paragraph 1, of the Convention on Special Missions.

61. That provision of the Convention on Special Missions had, of course, been the basis of the last sentence of paragraph 1 of article 25, on the inviolability of the premises of the permanent mission, as adopted by the Commission at its twenty-first session.<sup>19</sup> He thought that the special missions formula, or some variant of it, must be used. On the substance of the matter, he was strongly in favour of retaining a provision on the subject of fire or other disaster presenting a serious danger to the public. For that purpose, the obvious starting point was the formula used in the Convention on Special Missions, but he could accept any improved version of it.

62. Mr. KEARNEY said that, until the 1969 Convention on Special Missions received as wide acceptance as the 1963 Vienna Convention on Consular Relations, it could not be said that the 1963 formula had been superseded by that of 1969.

63. One solution to the problem would be to retain part of the wording proposed by the Drafting Committee; he suggested that the closing words of the last sentence of paragraph 1 should be deleted, so that the sentence would read:

“Such consent may be assumed in the case of fire or other disaster that seriously endangers public safety.”

In that form, the text should dispel any fear that the provision might be so interpreted as to permit entry in the event of a minor incident; the emphasis would be

clearly placed on the criterion of danger to the public, which was the material one in the circumstances. If a fire or other disaster did not involve serious danger to the public, the head of the permanent mission could be allowed to decide for himself how to handle the situation.

64. Mr. ALCÍVAR said he considered it both unnecessary and dangerous to place any limitation on the important principle of inviolability of the premises. Moreover, any attempt to introduce a provision covering the case of fire or other disaster would create more problems than it solved. It was impossible to draft provisions dealing adequately with all the many problems involved. For example, the text proposed by the Drafting Committee implied that, if it was possible to contact the permanent representative, the authorities in the host State would not be allowed to take any action to deal with the disaster.

65. The approach adopted in article 22, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations was preferable in every respect. That text was completely silent on the subject of fire or other disaster; as a result, the general principle of *force majeure* would apply in such cases. If a similar approach was adopted in the present article 25, the host State would have the right to take action to protect life and property in the event of a disaster that seriously endangered the public.

66. He had been present throughout the Sixth Committee's discussions on the draft articles on special missions. The majority of delegations had not accepted the proposal that special missions should be placed on a par with consulates, and had urged that they should be treated in the same way as diplomatic missions. It had been stressed that the 1961 and 1963 Vienna Conventions were both in force, and that there was good reason to adopt the earlier of the two as a model for special missions. After difficult negotiations, a compromise solution had ultimately been found, in the form of the last sentence of article 25, paragraph 1, of the Convention on Special Missions. One of the main arguments advanced in its favour had been that special missions were normally of short duration, so that their members were usually accommodated in hotels, and the outbreak of fire in hotel rooms constituted a danger to other users of the hotel.

67. He strongly opposed the suggestion that the formula used in the 1963 Vienna Convention on Consular Relations should be introduced into article 25, and urged the Commission to delete the last sentence of paragraph 1, so as to follow the model of the 1961 Vienna Convention on Diplomatic Relations. If that sentence was to be retained, however, the corresponding provision of the 1969 Convention on Special Missions was the only one which could be taken as a precedent.

68. Mr. REUTER said he could not accept the wording proposed by the Drafting Committee for the last sentence of paragraph 1. He would be able to accept it if the words “in order to obtain his express consent” were replaced by the words “in order to request his express consent”. Alternatively, he could accept the

<sup>18</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, p. 360.

<sup>19</sup> *Op. cit.*, 1969, vol. II, p. 208.

wording of the corresponding provision of the Vienna Convention on Diplomatic Relations, in which the last sentence of paragraph 1 did not appear, provided that it was clearly stated in the commentary that, in the event of a disaster, the application of the principle of inviolability was subject to the requirements of public safety and the protection of human life. That solution would have the advantage of eliminating a problem which had existed since the adoption of the Vienna Convention on Diplomatic Relations. If the members of the Commission believed in *jus cogens*, none of them would deny that the protection of human life and public safety were superior necessities ranking far above any form of inviolability.

69. He was therefore in favour either of deleting the last sentence of paragraph 1 altogether, on condition that the commentary left no doubt about the meaning of the provision, or of replacing the word "obtain", in that sentence, by the word "request". The closing words of the last sentence, as it stood, seemed to affirm the inviolability of the premises in cases—absurd perhaps, but still possible—in which agents of the host State had been able to get in touch with the permanent representative, but not to obtain his express consent. It should not be forgotten either, that article 25 would also govern the inviolability of private accommodation.

70. Mr. BARTOŠ endorsed Mr. Reuter's remarks.

71. Mr. CASTEÑEDA said he favoured the compromise formula proposed by the Drafting Committee, subject to the replacement of the word "obtain" by the word "request", as proposed by Mr. Reuter. From the strictly legal point of view the provisions of the last sentence of paragraph 1 were not indispensable, because the principles of *force majeure* would apply in their absence. Nevertheless, since that principle was not easy to apply, the provisions in question could provide useful guidance. It was necessary that they should appear in the text of the article itself and not merely in the commentary.

72. Mr. NAGENDRA SINGH reminded the Commission that he had stressed, by implication, the inherent character of the principle of *force majeure* when article 25 had first been discussed at the present session.<sup>20</sup> Even under the system instituted by the 1961 Vienna Convention on Diplomatic Relations, there could be no question of allowing the premises of a mission to burn simply because it had not been possible to contact the diplomatic agent concerned. If the authorities of the receiving State did not put out the fire, the sending State would clearly have a claim against it for negligence.

73. Unfortunately, however, the whole problem had been obscured by the adoption of the last sentence of article 31, paragraph 2, of the 1963 Vienna Convention on Consular Relations and the last sentence article 25, paragraph 1, of the 1969 Convention on Special Missions. The existence of those two provisions would create

difficulties of interpretation if the question was not specifically dealt with in the text under discussion.

74. He would not be opposed to the solution suggested by Mr. Kearney—that of deleting the last part of the last sentence of paragraph 1 and leaving it to provide only that the permanent representative's consent might be assumed in case of fire or other disaster that seriously endangered public safety. However, he could accept the approach adopted in the Vienna Convention on Diplomatic Relations if the commentary to article 25 clearly explained that the Commission interpreted the silence of article 22 of that Convention as to the assumption of consent as meaning that, in the event of fire or other disaster that endangered public safety, the receiving State was entitled to take appropriate protective measures.

75. Mr. ELIAS reiterated his view that article 25 should be referred back to the Drafting Committee so that it could consider whether to retain the present text or to amend it in the light of the various suggestions made during the discussion.

76. The CHAIRMAN, speaking as a member of the Commission, pointed out that in New York several permanent missions were often housed in the same building. Concern to safeguard the inviolability of one mission must not be allowed to endanger the interests of other missions or public safety in the host State.

77. Mr. USHAKOV observed that, in the event of a major disaster, all the missions concerned would be in the same situation. In view of recent advances in science and technology, however, there was every reason to believe that a mere incident, such as a fire, could now be easily contained.

78. Mr. SETTE CÂMARA said that the crux of the matter was the principle of inviolability of the premises; the cases under discussion constituted an exception to that principle. The text prepared by the Drafting Committee covered the needs of the present situation in that respect.

79. It should be remembered that fire was not the only emergency that could arise. There had recently been cases of the occupation of a mission by demonstrators; in such an event it was the delicate duty of the host State to preserve public safety. The situation was even more complicated when there were several permanent missions in the same building. Much had been said about the possibility of abuse of the principle of inviolability by a permanent representative who refused to co-operate in dealing with an emergency. That idea was rather far-fetched in the case of a fire. The situation was much more complicated in the case of a "sit-in" by demonstrators.

80. In the circumstances, he thought the Drafting Committee had been right in trying to preserve the principle of inviolability as far as possible, and he therefore supported the text it proposed.

81. The CHAIRMAN noted that opinions differed with regard to paragraph 1 of article 25. If there were no objections, he would take it that the Commission agreed to refer article 25 back to the Drafting Committee for

<sup>20</sup> See 1093rd meeting, para. 85.

reconsideration in the light of the views expressed during the discussion.

*It was so agreed.*<sup>21</sup>

The meeting rose at 12.55 p.m.

<sup>21</sup> For resumption of the discussion see 1117th meeting, para. 31.

## 1113th MEETING

Friday, 4 June, 1971, at 10 a.m.

Chairman: Mr. Senjin TSURUOKA

*Present:* Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Elías, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldo, Mr. Yasseen.

### Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168 and Add.1)

[Item 1 of the agenda]

(continued)

### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to continue its consideration of the draft articles proposed by the Drafting Committee (A/CN.4/L.168 and Add.1).

#### ARTICLE 26

2. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had deleted the words "of the permanent mission" from the title of article 26.

3. For the reasons given by Mr. Kearney,<sup>1</sup> the Committee had amended the beginning of paragraph 1 to follow the model of article 32, paragraph 1 of the Vienna Convention on Consular Relations.<sup>2</sup> It could, indeed, be argued that the text of paragraph 1 adopted in 1969<sup>3</sup> referred only to taxes levied on persons and not to those levied direct on buildings.

<sup>1</sup> See 1094th meeting, para. 6 *et seq.*

<sup>2</sup> United Nations, *Treaty Series*, vol. 596, p. 288.

<sup>3</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 209.

4. It had been held that paragraph 2 established a difference in treatment between States which owned the premises of their permanent missions and States which only rented them. The Commission had stated in paragraph (3) of the commentary to article 26 that it intended to examine the matter again in the light of the views of governments. As the Special Rapporteur had observed in his sixth report, the comments of governments did not clearly indicate how to dispose of the question (A/CN.4/241/Add.3, para. 16 under article 26). The Drafting Committee had therefore made no substantive change in paragraph 2 and had confined itself to a minor drafting amendment to the Spanish text.

5. The Commission had asked the Drafting Committee to consider the inclusion of a passage in the commentary drawing attention to the present inequality of treatment as between owned and rented premises,<sup>4</sup> and the Special Rapporteur had asked the Committee to transmit to the Commission a proposal which read:

"A statement would be included in the commentary to this article drawing the attention of governments to the matter and suggesting to them that it would be desirable to avoid discriminating between owned and leased premises and to put an end to present inequality of treatment between them."

6. The text proposed by the Drafting Committee for article 26 read:

#### Article 26

##### *Exemption of the premises from taxation*

1. The premises of the permanent mission of which the sending State or any person acting on its behalf is the owner or the lessee shall be exempt from all national, regional or municipal dues and taxes other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State, the permanent representative or another member of the permanent mission acting on behalf of the mission.

7. Mr. USTOR reserved his position on article 26, paragraph 2, but welcomed the proposal to include in the commentary a passage referring to the discussion on that paragraph and drawing the attention of governments to the matter.

8. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission provisionally approved article 26 in the form proposed by the Drafting Committee.

*It was so agreed.*<sup>5</sup>

#### ARTICLE 27

9. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had made no change in article 27, which read:

<sup>4</sup> See 1094th meeting, para. 15.

<sup>5</sup> For resumption of the discussion see 1133rd meeting, para. 1.

## Article 27

*Inviolability of archives and documents*

The archives and documents of the permanent mission shall be inviolable at any time and wherever they may be.

10. Sir Humphrey WALDOCK asked to be reminded of the reason for not including in article 27 the second sentence of the corresponding article 26 of the 1969 Convention on Special Missions:<sup>6</sup> "They should, when necessary, bear visible external marks of identification."

11. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said he thought the reason for putting visible external marks of identification on the archives and documents of special missions was that such missions were temporary. It did not seem necessary in the case of permanent missions.

12. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission provisionally approved article 27.

*It was so agreed.<sup>7</sup>*

## ARTICLE 27 bis

13. Mr. USHAKOV, speaking on behalf of the Drafting Committee, drew attention to the fact that at its twenty-first session, as stated in the commentary to article 48,<sup>8</sup> the Commission had considered the possibility of including in the draft a provision on the obligation of the host State to allow members of permanent missions to enter its territory, but had postponed its decision until the second reading. In the light of the comments made by several governments and by the secretariats of the United Nations and the International Atomic Energy Agency, the Special Rapporteur had submitted to the Commission, as a basis for discussion, the text of a new article 27 bis, entitled "Entry into the host State" (A/CN.4/241/Add.3). It was that text, in an amended form, which the Drafting Committee was submitting to the Commission; it would consider later in which part of the draft article 27 bis should appear.

14. The text proposed by the Drafting Committee for article 27 bis read:

*Article 27 bis**Entry into the territory of the host State*

1. The host State shall permit entry into its territory to members of the permanent mission and members of their families forming part of their respective households.

2. Visas, when required, shall be granted as promptly as possible to any person referred to in paragraph 1 of this article.

15. Mr. USTOR said that the host State had an obligation not only to permit the persons mentioned in paragraph 1 to enter its territory, but also to allow them

to leave and re-enter it as often as necessary. At the present stage, however, he would not propose that article 27 bis be amended to state that additional obligation, provided that the commentary explained that the provisions of the article also covered exit and re-entry.

16. Mr. REUTER said that in the French text of the title and paragraph 1, it would be more correct to say "*entrée dans son territoire*" than "*entrée sur son territoire*".

17. Mr. USHAKOV, speaking as a member of the Commission, suggested that in the French text of paragraph 2 the word "*mentionées*" should be replaced by the word "*visées*".

18. Mr. ROSENNE noted that the same question had arisen a number of times in connexion with other articles. He suggested that the Drafting Committee should go through the whole draft when it was completed in order to ensure uniformity in such matters.

19. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission provisionally approved article 27 bis as proposed by the Drafting Committee, with the drafting changes just proposed by members of the Commission, on the understanding that the final position of the article in the draft would be decided later, and taking into account Mr. Ustor's remark concerning the commentary.

*It was so agreed.<sup>9</sup>*

## ARTICLE 28

20. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had made no change in article 28, which read:

*Article 28**Freedom of movement*

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure freedom of movement and travel in its territory to all members of the permanent mission and members of their families forming part of their respective households.

21. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved article 28.

*It was so agreed.<sup>10</sup>*

## ARTICLE 29

22. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the only change made by the Committee in article 29 was to the Spanish text: in the first sentence of paragraph 7, it had replaced the word "*puerto*" by the word "*punto*".

<sup>6</sup> General Assembly resolution 2530 (XXIV), Annex.

<sup>7</sup> For resumption of the discussion see 1133rd meeting, para. 5.

<sup>8</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 221.

<sup>9</sup> For resumption of the discussion see 1135th meeting, para. 64.

<sup>10</sup> For resumption of the discussion see 1133rd meeting, para. 8.

23. The text proposed for article 29 read:

*Article 29*

*Freedom of communication*

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

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

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

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

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

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

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

24. Speaking as a member of the Commission, he noted that, in the French text, the second sentence of paragraph 1 seemed to suggest that the diplomatic, permanent and special missions and consular posts mentioned belonged to the permanent mission, not to the sending State.

25. Mr. REUTER suggested that the passage should be amended to read: "*ainsi qu'avec les missions diplomatiques, les missions permanentes, les postes consulaires et les missions spéciales de celui-ci.*"

26. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission provisionally approved article 29 as proposed by the Drafting Committee, with the amendment suggested by Mr. Reuter.

*It was so agreed.*<sup>11</sup>

<sup>11</sup> For resumption of the discussion see 1133rd meeting, para. 11.

ARTICLE 30

27. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had made no change in article 30, which read:

*Article 30*

*Personal inviolability*

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

28. After an exchange of views on the drafting of the French text in which Mr. REUTER, Mr. USHAKOV, Mr. EUSTATHIADES and Mr. YASSEEN took part, the CHAIRMAN said that, at the beginning of the second sentence, the word "*Ils*" would be replaced by the words "*Ceux-ci*", and that it would be explained in the commentary that "*Ceux-ci*" referred to the permanent representative and the members of the diplomatic staff of the permanent mission.

29. Mr. ALCÍVAR requested that the Spanish text of article 30 should be redrafted on the basis of the French text. He suggested that that task should be left to the Languages Division of the Secretariat.

30. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission provisionally approved article 30, subject to the necessary changes in the French and Spanish texts.

*It was so agreed.*<sup>12</sup>

ARTICLE 31

31. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had made no change in article 31, which read:

*Article 31*

*Inviolability of residence and property*

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

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

32. Mr. ALBÓNICO noted that article 31 purported to give the private residence of the persons concerned the same inviolability and protection as the premises of the permanent mission. Since a qualification had been introduced into article 25 concerning such occurrences as fire, the remarks made on that subject in the discussion on article 25<sup>13</sup> also applied to article 31.

<sup>12</sup> For resumption of the discussion see 1133rd meeting, para. 14.

<sup>13</sup> See previous meeting, para. 47 *et seq.*

33. Mr. USTOR said he thought the point was covered by paragraph 1. However, it could also be mentioned specifically in the commentary.

34. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission provisionally approved article 31.

*It was so agreed.*<sup>14</sup>

#### ARTICLE 32

35. Mr. USHAKOV, speaking on behalf of the Drafting Committee, drew attention to paragraph (4) of the commentary, concerning paragraph 1 (d).<sup>15</sup> Owing to a wide divergence of views among its members, the Commission had decided to place that sub-paragraph in square brackets and to bring it to the attention of governments. Several governments had submitted comments on the subject but, as the Special Rapporteur had pointed out, those comments were "not sufficient in themselves to give to the Commission any clear directive as to the manner in which the question should be finally resolved" (A/CN.4/241/Add.3, para. 21 under article 32).

36. Most members of the Drafting Committee had been in favour of including sub-paragraph (d) of paragraph 1 without the square brackets in the text of the article, with a slightly different wording to reflect the frequently expressed desire that the vehicles of members of the permanent mission should be insured against third-party risks. The Drafting Committee had replaced the words "official functions of the person in question", of which there was no definition, since they were functions carried out on the instructions of the Government of the sending State, by the words "functions of the permanent mission", which were defined in article 7. In addition, it had added at the end of the sub-paragraph the words "and only if those damages are not covered by insurance".

37. The text proposed by the Drafting Committee for article 32 read:

##### *Article 32*

##### *Immunity from jurisdiction*

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

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

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

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

(d) an action for damages arising out of an accident caused by a vehicle used by the person in question outside the exercise of the functions of the permanent mission and only if those damages are not covered by insurance.

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

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

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

38. Mr. TAMMES said he welcomed the inclusion of paragraph 1 (d) in article 32, as advocated by a number of governments and by several members of the Commission. The provisions of that sub-paragraph corresponded to those of article 31, paragraph 2 (d) of the 1969 Convention on Special Missions, but with the significant addition of the words "and only if those damages are not covered by insurance". A reference to insurance was acceptable in so far as insurance coverage meant better protection for individual victims of accidents, but he had some doubts about the net effect of the phrase added. The question arose whether it meant that, if the damages were covered by insurance, the general rule of immunity was restored; if so, the insurance company would be able to hide behind the policy-holder's immunity. Coverage by insurance would be ineffective if the principle of immunity was allowed to interfere with the payment of compensation.

39. Mr. ALBÓNICO observed that the proposed new text of paragraph 1 (d) met a legal necessity: that of enabling the victim of a traffic accident caused by a vehicle driven outside official duties to bring an action for damages. Admittedly, the requirement that the vehicle should have been used "outside the exercise of the functions of the permanent mission" introduced a complication; it would be extremely difficult for the injured party to establish that the vehicle had been so used. That difficulty, however, was inevitable, and the requirement in question made the provision consistent with sub-paragraphs (a), (b) and (c) of paragraph 1, which dealt with other cases of litigation relating to the private interests of the persons concerned.

40. The concluding proviso relating to insurance coverage raised a number of difficulties. The most serious one was that of proving liability. Many insurance companies did not settle a claim unless the liability of the driver was established. In countries like his own, which adhered to the subjective system of liability, the only valid proof was a court decision sentencing the driver for a violation of traffic regulations. Since, in many countries, a case of that kind was classified as a criminal and not a civil matter, an exception to the immunity from the criminal jurisdiction of the host State would be needed to allow sentence to be passed on the permanent representative or

<sup>14</sup> For resumption of the discussion see 1133rd meeting, para. 17.

<sup>15</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 212.

a member of the diplomatic staff of the permanent mission. The matter could perhaps be clarified in the commentary.

41. Another difficulty was that the insurance covered the damages only up to the amount insured; hence the injured party would not necessarily receive full compensation even if the damages were "covered by insurance".

42. Despite those difficulties, he was prepared to support paragraph 1 (*d*), because it was a progressive development by comparison with earlier texts.

43. Mr. ROSENNE agreed that the proposed paragraph 1 (*d*) marked a step forward. The first part of the text stated a common provision of diplomatic law which had not given rise to any insuperable difficulties of interpretation or application. The concluding words concerning insurance, however, failed to deal with the major problems involved. Two of those problems had been stressed in the debate in the Sixth Committee. The first was the need for a provision requiring the persons concerned to carry accident insurance. In an inter-State treaty such as the draft now under discussion it was not, of course, possible to impose such a requirement upon individuals, but it was possible to impose upon governments an obligation to see that certain insurances were effected.

44. The second problem, to which Mr. Tammes had drawn attention, was the need for the relevant provisions "to be so drafted as not to enable insurance companies to evade their obligations by relying on the immunity of the insured" (A/CN.4/241/Add.3, para. 4 under article 32).

45. The third problem was to decide what was meant by the requirement that the damages should be "covered by insurance", when that requirement was prescribed in a multilateral treaty; the text of the treaty might or might not become part of the municipal law of a signatory country, according to the system followed by that country. The application of the provision also raised the question whether the insurance was adequate and reasonable—a matter which should be dealt with in the text of the article itself.

46. Consequently, while he welcomed paragraph 1 (*d*), he could not, for the time being, support the concluding proviso. The matter derived added significance from the Drafting Committee's recommendation to delete the closely related article 34, on the settlement of civil claims (A/CN.4/L.168). He urged that article 32, and especially paragraph 1 (*d*), should receive further consideration.

47. Mr. KEARNEY said he found the expression "covered by insurance" extremely ambiguous. As Mr. Tammes had already pointed out, it left unsolved the key problem whether an insurance company was to be allowed to hide behind the immunity from jurisdiction of the insured. The point was particularly important in countries where the injured party could not bring an action direct against the insurance company and consequently had to sue the individual defendant.

48. Furthermore, the proposed sub-paragraph did not deal with the question of adequacy of compensation.

If the insurance company made a settlement which did not fully compensate the injured party, the question would arise whether that party could bring an action for the balance.

49. In order to deal with those problems, he proposed that the words "covered by insurance" should be replaced by "compensated by insurance". If an insurance company relied on the immunity from jurisdiction of the insured to avoid settling the claim, the damage could not be said to have been compensated. Similarly, if an insurance company made an inadequate payment, the damage would not be fully compensated.

50. For the sake of consistency in wording, he suggested that the expression "outside the exercise of the functions of the permanent mission", used in paragraph 1 (*d*), should be replaced by the well-established formula "outside his official functions", which was used in paragraph 1 (*c*) and in the corresponding provision of the Vienna Convention on Diplomatic Relations.<sup>16</sup>

51. Sir Humphrey WALDOCK said he shared the concern expressed by previous speakers. The use of the phrase "covered by insurance" could give rise to much discussion and could weaken the provisions of paragraph 1 (*d*). The intention was to require the damages to be met and to make it clear that the possibility of private action would subsist until the claim for damages was settled through insurance. He would prefer to drop the concluding phrase of the sub-paragraph rather than leave it in its present defective form. A provision on the lines of article 31, paragraph 2 (*d*) of the 1969 Convention on Special Missions<sup>17</sup> would leave a simple right of action in the case of traffic accidents; it was better not to weaken that safeguard by introducing a proviso of the kind proposed by the Drafting Committee.

52. The proviso also suffered from a drafting defect: the words "and only if" were intended to establish an exception to the exception set forth in the first part of the sub-paragraph, and should be replaced by the words "and where".

53. He would be prepared to support paragraph 1 (*d*) if a satisfactory text could be found for the concluding proviso.

54. Mr. USTOR said that the provisions of paragraph 1 (*d*) clearly imposed a restriction on immunity from jurisdiction. That restriction was not imposed by article 31 of the 1961 Vienna Convention on Diplomatic Relations; it had been taken from article 31, paragraph 2 (*d*), of the 1969 Convention on Special Missions. A permanent mission should obviously be placed on the same footing as a diplomatic mission, not a special mission. The difference in treatment between diplomatic agents and permanent representatives established by the Vienna Convention on Diplomatic Relations and the article under discussion would be particularly invidious in such cities as Paris, which were host not only to permanent missions to an international organization, but also to the diplomatic missions accredited to the host State.

<sup>16</sup> United Nations, *Treaty Series*, vol. 500, p. 112, article 31.

<sup>17</sup> General Assembly resolution 2530 (XXIV), Annex.

55. In any case, the problem which paragraph 1 (*d*) was designed to solve was an artificial one. The question of damages was settled by third-party insurance, which was already compulsory in most States and was bound to become so throughout the world.

56. For those reasons, although the wording had been improved and could be improved still further, he reserved his position on paragraph 1 (*d*);

57. Mr. YASSEEN said that at first, when the Commission had taken up article 32, he had thought that the problem dealt with in paragraph 1 (*d*) would hardly arise in practice, because in most host States third-party insurance was compulsory. But he now saw the value of that provision in the case of host States in which such insurance was not compulsory, even though they were becoming increasingly rare.

58. The word "covered" was adequate, since the amount of cover would be stated in the insurance policy. It was when the vehicle was not insured for the amount of damage caused that an action for damages could be brought. He could therefore accept paragraph 1 (*d*).

59. Mr. ELIAS said that the text proposed by the Drafting Committee for paragraph 1 (*d*) represented a compromise between those who opposed the inclusion of any such provision and those who wanted a provision on the lines of article 31, paragraph 2 (*d*) of the 1969 Convention on Special Missions. After a long and difficult discussion, the Drafting Committee had agreed to retain the sub-paragraph, but with the addition of the concluding proviso concerning insurance coverage.

60. The suggestion that the expression "compensated by insurance" should be used instead of "covered by insurance" had also been made in the Drafting Committee, but he had objected to it as being no clearer. He agreed with Mr. Kearney, however, that the expression "outside the exercise of the functions of the permanent mission" was inconsistent with the language of sub-paragraph (*c*); it also differed from the language used for the same purpose in article 31 of the Convention on Special Missions and in many provisions of other existing instruments.

61. He suggested that paragraph 1 (*d*) should be referred back to the Drafting Committee for reconsideration in the light of the discussion.

62. Mr. USHAKOV, speaking as a member of the Commission, said that the situations referred to in sub-paragraphs (*c*) and (*d*) of paragraph 1 were quite different. In his opinion, the Drafting Committee had been right to use the words "outside his official functions" in the one case and "outside the exercise of the functions of the permanent mission" in the other.

63. The first formula was taken from article 31, paragraph 1 (*c*) of the Vienna Convention on Diplomatic Relations, and was intended to extend immunity from jurisdiction to a permanent representative or a member of the diplomatic staff of a permanent mission who, for example, made a purchase for the sending State or the permanent mission. In such a case the person concerned

was performing official functions, but not functions of the permanent mission as such.

64. Sub-paragraph (*d*) of paragraph 1, had its counterpart in the Convention on Special Missions, but not in the Vienna Convention on Diplomatic Relations. It was designed to preserve immunity from jurisdiction in cases where the person concerned caused an accident when using a vehicle in the exercise of functions which were genuinely functions of the permanent mission.

65. Mr. BARTOŠ agreed with Mr. Ushakov. When a State instructed its permanent representative or a member of the diplomatic staff of its permanent mission to make a purchase for it, the person concerned should not be subject to the civil and administrative jurisdiction of the host State. He was acting as an *ad hoc* commercial representative of his State, and not exercising official functions of the permanent mission. It was obvious, however, that such activities must not be contrary to public policy in the host State. That distinction had often given rise to disputes, and the Commission should give the necessary explanations in its commentary to article 32.

66. Mr. EUSTATHIADES said it should be specified in the commentary that the reference to a vehicle in paragraph 1 (*d*) also covered vessels and aircraft, which were mentioned in article 43, paragraph 2 (*b*) of the Vienna Convention on Consular Relations.<sup>18</sup> The Commission's texts should be drafted for the future, when some situations which were at present extremely rare might become more common. It was necessary to ensure that the omission of any reference to vessels and aircraft was not interpreted as excluding those means of transport.

67. The CHAIRMAN noted that the Commission was in favour of referring article 32 back to the Drafting Committee for reconsideration in the light of the opinions expressed.

*It was so agreed.*<sup>19</sup>

#### ARTICLE 33

68. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had only made a few drafting changes in the English and Spanish versions of article 33.

69. The text proposed for article 33 read:

#### *Article 33*

##### *Waiver of immunity*

1. The immunity from jurisdiction of the permanent representative and members of the diplomatic staff of the permanent mission and of persons enjoying immunity under article 40 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by the permanent representative, by a member of the diplomatic staff of the permanent

<sup>18</sup> United Nations, *Treaty Series*, vol. 596, p. 298.

<sup>19</sup> For resumption of the discussion see 1117th meeting, para. 41.

mission or by a person enjoying immunity from jurisdiction under article 40 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

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

70. The CHAIRMAN said that, in the absence of any comments, he would take it that the Commission provisionally approved article 33 as proposed by the Drafting Committee.

*It was so agreed.*<sup>20</sup>

#### ARTICLE 34<sup>21</sup>

71. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that article 34, on the settlement of civil claims, was based on article 42 of the draft articles on special missions which, in turn, had been based on resolution II adopted by the United Nations Conference on Diplomatic Intercourse and Immunities on 14 April 1961.<sup>22</sup> The General Assembly had not included the provisions of draft article 42 in the Convention on Special Missions, but on 8 December 1969, had adopted resolution 2531 (XXIV) embodying a recommendation based on those provisions. The Drafting Committee therefore proposed that article 34 should be deleted. At the same time, it hoped that the Commission would explain the reasons for the deletion in the commentary to article 33 and would propose that those responsible for establishing the final text of the articles should adopt a resolution similar to General Assembly resolution 2531 (XXIV).

72. Mr. YASSEEN said that, for the reasons he had given during the second reading of article 34,<sup>23</sup> he welcomed the deletion of the article and endorsed the Drafting Committee's suggestions.

73. Mr. KEARNEY said that, if the Commission decided to delete article 34, he thought it would be hypocritical to insert in the commentary a reference to a resolution which merely expressed the pious hope that governments would settle claims justly. In his opinion, if the Commission wished to impose an obligation on the sending State to waive immunity, it should retain article 34; if not, the less said about it the better. Since the article involved a major point of principle which was of substantial interest to a number of States, he thought that at some time the Commission would have to vote on the question of its deletion.

74. Mr. ALBÓNICO said he disagreed with the views expressed by the Drafting Committee and by Mr. Yasseen. He did not think the Drafting Committee was com-

petent to delete an article which the Commission had submitted to it for review.

75. Mr. TAMMES said that for humanitarian reasons he would regret the deletion of article 34, though in view of the inclusion of paragraph 1 (*d*) in article 32, it had perhaps lost some of its practical significance. Nevertheless, article 34 might still serve a useful purpose in cases of civil claims for damages, and the obligation to waive immunity was sufficiently qualified in the text to safeguard the performance of the functions of the permanent mission as well as its diplomatic status.

76. Mr. USTOR replying to the comment made by Mr. Albónico, said that the Drafting Committee was in the hands of the Commission and always worked on its instructions. Since it dealt with questions of substance as well as questions of form, it had discussed article 34 and had proposed its deletion for the reasons given by Mr. Ushakov. An article identical with article 34 had been included in the Commission's draft articles on special missions, but had been deleted by the General Assembly. Since it was the normal practice of the Commission to respect all decisions of the General Assembly, the Drafting Committee had considered that it would be awkward, to say the least, to submit to the General Assembly an article almost identical with one it had recently rejected.

77. Mr. SETTE CÂMARA said he fully concurred in the Drafting Committee's decision to delete article 34. Waiver of immunity was an act of sovereignty which had to be decided upon by the sending State in the light of the circumstances of each individual case. Since the question of the settlement of claims was already covered by article 32, paragraph 1 (*d*), the deletion of article 34 should present no difficulties.

78. He agreed with Mr. Ustor that the deletion of the article was merely suggested to the Commission. It might eventually be necessary to take a vote on that matter, as Mr. Kearney had said, but that did not mean that the Drafting Committee had exceeded its terms of reference.

79. Mr. ALCÍVAR said that he was in full agreement with the proposal to delete article 34 and shared the views of Mr. Ustor and Mr. Sette Câmara on the comment made by Mr. Albónico.

80. Mr. BARTOŠ said he was in favour of deleting article 34 in order to keep the conventions on diplomatic law as uniform as possible. In the present case there was no reason to depart from the rules laid down at Vienna in 1961 and to treat the permanent representative of a State to an international organization differently from the representative of one State to another State.

81. Mr. EUSTATHIADES said he could not accept the argument that article 32, paragraph 1 (*d*), covered all the cases referred to in article 34, or even a large proportion of them. Article 34 was general in scope, whereas article 32, paragraph 1 (*d*) related to only one specific category of civil claims.

82. The drafting of article 34 might leave something to be desired and it was a departure from the solution adopted in other conventions, but it had the virtue of

<sup>20</sup> For resumption of the discussion see 1133rd meeting, para. 26.

<sup>21</sup> For text see 1095th meeting, para. 14.

<sup>22</sup> United Nations, *Treaty Series*, vol. 500, pp. 218-220.

<sup>23</sup> See 1095th meeting, para. 62.

stressing the link between the granting of immunities and the regular performances of the functions of the permanent mission. It did not impose an obligation on the sending State, but gave a directive which was quite consistent with the general system of immunities. If the Commission decided to delete article 34, it should reproduce the whole of it in the commentary to article 33.

83. Mr. NAGENDRA SINGH said that he had no very strong feelings about article 34, but considered that it made some positive contribution by stating, in the last sentence, that the sending State "shall use its best endeavours to bring about a just settlement of such claims".

84. After a procedural discussion in which the CHAIRMAN, Mr. BARTOŠ, Mr. USTOR, Mr. ALBÓNICO and Mr. USHAKOV took part, the CHAIRMAN noted that there were differences of opinion on the question whether article 34 should be retained. He suggested that the Drafting Committee should be requested to reconsider the article in the light of the opinions expressed during the discussion, and to take into consideration, in particular, the relationship between article 34 and article 32, paragraph 1 (d).

*It was so agreed.<sup>24</sup>*

The meeting rose at 12.55 p.m.

<sup>24</sup> For resumption of the discussion see 1117th meeting, para. 20.

### 1114th MEETING

*Monday, 7 June 1971, at 3.10 p.m.*

*Chairman:* Mr. Senjin TSURUOKA

*Present:* Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

#### Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168 and Add.1; A/CN.4/L.170)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the draft articles proposed by the Drafting Committee, beginning with article 12, on the credentials of the permanent representative.

#### ARTICLE 12

2. Mr. AGO (Chairman of the Drafting Committee) reminded the Commission that on 2 June it had referred the text of the article back to the Drafting Committee for reconsideration.<sup>1</sup> The Committee had replaced the words "or by another competent minister" by the words "or by another competent authority". Most of the members of the Commission had appeared to prefer the latter phrase, which covered the former, but was broader and allowed for the fact that in some States credentials were issued by collegiate authorities which could not be classed as ministers.

3. The text proposed by the Drafting Committee for article 12 read:

#### *Article 12*

##### *Credentials of the permanent representative*

The credentials of the permanent representative shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent authority of the sending State if that is allowed by the practice followed in the Organization, and shall be transmitted to the competent organ of the Organization.

4. Mr. YASSEEN and Mr. BARTOŠ welcomed the change in wording.

5. Mr. NAGENDRA SINGH said he fully supported the Drafting Committee's text. The expression "another competent authority" was the appropriate one to use in the context. State practice showed that there were cases in which an authority other than a Minister was allowed to issue the credentials of the permanent representative.

6. Mr. USHAKOV said he could accept the text proposed by the Drafting Committee, but did not share the view held by the majority of the Commission.

7. The CHAIRMAN said that, if there were no objection, he would take it that the Commission provisionally approved article 12 in the new form proposed by the Drafting Committee.

*It was so agreed.<sup>2</sup>*

#### ARTICLE 35

8. Mr. AGO (Chairman of the Drafting Committee) said that the Drafting Committee had made no change in article 35, but considered that two observations on it should be included in the commentary.

9. The first related to paragraphs 1 and 3. As had been pointed out in the written observations (A/CN.4/239, section D.9, para. 6 [b]), there was nothing in paragraph 1 to exempt the sending State, in its capacity as

<sup>1</sup> See 1111th meeting, para. 60.

<sup>2</sup> For resumption of the discussion see 1132nd meeting, para. 84.

employer, from social security legislation. The Drafting Committee considered such a provision unnecessary in view of the rule of general international law on the immunity enjoyed by the State in diplomatic relations. If reference to the sending State was implied in paragraph 1, it must also be implied in paragraph 3.

10. The second observation related to paragraph 5. In 1969 the Commission had expressed its intention to consider, in the light of the comments to be received from governments, whether paragraph 5 was necessary in view of the provisions of articles 4 and 5 of the draft.<sup>3</sup> Although few governments had commented on that point, their observations seemed conclusive: paragraph 5 unnecessary. The Special Rapporteur had therefore deleted it from the draft of article 35 proposed in his sixth report (A/CN.4/241/Add.3). The deletion did not seem to have met with any objection in the Commission, but in the Drafting Committee the Special Rapporteur had urged the restoration of paragraph 5 on the grounds that even if it was not necessary, it could do no harm. The Committee had accepted his view.

11. The text proposed for article 35 read:

*Article 35*

*Exemption from social security legislation*

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

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

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

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

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

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

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

12. Mr. YASSEEN said that when the Commission was stating general rules it need not draw attention to one or other of their obvious consequences as it had done in paragraph 5. Nevertheless, it could approve that paragraph provisionally, pending a decision whether to include a general article on the relationship between

the convention it was preparing and subsequent agreements.

13. Sir Humphrey WALDOCK agreed with Mr. Yasseen. There were a number of other articles, such as that dealing with nationality, in which it was possible to introduce a similar provision. The question should, however, be left over until the Commission had decided on the general articles.

14. The CHAIRMAN suggested that, pending approval of the general articles, the Commission should provisionally approve article 35 as proposed by the Drafting Committee.

*It was so agreed.<sup>4</sup>*

ARTICLE 36

15. Mr. AGO (Chairman of the Drafting Committee) said that in article 36 the Drafting Committee had made only minor drafting changes to the Spanish text, but it wished to make two comments on the article.

16. First, in paragraph (5) of the commentary,<sup>5</sup> the Commission had stated that sub-paragraph (f), which was based on the corresponding provision of the Vienna Convention on Diplomatic Relations, might give rise to difficulties of interpretation, mainly because it stayed an exception to a rule which was itself an exception. The Commission had therefore enquired of governments whether they had experienced any practical difficulties in applying that provision. As the Special Rapporteur had noted (A/CN.4/241/Add.3), governments had not indicated the existence of any such difficulties. The Drafting Committee had therefore retained sub-paragraph (f) as it stood, with the exception of a slight drafting change in the Spanish text.

17. Secondly, the Committee wished to point out that, in the light of the observations made by UNESCO (A/CN.4/239, section D.3, para. 11 and foot-note 23), the references to that organization in the commentary to article 36 should be carefully examined.

18. The text proposed for article 36 read:

*Article 36*

*Exemption from dues and taxes*

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

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

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

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

<sup>4</sup> For resumption of the discussion see 1133rd meeting, para. 34.

<sup>5</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 214.

<sup>3</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 214, para. (3) of commentary to article 35.

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

(e) charges levied for specific services rendered;

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

19. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved article 36 as proposed by the Drafting Committee.

*It was so agreed.<sup>6</sup>*

#### ARTICLE 37

20. Mr. AGO (Chairman of the Drafting Committee) said that the Drafting Committee had made no change in article 37, which read:

##### *Article 37*

##### *Exemption from personal services*

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

21. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved article 37 as proposed by the Drafting Committee.

*It was so agreed.<sup>7</sup>*

#### ARTICLE 38

22. Mr. AGO (Chairman of the Drafting Committee) said that, apart from minor drafting changes in the English and Spanish texts, the Drafting Committee had made only one change in article 38: it had deleted from paragraph 1, sub-paragraph (b), the phrase "or members of his family forming part of his household". That phrase was unnecessary because article 38 was referred to in article 40, paragraph 1, concerning the members of the family of the permanent representative and the members of the family of a member of the diplomatic staff of the permanent mission.

23. The text proposed for article 38 read:

##### *Article 38*

##### *Exemption from customs duties and inspection*

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

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

(b) articles for the personal use of the permanent repre-

sentative or a member of the diplomatic staff of the permanent mission, including articles intended for his establishment.

2. The personal baggage of the permanent representative or a member of the diplomatic staff of the permanent mission shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions 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. In such cases, inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

24. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved article 38 as proposed by the Drafting Committee.

*It was so agreed.<sup>8</sup>*

25. Mr. AGO (Chairman of the Drafting Committee) said that the Drafting Committee was reconsidering article 39.

#### ARTICLE 40

26. Introducing article 40, he pointed out that in the text adopted by the Commission in 1969,<sup>9</sup> the references to sequences of articles gave only the first and last numbers. The drafting Committee had thought it better to enumerate all the articles concerned, as the Commission had done in article 69, paragraph 1.

27. In the cross-reference, now made in full, at the end of paragraph 1, the Committee had not included articles 33 and 34: article 33 did not specify a privilege or an immunity, but concerned waiver of immunity, and the Committee had proposed the deletion of article 34. In addition the Committee had noted that article 38, paragraph 1 (a), referred to a customs exemption granted to the permanent mission itself, not to members of the family; it had therefore replaced the reference to article 38 by a more specific reference to "paragraphs 1 (b) and 2 of article 38". For the same reasons, the Drafting Committee had deleted articles 33 and 34 from the cross-reference in the first sentence of paragraph 2 and in the last sentence of that paragraph had replaced the reference to paragraph 1 of article 38 by a reference to paragraph 1 (b) of article 38.

28. The text proposed for article 40 read as follows:

##### *Article 40*

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

1. The members of the family of the permanent representative forming part of his household and the members of the family of a member of the diplomatic staff of the permanent mission forming part of his household shall, if they are not nationals of the host State, enjoy the privileges and immunities specified in articles 30, 31, 32, 35, 36, 37 and paragraphs 1 (b), and 2 of article 38.

<sup>6</sup> For resumption of the discussion see 1133rd meeting, para. 38.

<sup>7</sup> For resumption of the discussion see 1133rd meeting, para. 41.

<sup>8</sup> For resumption of the discussion see 1133rd meeting, para. 44.

<sup>9</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 216.

2. Members of the administrative and technical staff of the permanent mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 30, 31, 32, 35, 36 and 37, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 32 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1 (b) of article 38, in respect of articles imported at the time of first installation.

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

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

29. Mr. USHAKOV said that the Commission should explain, in the commentary to article 40, that in deleting the reference to article 33 it had corrected a mistake which had also been made in the Vienna Convention on Diplomatic Relations. For article 37, paragraph 1, of that Convention,<sup>10</sup> which corresponded to article 40, paragraph 1, of the draft, referred to articles 29 to 36, but article 32 had no place in the enumeration because it dealt with waiver of immunity.

30. The CHAIRMAN said that, if there were no objections, he would take it that the Commission provisionally approved article 40 as proposed by the Drafting Committee.

*It was so agreed.*<sup>11</sup>

#### ARTICLE 41

31. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made only a drafting change in article 41, which was based on article 38 of the Vienna Convention on Diplomatic Relations. In the French text of paragraph 1 of the latter article (the word "*que*" had been placed before the words "*pour les actes officiels*" instead of before the words "*de l'immunité de juridiction*"). In 1969 the Commission had reproduced in the French text of article 41<sup>12</sup> the erroneous wording of the Vienna Convention and had aligned the English text with it, thus also introducing the error into the English text.<sup>13</sup> The Drafting Committee had restored the English

text as adopted at Vienna and aligned the French text with it. It should be noted that the General Assembly had done the same with article 40 of the Convention on Special Missions.<sup>14</sup>

32. The text proposed for article 41 read:

#### *Article 41*

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

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

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

33. The CHAIRMAN said that, if there were no objections, he would take it that the Commission provisionally approved article 41 as proposed by the Drafting Committee.

*It was so agreed.*<sup>15</sup>

#### ARTICLE 42

34. Mr. AGO (Chairman of the Drafting Committee) said that no change worth mentioning had been made in article 42, the text of which read:

#### *Article 42*

##### *Duration of privileges and immunities*

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

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

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

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

<sup>10</sup> United Nations, *Treaty Series*, vol. 500, p. 116.

<sup>11</sup> For resumption of the discussion see 1133rd meeting, para. 47.

<sup>12</sup> See *Annuaire de la Commission du droit international*, 1969, vol. II, p. 225.

<sup>13</sup> See *Yearbook of the International Law Commission*, 1969, vol. II, p. 217.

<sup>14</sup> See General Assembly resolution 2530 (XXIV), Annex.

<sup>15</sup> For resumption of the discussion see 1133rd meeting, para. 50.

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.

35. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved article 42 as proposed by the Drafting Committee.

*It was so agreed.*<sup>16</sup>

#### ARTICLE 43

36. Mr. AGO (Chairman of the Drafting Committee) said that no change worth mentioning had been made in article 43, the text of which read:

##### *Article 43*

##### *Transit through the territory of a third State*

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

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

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

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

37. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved article 43 as proposed by the Drafting Committee.

*It was so agreed.*<sup>17</sup>

<sup>16</sup> For resumption of the discussion see 1133rd meeting, para. 53.

<sup>17</sup> For resumption of the discussion see 1135th meeting, para. 70.

#### ARTICLE 44

38. Mr. AGO (Chairman of the Drafting Committee) said that the French text of article 44 had been redrafted on the model of article 49, paragraph 1, of the Convention on Special Missions. Since the article was of a general character, the Commission would have to decide later where it should be placed in the draft and whether it should perhaps be made applicable to all the articles.

39. The text proposed for article 44 read:

##### *Article 44*

##### *Non-discrimination*

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

40. Mr. EUSTATHIADES observed that, if the provision was to apply not only to permanent missions but also to permanent observer missions, the word "*Etats*", in the French text should not be preceded by the article "*les*". In the case of permanent missions, it was clear that the States referred to were the members of the organization, but in the case of permanent observer missions it was not known in advance which States would be involved. That amendment would also bring the French text closer to the English.

41. Mr. REUTER said it was preferable, wherever possible, to follow the English text.

42. The CHAIRMAN pointed out that, in article 49, paragraph 1, of the Convention on Special Missions, the French text contained the expression "*entre les Etats*" where the English had "as between States".

43. Mr. USHAKOV added that the expression "*entre les Etats*" was also used in the French text of article 47, paragraph 1, of the Vienna Convention on Diplomatic Relations.

44. Mr. ALCÍVAR said that the phrase "*entre los Estados*", which had appeared in the original text of article 44 and remained in the text proposed by the Drafting Committee, was correct in Spanish.

45. Mr. EUSTATHIADES said that, in view of the precedents cited, the wording proposed by the Drafting Committee could be retained.

46. The CHAIRMAN said that, if there were no objections, he could take it that the Commission provisionally approved article 44 as proposed by the Drafting Committee.

*It was so agreed.*<sup>18</sup>

#### ARTICLE 45

47. Mr. AGO (Chairman of the Drafting Committee) said that article 45 had been the subject of long discussions and that the Drafting Committee had made great efforts to arrive at a generally acceptable text.

<sup>18</sup> For resumption of the discussion see 1135th meeting, para. 78.

48. Paragraph 1 remained unchanged, but major changes had been made in paragraph 2, to protect the interests of both the host State and the sending State. The first sentence of paragraph 2 had been retained, but the word "criminal" before the word "jurisdiction" had been deleted. The following sentence had then been added:

"The sending State shall take the same action in case of grave and manifest interference in the internal affairs of the host State".

That sentence had been considered necessary because some kinds of interference in the internal affairs of the host State did not necessarily come under its criminal law. In the last sentence of paragraph 2 the words "within either the Organization or the premises of a permanent mission", had been deleted.

49. It would be necessary to explain in the commentary that paragraph 2 must not be interpreted as derogating from the principle stated in paragraph 1. Paragraph 2 provided for certain specific measures in case of grave and manifest violation of the criminal law of the host State, but that in no way detracted from the general obligation to respect the laws and regulations of the host State, whether criminal or non-criminal. The obligation to recall, imposed by paragraph 2, related to violation of the criminal law. Violations of the civil law could give rise to consultations between the sending State, the host State and the organization under article 50.

50. The Drafting Committee considered that repeated minor violations of the criminal law could constitute a "grave and manifest violation" within the meaning of paragraph 2.

51. The text proposed for article 45 read:

*Article 45*

*Respect for the laws and regulations of the host State*

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

2. In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from jurisdiction, the sending State shall, unless it waives the immunity of the person concerned, recall him, terminate his functions with the mission or secure his departure, as appropriate. The sending State shall take the same action in case of grave and manifest interference in the internal affairs of the host State. 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.

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

52. Mr. ALBÓNICO said he could not support the Drafting Committee's text of paragraph 2. The first sentence referred to the case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from jurisdiction. That formula was unnecessarily restrictive; some remedy should also be open to the host State in case of grave and manifest violation of its law in an administrative, fiscal or social security matter.

53. The second sentence of paragraph 2 referred to the case of grave and manifest interference in the internal affairs of the host State. He could not accept the qualification; all interferences in the internal affairs of the host State were grave. The principle of non-intervention did not admit of any exceptions; the General Assembly had made that perfectly clear by adopting resolution 2131 (XX), embodying the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty.

54. Furthermore, he considered that the second sentence of paragraph 2 should constitute a separate paragraph.

55. He could not agree to the exception made in the last sentence of paragraph 2 in so far as it related to the second sentence of that paragraph. Any interference in the internal affairs of the host State should lead to the recall of the person concerned, whether it was committed in carrying out the functions of the permanent mission or not.

56. Mr. AGO explained that the Drafting Committee had not intended paragraph 2 to limit paragraph 1 in any way, but to provide for an extreme measure in case of grave and manifest violation, namely, the recall of the person concerned. In other cases, the obligation to recall would not come into effect immediately, but the host State could request recall through the consultation procedure.

57. As to the last sentence of paragraph 2, it seemed to apply to both the possibilities mentioned by Mr. Albónico: for example, if an international labour conference met in a country where trade union law was not respected or in a country where the policy of *apartheid* was practised, those situations could be criticized by representatives at the conference in carrying out their functions.

58. Mr. CASTAÑEDA said he could support the Drafting Committee's text: it was not perfect, but it was the best that could be achieved in the circumstances. In particular, he preferred the proposed paragraph 2, with the new second sentence, to any suggestion to dilute the provision laid down in the first sentence. It was important to retain the reference to the case of grave and manifest violation of the criminal law of the host State.

59. Applying the principle of non-interference in the internal affairs of the host State involved grave difficulties. The scope of the prohibition of interference was not the same in bilateral and in multilateral relations. In bilateral relations, the sending State had to try to maintain cordial, or at least acceptable, relations with the receiving State. As to multilateral relations, the Chairman of the Drafting Committee had mentioned two extreme cases. It was possible to mention other less extreme, but much more frequent cases: for example, at international meetings it was not at all uncommon for a sending State's representative to make critical remarks about the economic policies of the host State. That type of remark would be unacceptable in bilateral relations, but might be perfectly normal in debate in an international organization. However, a difficult situation could arise if such critical statements were made elsewhere,

in a speech delivered by a representative in his official capacity.

60. In dealing with all those difficulties it would perhaps be advisable to draw inspiration from the concept of "clear and present danger" enunciated by Oliver Wendell Holmes. The problem was to determine whether the statement made by the representative had had a serious impact on the public affairs of the host State—something which could only be assessed subjectively.

61. He suggested that the commentary should make it clear that the second and third sentences of paragraph 2 were to be interpreted liberally so as not to hamper the freedom of action of the permanent representative.

62. Mr. USHAKOV said that he too could accept paragraph 2 as proposed by the Drafting Committee, though he did not consider it entirely satisfactory either as to form or as to substance. It was obvious that the facilities, privileges and immunities enumerated in Part II, section 2, of the draft could be violated by the host State. In such a case the sending State's only recourse was to invoke article 50, even if violations were repeated. On the other hand, article 45, paragraph 1, provided for obligations which the sending State had to assume through its representatives and the members of its missions. In case of grave violation of those obligations, the host State could not only invoke article 50, but could demand the recall of the person concerned. It was because of that lack of balance between the situations of the sending State and the host State that he had reservations regarding the substance of article 45, paragraph 2.

63. Mr. YASSEEN noted that two main changes had been made in article 45. First, it no longer mentioned the place where the violation was committed. For the reason he had stated previously,<sup>19</sup> he welcomed that deletion. Secondly, the notion of grave and manifest interference in the internal affairs of the host State had been introduced into paragraph 2. He could accept that addition if it was clearly understood that the host State would not have final authority to determine whether a violation of its criminal law or an interference in its internal affairs was "grave and manifest". It should always be possible to submit that question to the consultation procedure provided for in article 50 or to the other traditional means of settling international disputes.

64. Sir Humphrey WALDOCK said he shared the concern of those speakers who did not consider article 45 a wholly satisfactory compromise. In particular, he feared that paragraph 2, ostensibly designed to strengthen the position of the host State, would have the effect of weakening it. Paragraph 2 was designed to place an obligation on the sending State to recall a representative in specified circumstances; but there was a danger that it might be interpreted as setting a standard for cases of recall, inasmuch as it not only defined the obligation of the sending State, but also defined the cases in which the host State could ask it to recall a representative. If a dispute should arise between them, and if they

entered into consultations under article 50, the sending State could always say that the alleged violation was not "grave and manifest", and contest the host State's right to insist on recall. In such a case, paragraph 2 would not be limited to its real purpose, but could be regarded as setting a standard for cases of recall in general. In his opinion, therefore, the real purpose of paragraph 2 should be explained in the commentary, which should also make it clear that the obligations set forth in paragraphs 1 and 3 remained.

65. He likewise shared the concern of some members with regard to the last sentence of paragraph 2. The important thing to be borne in mind, however, was that that sentence referred, not to official acts, but to acts performed in carrying out the functions of the permanent mission. If interference in the internal affairs of the host State took the form of publishing material aimed at encouraging disaffection in the host State, that interference would not fall within the scope of acts performed in carrying out the functions of the permanent mission.

66. He was reluctant to accept article 45, although it seemed to be the best text the Drafting Committee could produce. If the article was adopted, it was essential that its underlying purpose should be explained in the commentary and that the position of the host State should be left intact.

67. Mr. KEARNEY said that, like other members of the Commission, he considered the present text of article 45 imperfect, but was prepared to accept it for the reasons given by the Chairman of the Drafting Committee and Sir Humphrey Waldock; he thanked the former for his excellent summary of the points that needed to be made in the commentary in order to ensure that the full meaning and purpose of the article were known to all.

68. He did not think there was any likelihood that the host State would take advantage of the provisions relating to grave and manifest violation of its criminal law or grave and manifest interference in its internal affairs. The Headquarters Agreement between the United Nations and the United States of America,<sup>20</sup> which had been in operation for almost twenty-five years, was in some respects more restrictive than the proposed article 45, but it had never given rise to any particular difficulties. For example, section 13 (b) provided that:

"... In case of abuse of such privileges of residence by any such person in activities in the United States outside his official capacity, it is understood that the privileges referred to in Section 11 shall not be construed to grant him exemption from the laws and regulations of the United States regarding the continued residence of aliens..."

It had never been alleged that the United States had abused that provision; on the contrary, it had always gone out of its way to avoid limiting the right of representatives to speak as they saw fit. Both in and outside the United Nations, representatives had been known to suggest that United States tax revenues should be used

<sup>19</sup> See 1098th meeting, para. 9.

<sup>20</sup> United Nations, *Treaty Series*, vol. 11, p. 12.

for the benefit of the international community—a suggestion which might be considered unreasonable interference in his country's domestic affairs. The concern expressed that article 45, paragraph 2, might lead to abuses by the host State was unwarranted and exaggerated. If such concern did exist in the Commission, that only reinforced the argument that some more elaborate system for the settlement of disputes should be provided for under article 50.

69. Mr. REUTER said that he had no enthusiasm for article 45, but had resigned himself to accepting it provisionally, for three reasons. First, as previous speakers had implied, a bad text was perhaps better than no text at all. Secondly, it must be recognized that the practice of permanent missions, though it went back a good many years, had not yet produced any dramatic incidents. Thirdly, neither the host State nor the sending State could be granted the right of final decision, but if a dispute arose it would always be possible to invoke article 50.

70. Nevertheless, the fact remained that the text of article 45 was obscure; it was one of those compromises which were open to any and every interpretation. Paragraph 1 stated a very general obligation without specifying the sanction for its breach, while paragraph 2 mentioned a possible sanction for grave cases. But the members of the Commission themselves disagreed on the interpretation of those provisions: some believed that paragraph 2 applied automatically—an opinion he did not share, since it would always be possible to invoke article 50—and others that in the case of minor violations, paragraph 2 would also be applicable, though less strictly. In any event, the article raised a more serious problem of ordinary international law, namely, the meaning of the words "Without prejudice to their privileges and immunities" in paragraph 1.

71. The last sentence of paragraph 2 was not clear either; it was impossible to imagine what criminal offence could be committed in carrying out the functions of the permanent mission as enumerated in article 7. The same applied to interference in the internal affairs of the host State, the only example which came to mind being that of delegations to organs and conferences, whose freedom of speech no one contested. He could not imagine a single instance in which the sentence in question could have any practical application to permanent missions.

72. A tribute was due to the Drafting Committee for its efforts to produce a satisfactory text, but as matters stood, and if article 50 remained in its present form, article 45 would be open to every possible interpretation.

73. Mr. EUSTATHIADES said that he too found the text lacking in clarity, particularly the last sentence of paragraph 2, which introduced an exception into a specific system of sanctions. Paragraph 1 stated a general rule, a breach of which might possibly entail sanctions, subject to article 50. Paragraph 2 went further by expressly providing for a specific sanction in cases of grave violation. The procedure provided for in article 50 would also be applied in such cases, but it would be

preceded by the application of the sanction; and that made the situation in paragraph 2 clearer. Next, as a second possibility, came interference in the internal affairs of the host State, and then the exception stated in the last sentence. The scope of that last sentence was very wide, since it referred to acts performed "in carrying out the functions of the permanent mission", which in the case of missions to international organizations with a wide range of activities, meant a great variety of acts. By virtue of that exception, the permanent representative would in most cases be exonerated if he interfered in the internal affairs of the host State. Logically speaking, since such interference could entail a sanction only if it was committed outside the exercise of the functions of the mission, there was no reason and no necessity to require that it should be "grave and manifest", like the violation of the criminal law, in order to produce the prescribed effect.

74. Like other members of the Commission, he could only approve article 45 provisionally. It would be necessary to draft a very clear commentary on the lines proposed by Sir Humphrey Waldock; but the Commission could not do that until it had considered article 50.

The meeting rose at 6 p.m.

## 1115th MEETING

Tuesday, 8 June 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

*Present:* Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

### Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168 and Add.1; A/CN.4/L.169; A/CN.4/L.170)

[Item 1 of the agenda]

(continued)

### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of draft article 45 proposed by the Drafting Committee (A/CN.4/L.168/Add.1).

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

2. Mr. ALBÓNICO said it was his understanding that the obligations imposed by paragraph 1 of the article were general and absolute; the difference established by paragraph 2 related only to the sanction in the event of violation. A distinction was drawn between violations which were grave and manifest and those which were not. In the case of a grave and manifest violation the sending State had a duty to take one of the three measures indicated in paragraph 2, unless the person concerned had performed the act in carrying out the functions of the permanent mission. In the case of violation which was not grave and manifest, the consultation procedure provided for in article 50 would apply, over and above all other means of settlement recognized by international law.

3. However, while it was comparatively easy to determine whether a violation of the criminal law was grave and manifest, the same could not be said of interference in the internal affairs of the host State, although there was a considerable difference between, say, criticism of a policy which violated human rights, such as *apartheid*, and an attack on a specific act performed by a government.

4. He would be grateful to the Chairman of the Drafting Committee if he could answer three questions. First, who determined whether a violation was grave and manifest? Secondly, in case of a grave and manifest violation committed by a person in carrying out the functions of their permanent mission, what were the rights of the host State? Thirdly, who determined whether an act had been performed in carrying out the functions of the permanent mission?

5. Mr. ALCÍVAR said that from the outset he had had misgivings about introducing into article 45 the concept of non-interference in the internal affairs of the host State. He agreed that such interference should be prohibited, but he feared that the officials of the host State might abuse such a prohibition to give their State some control, to which it was in no way entitled, over the international organization. He was nevertheless prepared to accept paragraph 2 as a compromise formula, provided that it was made clear in the commentary that the consultation procedure laid down in article 50 would apply; it could not be left to the sole discretion of the host State to determine whether interference in its internal affairs had occurred.

6. Mr. TAMMES said that, for those who were not familiar with the long history of article 45<sup>1</sup> the last sentence of paragraph 2 could be disturbing. It presented as an exception to the rule laid down in that paragraph an issue which was central to the purpose of the whole draft. The rule that the sanctions prescribed in paragraph 2 did not apply to acts performed in carrying out the functions of the permanent mission was really a qualification of the general rule laid down in paragraph 1

of the article. It was, in effect, an expression of the right of the sending State to unrestricted participation in the work of the organization.

7. The best solution to the problem would be to convert the last sentence of paragraph 2 into a separate paragraph, which would read:

“The provisions of paragraphs 1 and 2 shall not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission.”

That change would not disturb the balance of the compromise formula proposed by the Drafting Committee.

8. He was also concerned about the time-span covered by the provisions of paragraph 2. It had been suggested that they could apply to a period when the person concerned had been in the host State before beginning to enjoy full privileges under the present articles; he was opposed to that view. The question had been raised during the discussion on article 10, and Mr. Castrén had expressed the view that, if a person previously convicted of an offence in the host State was appointed as a member of a permanent mission, that State could rely on the provisions of article 45.<sup>2</sup> It had even been suggested that article 45 should be one of the qualifying articles listed in article 10. He suggested that the matter should be clarified in the commentary to article 45.

9. Mr. USTOR said that he was prepared to accept the provisions of paragraph 2 as a compromise solution, but he had two points to make. First, article 45 should be one of the general articles applicable to the whole draft. Secondly, the Drafting Committee should consider broadening the language of the last sentence of paragraph 2 to cover all official functions of the persons concerned. That would be in keeping with the intention of the provision, which was to ensure complete immunity for acts of State.

10. Mr. SETTE CÂMARA said that article 45 as proposed by the Drafting Committee was far from being a perfect formulation of a rule of law; it suffered from the inevitable imperfections of a compromise. He would support it, however, because he realized that it would be very difficult to produce a better text; the critics of the present text had not been able to do so.

11. Paragraph 1 stated the rule that the privileges and immunities enjoyed by the persons concerned did not place them above the law. It also laid down the essential duty of those persons not to interfere in the internal affairs of the host State.

12. The provisions of paragraph 2 raised many controversial questions. The use of the words “grave and manifest” was intended to afford some protection to the sending State and to ensure that the severe procedure laid down in the first sentence of the paragraph would not be set in motion unless a really serious breach had been committed.

13. The concluding sentence of paragraph 2 was an essential provision. As permanent representative of his

<sup>1</sup> Formerly article 44; see *Yearbook of the International Law Commission, 1969*, vol. I, pp. 39-46, 172-178, 202-210, 218-224.

<sup>2</sup> See 1090th meeting, para. 84.

country in international organizations, he had witnessed many cases in which the exception relating to acts performed in carrying out the functions of the permanent mission had been the only protection available to a representative.

14. Mr. AGO (Chairman of the Drafting Committee) said that, since article 45 was the result of a compromise, it was not surprising that the text was now being criticized. Paragraph 1 did perhaps contain some obscurities, as Mr. Reuter had said, and might give rise to difficulties of interpretation and application. It should be noted, however, that that provision appeared in the previous Conventions and did not seem to have caused any such difficulties. The phrase "Without prejudice to their privileges and immunities" might be open to different interpretations, but the reservation it expressed was absolutely necessary. In practice it might mean that if the persons concerned enjoyed immunity from taxation, their obligation to respect the laws of the host State did not extend to its tax laws.

15. Paragraph 2 raised a number of problems, but they would not be solved by simply deleting it. The paragraph imposed an obligation to recall a member of a permanent mission both in case of grave and manifest violation of the criminal law of the host State and in case of grave and manifest interference in its internal affairs. In the absence of a tribunal competent to determine the grave and manifest character of such acts, it was necessary to rely on the judgement and good sense of the parties concerned. It was reasonable to assume that sending States would not deny the gravity of certain offences and hence would not contest their obligation to recall the person concerned. If a dispute arose, consultations could be held, which would either convince the sending State that the act committed was grave and manifest and that the person concerned must be recalled, or convince the host State that the act was not grave and manifest and that the request for recall was unfounded.

16. The reservation concerning grave and manifest violations committed in carrying out the functions of the mission related to extreme cases, but should be maintained precisely for that reason. The same provision should also appear in the part of the draft concerning delegations to organs and to conferences, where it would be particularly important.

17. The defects of article 45 seemed less important in view of the fact that the absence of such a provision might jeopardize the adoption of the convention being prepared. He was glad that the Commission and the Drafting Committee had been able to find a compromise solution which should satisfy both host States and sending States. As past experience had shown, if the draft did not contain such a provision as article 45, a pleni-potentiary conference would not be able to make good that omission. In its present form, and accompanied by a suitable commentary, article 45 should be acceptable.

18. Mr. ALBÓNICO said that, in the light of the explanations given by the Chairman of the Drafting Committee, he was prepared to accept article 45 on the

understanding that those explanations would appear in the commentary.

19. Sir Humphrey WALDOCK pointed out that the opening words of the last sentence of paragraph 2, "This provision", came from a text which did not contain the present second sentence. He suggested that those words should be amended to read: "These provisions".

20. Mr. YASSEEN agreed with that suggestion. However, he thought that the last sentence of paragraph 2, concerning cases in which the paragraph did not apply, also related to the duties mentioned in paragraph 1. As Mr. Tammes had suggested, it might be better to deal with the matter in a separate paragraph.

21. Mr. AGO (Chairman of the Drafting Committee) did not agree that the last sentence of paragraph 2 applied also to paragraph 1. He suggested that that sentence should begin with the words "The provisions of this paragraph".

22. The CHAIRMAN said that if there were no objections he would take it that the Commission provisionally approved article 45 as proposed by the Drafting Committee, with the amendment submitted by Sir Humphrey Waldox and amplified by the Chairman of the Drafting Committee.

*It was so agreed.<sup>3</sup>*

#### ARTICLE 46

23. Mr. AGO (Chairman of the Drafting Committee) said that in article 46 the Drafting Committee had added the words "or commercial" to the title to make it consistent with the body of the article.

24. The text proposed for article 46 read:

#### *Article 46*

##### *Professional or commercial 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.

25. The CHAIRMAN said that, in the absence of any comments, he took it that the Commission provisionally approved article 46 as proposed by the Drafting Committee.

*It was so agreed.<sup>4</sup>*

#### ARTICLE 47

26. Mr. AGO (Chairman of the Drafting Committee) said that in article 47 the Committee had made only drafting changes. In sub-paragraph (a) it had adopted a suggestion made by the United Nations Secretariat (A/CN.4/L.162/Rev.1); the French text of that amendment was based on article 43 of the Vienna Convention

<sup>3</sup> For resumption of the discussion see 1135th meeting, para. 46.

<sup>4</sup> For resumption of the discussion see 1135th meeting, para. 49.

on Diplomatic Relations.<sup>5</sup> The Drafting Committee had also inserted the word "shall" before the words "come to an end" in the introductory sentence of the article.

27. The text proposed for article 47 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.

28. Mr. USHAKOV asked that the following clarification of sub-paragraph (b) should be included in the commentary:

"Even if a permanent mission is finally or temporarily recalled, it continues to exist so long as the permanent representative exercises his functions with the Organization."

29. The CHAIRMAN said that, if there were no objections, he would take it that the Commission provisionally approved article 47 as proposed by the Drafting Committee, taking into account Mr. Ushakov's suggestion for the commentary.

*It was so agreed.*<sup>6</sup>

ARTICLE 48

30. Mr. AGO (Chairman of the Drafting Committee) said that the second sentence of article 48, as adopted in 1969,<sup>7</sup> had been criticized by certain governments (A/CN.4/238/Add.1, section B.4 and A/CN.4/239/Add.2, section B.5). The Drafting Committee found that sentence unnecessary, because the means of transport in question constituted one of the facilities for departure referred to in the first sentence. The Committee had therefore deleted the second sentence. It had also made some minor drafting changes in the English and Spanish texts of the first sentence.

31. The text proposed for article 48 read:

*Article 48*

*Facilities for departure*

The host State shall, if requested, grant facilities 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.

32. Mr. USHAKOV pointed out that article 48 of the draft was based on article 44 of the Vienna Convention on Diplomatic Relations.<sup>8</sup> That article dealt with quite

exceptional situations such as the breaking off of diplomatic relations between the receiving State and the sending State, which might or might not be followed by armed conflict. Article 48 of the draft was not of the same emergency character; it concerned relations between the sending State and the Organization, and was based on a request addressed by the sending State to the host State. That was why its wording was quite different from that of article 44 of the Vienna Convention and did not include, for example, the phrase "at the earliest possible moment". The difference should be clearly indicated in the commentary.

33. Sir Humphrey WALDOCK said he had no objection to the idea of indicating those differences in the commentary. However, the commentary must not give the impression that the provisions of article 48 would not apply in certain cases of extreme emergency such as the outbreak of hostilities, the possibility of which could not be ruled out. Such an emergency could affect the situation at the headquarters of an organization and create a need for special facilities to enable the persons concerned to leave the territory of the host State.

34. Mr. USHAKOV asked Sir Humphrey Waldock what hostilities he had in mind. It seemed that article 48 could apply only to hostilities between the sending State and the organization, since a conflict between the sending State and the host State did not affect relations between the sending State and the organization. Again, the severance of relations between the sending State and the organization did not create an emergency situation between the sending State and the host State, and hence did not constitute one of the emergencies contemplated in the Vienna Convention on Diplomatic Relations.

35. Sir Humphrey WALDOCK replied that the question which arose was not connected with the relations between the sending State, the host State and the organization. It was simply a question of fact. In the event of hostilities which created an emergency at the very place of the headquarters of the organization, special facilities for departure were necessary and it would be wrong to suggest anything to the contrary.

36. Mr. EUSTATHIADES noted that the Drafting Committee, in its desire to be concise, had decided that the second sentence of article 48 could be deleted if an explanation was given in the commentary. As now worded, however, the article did not impose an obligation on the host State to grant facilities unless it was requested to do so by the sending State. It was hardly possible to say in the commentary that such a request was not necessary in an emergency, for that would amount to broadening the obligation of the host State in spite of the clear terms of the article. Since he was in favour of requiring the host State to grant certain facilities to the sending State in an emergency, he was in favour of restoring the second sentence.

37. Mr. USHAKOV said he thought the former second sentence of article 48 was subject to the stipulation in the first sentence that a request be made to the host State. If so, Mr. Eustathiades need have no anxiety, since

<sup>5</sup> United Nations, *Treaty Series*, vol. 500, p. 123.

<sup>6</sup> For resumption of the discussion see 1133rd meeting, para. 56.

<sup>7</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 220.

<sup>8</sup> United Nations, *Treaty Series*, vol. 500, p. 122.

a request would be necessary in all cases, even under the new wording of article 48.

38. Mr. REUTER said he agreed with Mr. Ushakov. If a permanent representative refused to leave the organization in an emergency, the host State would not force him to leave. The word "emergency" therefore applied to cases in which it was not possible to address a formal request to the host State. As in most of the articles, a reservation must be made for the case of *force majeure*. That reservation could be stated in the commentary, unless a general provision on cases of *force majeure* was subsequently added to the draft.

39. Mr. USTOR said that the commentary could make it clear that a request for special facilities would be made by the sending State only in the event of difficulty. The host State had to comply with such a reasonable request. In normal circumstances there would, of course, be no question of special facilities being requested by the sending State.

40. Mr. AGO (Chairman of the Drafting Committee), speaking as a member of the Commission, said he did not believe that the second sentence of article 48 had been intended to broaden the obligations of the host State as Mr. Eustathiades thought. It was difficult to conceive that, in the absence of a request from the sending State, the host State had an automatic obligation to place means of transport at the disposal of nationals of the sending State. The host State could offer such facilities, but could not impose them. The first sentence was therefore quite sufficient and there was no need for the obligation it stated to be further extended in the commentary. On the other hand, the commentary should make it clear that no circumstances were excluded, even though the text of article 48 differed from that of the other Conventions. In particular, the obligation to facilitate departure applied in the case of armed conflict.

41. Mr. REUTER drew attention to a difference between the first and second sentences of the former text. The second sentence referred to the necessary means of transport for the persons concerned "and their property". After the deletion of that sentence, there was no longer any mention of property in article 48. The commentary should make it clear that the provision also covered property.

42. Mr. EUSTATHIADES said that the observations of the previous speakers might perhaps suggest that the words "if requested" should be deleted, since they added nothing and did not appear in article 44 of the Vienna Convention on Diplomatic Relations. On the other hand, if the Commission prescribed a request by the sending State, a reservation for emergencies should be made in the commentary.

43. Mr. BARTOŠ said that the words "if requested" should be retained, for otherwise a host State could politely ask a mission to leave its territory and grant it the necessary facilities for doing so, on the pretext that there was an emergency. In fact it was for the sending State to decide whether it wished to request

the host State to grant facilities for its nationals to leave the territory of the host State, or whether it wished its mission to stay there in spite of the alleged emergency, at the risk and on the responsibility of the sending State.

44. Sir Humphrey WALDOCK agreed that the words "if requested" should be retained; otherwise article 48 would lay an unduly broad obligation on the host State. Even with the proviso "if requested", there was no indication that the duty of the host State applied only in an emergency.

45. It was not enough to clarify the matter in the commentary, because the commentaries would disappear and the text, if construed in its natural and ordinary meaning, could be interpreted to mean that the host State was under a duty to provide facilities for departure at a mere nod from the sending State.

46. Mr. ROSENNE agreed with Sir Humphrey WaldoCK. He drew attention to a slight change of wording made by the Drafting Committee in the English text: the words "whenever requested", with their temporal connotation, had been replaced by the words "if requested". He suggested that the Commission should consider restoring the former phrase.

47. Sir Humphrey WALDOCK said that the use of the word "whenever" would make the obligation of the host State even broader. He preferred the word "if", which signified a condition.

48. Mr. AGO (Chairman of the Drafting Committee) explained that the Committee had had to choose between translating the word "whenever" into French literally, by the words "*chaque fois que*", and keeping the word "*si*" in the French text, but replacing the word "whenever" by "if". The Committee had chosen the second alternative, which it considered quite adequate.

49. The CHAIRMAN noted that the Commission seemed prepared to accept the article, subject to the remarks made concerning the commentary. If there were no objections he would take it that the Commission provisionally approved article 4 as proposed by the Drafting Committee.

*It was so agreed.\**

#### ARTICLE 49

50. Mr. AGO (Chairman of the Drafting Committee) pointed out that paragraph (2) of the commentary to article 49 explained that the sending State was free to discharge its obligation under paragraph 1 of the article in various ways: for instance, by entrusting the property and archives of the permanent mission to the diplomatic mission of another State. The Drafting Committee had considered that that possibility open to the sending State should be mentioned in the text of the article itself. Taking article 45, sub-paragraph (b), of the Vienna

\* For resumption of the discussion see 1135th meeting, para. 67.

Convention on Diplomatic Relations as a model, it had therefore added a third sentence to paragraph 1.

51. In addition, since the property of the permanent mission was mentioned in the body of the article, the Committee had added the word "property" to the title. It had also made a minor drafting change in the Spanish text of paragraph 2.

52. The text proposed for article 49 read:

*Article 49*

*Protection of premises, property 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. It may entrust custody of the premises, property and archives of the permanent mission to a third State acceptable to the host State.

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

53. Mr. ROSENNE said that the text proposed by the Drafting Committee for article 49 was a considerable improvement on the former text. In particular, the new third sentence in paragraph 1 helped to clarify the concept of a "special duty" embodied in the preceding sentence, which recalled the case of the Italian general referred to by the Special Rapporteur in that connexion.<sup>10</sup> He suggested that in the commentary to article 49, the Commission should be rather more explicit than it had been in its 1969 commentary.

54. Mr. USHAKOV said he did not see why the duty stated in paragraph 1 should be qualified as "special". It might perhaps be advisable to delete that word, unless the Chairman of the Drafting Committee could justify its use.

55. Mr. YASSEEN thought that the use of the word "special" was necessary in article 49, which imposed a duty going beyond the general duty a host State always had to protect the property of all persons in general and of permanent missions in particular. Moreover, the duty in question also had the special characteristic of not being of indefinite duration.

56. Mr. AGO (Chairman of the Drafting Committee) said that the text was quite clear, whether the word "special" was included or not. The reason why the Special Rapporteur had seen fit to use that word was probably that, since the permanent mission was accredited to the organization, the duty of the host State to protect the property of a mission not accredited to itself was in fact a special duty. Hence the word was not redundant.

57. Mr. USHAKOV said he was satisfied with that explanation and would not press for the deletion of the word "special".

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission provisionally approved article 49 as proposed by the Drafting Committee.

*It was so agreed.*<sup>11</sup>

ARTICLE 50

59. The CHAIRMAN said that the Commission did not yet have before it all the texts relating to article 50. He reminded members that, at the end of the discussion on that article<sup>12</sup> the Commission had decided to refer it to the Drafting Committee, intimating that it was almost unanimously in favour of retaining the article and suggesting that, since other questions might arise during the consideration of subsequent articles, the Drafting Committee might prefer to defer consideration of it. He, as Chairman, had noted that opinion in the Commission was not unanimous regarding other methods of settling disputes and that no specific proposals had been made on legal rather than practical modes of settlement; he had suggested that the Special Rapporteur should prepare a draft "provision concerning the settlement of disputes which might arise from the application of the articles", as envisaged by the Commission in its commentary to article 50.<sup>13</sup> On the proposal of one of its members, the Commission had also decided to ask the Special Rapporteur to prepare a working paper on that subject, together with a draft article, on the model of his working paper on the possible effects of exceptional situations (A/CN.4/L.166). The Special Rapporteur had informed the Secretariat that he had nearly completed the work and would submit it to the Commission shortly.

60. Meanwhile the Commission had before it document A/CN.4/L.169 containing amendments to article 50 submitted by Mr. Kearney. He inquired whether the Commission would prefer to proceed immediately with the consideration of article 50 and Mr. Kearney's amendments or to wait until it received the Special Rapporteur's proposals.

61. Mr. KEARNEY said that he had submitted certain amendments to article 50 because it seemed to him that many of the problems raised by the present set of draft articles were different from those connected with the previous instruments which the Commission had taken as models. Moreover, since there appeared to be different views in the Commission concerning the proper course to adopt with regard to consultations, it would be undesirable to leave the discussion of that topic until the end of the session.

62. However, since new proposals concerning article 50 could be expected from the Special Rapporteur shortly, he suggested that the Commission should now proceed with its consideration of the other articles and should

<sup>11</sup> For resumption of the discussion see 1133rd meeting, para. 59.

<sup>12</sup> See 1102nd meeting, paras. 17-21.

<sup>13</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 222, para. (5).

<sup>10</sup> See 1098th meeting, para. 99.

take up article 50 when the Special Rapporteur's text was before it.

63. Mr. USHAKOV said he noted a difference in approach between the text of article 50 adopted at first reading and that proposed by Mr. Kearney. The former provided for consultations if any "question" arose concerning the "application" of the articles; the latter provided for such consultations if any "difference" arose concerning the "respective rights and obligations" of the sending State and the host State. Mr. Kearney's text was thus concerned with a difference in the interpretation of the articles and not merely with their application; hence there was no point in providing for conciliation procedure, as was done in paragraph 2, since questions relating to the interpretation of international instruments could be settled only by a competent body.

64. Mr. KEARNEY said that he himself did not see all the differences noted by Mr. Ushakov between the former text of article 50 and his new text. He had not, in fact, intended to make any drastic changes in the article. The reference to "rights and obligations" in his proposed new paragraph 1 was intended to cover both problems of interpretation and problems of application. For example, if a host State chose to place a restrictive interpretation on a clause concerning the right of entry of representatives of the sending State, that would surely affect the application of the present articles as well as their interpretation. To his way of thinking, the conciliation procedure could be followed with respect to both the interpretation and the application of the draft articles, as provided in article 66, sub-paragraph (b), of the Vienna Convention on the Law of Treaties.<sup>14</sup>

65. Mr. USHAKOV thanked Mr. Kearney for his explanation.

66. Mr. EUSTATHIADES said he welcomed Mr. Kearney's proposal, which complemented article 50 very felicitously by adding an appropriate conciliation procedure to the consultations. He had only some comments of secondary importance to make on the drafting.

67. In the context of article 50, a question and a difference were not the same thing. Under the former text of the article a "question" might be either something that arose, but never attained the seriousness of a difference, or something that became a problem if the organization adopted, towards a provision of the convention, an attitude which drew different reactions from the host State and the sending State. But the word "question" could also be interpreted in the wider sense of a "difference", and to avoid wrong interpretations it might perhaps be advisable to use both words in the text and say "If any question or difference arises . . .". The reason why Mr. Kearney had replaced the word "question" by "difference" was probably that his proposal provided not only for consultation machinery, but also for a conciliation procedure which could come into use when the "question" had degenerated into a "difference"; the word

"difference" took on its full meaning when article 50 was read in conjunction with the proposed articles 50 *bis* and 50 *ter*. Those considerations argued in favour of using both terms in the first sentence of paragraph 1.

68. Mr. Kearney had done well to replace the words "a sending State" by "one or more sending States", for a question might concern several sending States or a difference arise between several of them and the host State. On the other hand there was no justification for replacing the words "concerning the application of the present articles" by "concerning their respective rights and obligations under the present articles". The former text covered both differences and problems for which a solution could be sought through consultation; and it also covered rights and obligations.

69. As to the drafting, since "one or more sending States" were referred to at the beginning of paragraph 1, those words should also be used later in the sentence. In paragraph 2, the subject of the first sentence should be only "any State engaged therein" and should not include "the Organization", since the latter could hardly send a written notice to its own Secretary General.

70. Mr. Kearney's draft as a whole provided for a much more complete system than the consultations under article 50 and was, in general, a well-conceived solution of the problem of settlement of disputes.

71. After a brief procedural discussion in which the CHAIRMAN, Mr. USHAKOV, Mr. ROSENNE and Mr. KEARNEY took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to await the Special Rapporteur's proposals before examining article 50 as a whole, provided that it received those proposals within a reasonable time.

*It was so agreed.*<sup>15</sup>

The meeting rose at 1 p.m.

<sup>15</sup> For resumption of the discussion see 1119th meeting, para. 81.

## 1116th MEETING

*Wednesday, 9 June 1971, at 10.5 a.m.*

*Chairman:* Mr. Senjin TSURUOKA

*later:* Mr. Roberto AGO

*Present:* Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Barotoš, Mr. Castañeda, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

<sup>14</sup> *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 298 (United Nations publication, Sales No.: E.70.V.5).

**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 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168 and Add.1 and 2; A/CN.4/L.169; A/CN.4/L.170)

[Item 1 of the agenda]  
(continued)

**DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE**  
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the draft articles proposed by the Drafting Committee, starting with article 39.

**ARTICLE 39<sup>1</sup>**

2. Mr. AGO (Chairman of the Drafting Committee) said that on mature consideration the Drafting Committee had decided to make no change in article 39, believing that in such a delicate text it was necessary to follow, to the letter, the 1961 Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality.<sup>2</sup> The Committee had even decided against replacing the words "not being nationals", in the first phrase of the English text, by the words "who are not nationals" (A/CN.4/L.162/Rev.1).

3. The text proposed for article 39 read:

*Article 39*

*Exemption from laws concerning acquisition of nationality*

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

4. However, since article 39, like article 40, dealt with the privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff, the Drafting Committee thought it would be more logical to place article 39 after article 40, and therefore proposed that the order of the two articles should be reversed.

5. Mr. USHAKOV said he assumed that that was merely a provisional proposal, since the Drafting Committee intended to review the order of all the articles in the draft at a later stage.

6. The CHAIRMAN said that, if there were no other comments, he would take it that the Commission provisionally approved the Drafting Committee's proposals for article 39 in the light of Mr. Ushakov's comment.

*It was so agreed.<sup>3</sup>*

<sup>1</sup> For previous discussions see 1096th meeting, para. 77; 1098th meeting, para. 101; 1099th meeting, para. 1.

<sup>2</sup> United Nations, *Treaty Series*, vol. 500, p. 224.

<sup>3</sup> For resumption of the discussion see 1135th meeting, para. 40.

**PART III. Permanent observer missions to international organizations**

7. The CHAIRMAN invited the Commission to take up Part III of the draft, concerning permanent observer missions to international organizations (A/CN.4/L.168/Add.2).

**ARTICLE 52**

8. Mr. AGO (Chairman of the Drafting Committee), introducing article 52, said that in paragraph 1, in order to emphasize that there must be no discrimination in the establishment of permanent observer missions, the Drafting Committee had inserted the words "and with article 75" after the words "in accordance with the rules or practice of the Organization". The Committee would consider on second reading whether a corresponding change should be made in article 6 on the establishment of permanent missions.

9. As in article 6 and for the same reasons, the Drafting Committee had replaced the words "functions set forth" by the words "functions mentioned".

10. The Committee had added a second paragraph modelled on the paragraph 2 it had added to article 6 (A/CN.4/L.168).

11. The text proposed for article 52 read:

*Article 52*

*Establishment of permanent observer missions*

1. Non-member States may, in accordance with the rules or practice of the Organization and with article 75, establish permanent observer missions for the performance of the functions mentioned in article 53.

2. The Organization shall notify the host State of the establishment of a permanent observer mission.

12. Mr. TAMMES said he could not accept the new text of article 52, for the reasons he had stated when the Commission had examined the previous text.<sup>4</sup> Apart from the addition of the new paragraph 2, the article was in essentials unchanged and was still ambiguous inasmuch as it might be interpreted as imposing an obligation on the organization. As the text read at present, the organization could be required to permit the establishment of permanent observer missions provided that it had no rules or practice to the contrary. The problem had been well stated by Mr. Bartoš, who had asked whether the phrase "in accordance with the rules or practice of the Organization" meant that non-member States could establish permanent observer missions if the organization permitted them to do so, or that it was for the organization to lay down the conditions governing the establishment of observer missions.<sup>5</sup>

13. Mr. ALBÓNICO said he did not know whether the additional words "and with article 75" meant anything in the English and French texts; in the Spanish text they were meaningless.

<sup>4</sup> See 1102nd meeting, para. 31 *et seq.*

<sup>5</sup> *Ibid.*, para. 53.

14. Mr. USTOR disagreed with Mr. Tammes's view that the new text of article 52 could be interpreted to mean that non-member States could compel an organization to permit them to establish permanent observer missions. The organization's rights in the matter were amply safeguarded by the phrase "in accordance with the rules or practice of the Organization and with article 75". Any remaining doubts could easily be dispelled in the commentary.

15. Mr. KEARNEY expressed dissatisfaction with the new text and particularly with the reference to article 75. Article 75, on non-discrimination, was a general article which applied to all the draft articles in the part on permanent observer missions. It was not the Commission's practice to make specific references to an article of that type; that had been made clear when it had been suggested that a reference to article 50 should be included in article 10.<sup>6</sup> If a reference to article 75 was accepted in article 52, there would seem to be no valid reason why such a reference should not be made in a number of other articles as well.

16. Mr. EUSTATHIADES agreed with Mr. Kearney that a general provision such as article 75, on non-discrimination, need not be expressly mentioned. In the present case, it was unnecessary to mention article 75 if the practice and rules of the organization permitted the establishment of permanent observer missions; if they did not, such a reference was even dangerous, for it would make it more difficult for organizations which did not permit the establishment of observer missions to change their policy.

17. He would not press for deletion of the reference to the rules or practice of the organization, provided that it was clearly explained in the commentary how that provision could be reconciled with the aim of making it the general practice to allow non-member States to establish permanent observer missions to international organizations.

18. Mr. USHAKOV said he doubted whether paragraph 1 could be interpreted as Mr. Tammes feared, since the establishment of a permanent observer mission, just like that of a permanent mission, was necessarily subject to the organization's consent.

19. Logically, either the reference to article 75 should be accepted, if the implicit reference to article 3 in the words "in accordance with the rules or practice of the Organization" was recognized, or all references to general provisions should be deleted. At all events, if the two references—explicit and implicit—were retained in article 52, article 6 should be amended accordingly.

20. Mr. REUTER agreed with previous speakers in finding the words "and with article 75" unacceptable.

21. Sir Humphrey WALDOCK said that, like other members, he did not think the reference to article 75 was either necessary or appropriate. It did not alter the sub-

stance of the article, since what the Commission was concerned with was the application of the principle of universality. The case of permanent observer missions presented a special problem, since it was necessary to safeguard the general position of organizations which did not have any rules or practice in the matter. Everyone could agree that the member States of an organization of a universal character should enjoy equal rights with respect to representation, but it was open to question whether non-member States should be allowed any rights at all. The real problem in such cases was, of course, essentially political and could not be solved by drafting. However, since there was nothing in the new text of article 52 to restrict the freedom of action of an organization in dealing with a non-member State, he was prepared to accept it.

22. Mr. AGO (Chairman of the Drafting Committee) said that, in appraising the wording of an article, particularly one that had to stress a number of requirements which were contradictory, but all had to be taken into consideration, it was necessary first to agree on the substance and then to see whether it was appropriately expressed. In article 52, three requirements had to be put into appropriate form. First, the will of the international organization, which was sovereign, must be respected, whether it chose to accept observer missions or not to accept them. Secondly, if the organization accepted permanent observer missions, it could make their establishment subject to certain conditions and procedures that were either defined in the rules of the organization, which was rather exceptional, or derived from its practice, which was normal. Thirdly, once an organization had agreed to accept permanent observer missions, it could not permit some States to establish them and refuse others.

23. The question was whether article 52, in its present wording, adequately reflected those three requirements. Some members feared that paragraph 1 could be interpreted to mean that the organization was obliged to accept the establishment of permanent observer missions. He did not think so. The words "in accordance with the rules or practice of the Organization" provided all the necessary safeguards, for if a non-member State wished to establish a permanent observer mission to an organization whose rules or practice did not allow it, such a mission could not be said to be established in accordance with the rules or practice of the organization. The use of those words made it quite impossible for a non-member State to establish an observer mission to an organization which did not wish it. That point should be made clear in the commentary.

24. The reference to article 75 was intended to express the idea that there must be no discrimination between non-member States. The reference was not, perhaps, superfluous, for the simple reason that the non-discrimination referred to in article 75 applied mainly to the treatment of sending States by the host State, whereas article 52 dealt with non-discrimination on the part of the organization. Perhaps it was not necessary to refer expressly to article 75 in cases where discrimination

<sup>6</sup> See 1090th meeting, para. 73 *et seq.* and 1091st meeting, para. 4 *et seq.*

might be practiced by the host State; but it was well to do so where it was the organization which might discriminate.

25. Article 52, as drafted, was thus a fairly satisfactory expression of the Commission's ideas and aims.

26. Mr. KEARNEY said he might not have fully understood the Chairman of the Drafting Committee, but he saw no reason to abandon a principle of drafting which the Commission had followed for a long time. Even if article 52 made no reference to article 75, there was no doubt that the latter article would continue to apply to all the draft articles on permanent observer missions.

27. Mr. REUTER said that the very clear explanations given by the Chairman of the Drafting Committee confirmed his opinion that article 52 was unacceptable. After an organization had given non-member States permission to establish permanent observer missions, the rule of non-discrimination should certainly apply as between those States, but it was impossible to accept a rule which would force organizations to choose between two alternatives: to permit all non-member States to establish permanent observer missions or to permit none. Respect for the sovereignty of the organization required that its freedom to judge for itself be protected.

28. Mr. ALCÍVAR agreed with Sir Humphrey Waldock that the problem raised in article 52 with regard to organizations, and particularly with regard to the United Nations, was a political problem. He proposed that either article 52 should include a reference to article 75 or the phrase "in accordance with the rules or practice of the Organization" should be deleted.

29. Mr. TAMMES associated himself with Mr. Reuter's remarks. The possibility of interpreting article 52 as imposing an obligation on the organization would exist only if the organization had no rules or practice in the matter; but, as was clear from the comments received from a number of organizations, many had no such rules or practice. It was, of course, possible to remove all doubt by including an appropriate reference in the commentary, but he thought it would be better to do so in the text of the article itself by using some such phrase as "in so far as this is provided for in the relevant rules of the Organization", which he had previously proposed.<sup>7</sup>

30. Mr. USTOR said that he could not accept Mr. Reuter's contention that an organization of a universal character could make a choice between States. In his view, the same rule should apply to non-member States as to member States: to allow organizations to discriminate by permitting some States to establish permanent observer missions and refusing others would conflict with the principle of universality to which the Commission was committed.

31. As to Mr. Kearney's objection to the reference to article 75, it should be noted that article 3, although not

referred to as such, was nevertheless represented in article 52 by the words "in accordance with the rules or practice of the Organization".

32. With regard to the political content of article 52, it was true that organizations possessed a certain amount of freedom when it came to deciding whether they would or would not recognize political entities as States, but that freedom was relative and subject to the general principle of friendly relations, good faith and co-operation between States.

33. Mr. ROSENNE said that he shared the hesitation expressed by Mr. Tammes and Mr. Reuter; the new text of article 52, as presented and explained, seemed to change the whole character of permanent observer missions. He feared that the Commission was developing a tendency to include far too many rules of law in ephemeral commentaries which would disappear if the Vienna Convention on the Law of Treaties was ever properly applied.

34. It had been suggested that if the Commission accepted article 6, which permitted member States to establish permanent missions, it should also accept the same rule for application to non-member States. But that suggestion ignored the fact that before a State became a member of an organization, there was an initial process by which it became a member. However nominal the process of admission to membership in the United Nations might be today, it had still to be undergone in accordance with Article 4 of the Charter, and article 6 of the present draft articles applied only to States which had already undergone such a process.

35. He noted a slight difference between paragraph 2 of the new article 52 and article 6, paragraph 2, as provisionally approved by the Commission.<sup>8</sup> Article 52, paragraph 2, read: "The Organization shall notify the host State of the establishment . . .", whereas article 6, paragraph 2, read: "The Organization shall notify to the host State the establishment . . .". He understood the text in article 52 to mean that notification would be made after the establishment of a permanent observer mission; that had not been the meaning given to the corresponding text of article 6.

36. Mr. USHAKOV said that the sovereignty of States was subject to the rule of general international law prohibiting the practice of discrimination between States. The sovereignty of international organizations was subject to the same incontestable rule of *jus cogens*. Hence it was inconceivable that members of the Commission, who should be guided exclusively by legal and not by political considerations, should grant the organization the right to discriminate between States.

37. Mr. ALBÓNICO said that, on merely reading article 52 in its present form as a layman, he would understand it to mean that non-member States had the right to establish permanent observer missions. The phrase "in accordance with the rules or practice of the

<sup>7</sup> See 1102nd meeting, para. 32.

<sup>8</sup> See 1110th meeting, para. 18.

Organization and with article 75” was of a purely procedural, not a substantive, nature. Since a political problem was involved, he thought some explicit reference to the agreement or consent of the organization was indispensable in the article.

38. Mr. CASTAÑEDA said that non-discrimination was implicitly a rule in all international organizations. An organization was free to lay down certain conditions for membership but, if a candidate fulfilled those conditions, it could not be refused admission. That principle had been confirmed by the International Court of Justice in its advisory opinion of 3 March 1950,<sup>9</sup> the essence of which was that the United Nations could not deny admission to a State for any reasons other than those laid down in the Charter.

39. Mr. SETTE CÂMARA observed that, in Mr. Albónico's view, the element of consent of the organization was lacking in article 52; he, on the contrary, believed that it was present in the words “in accordance with the rules or practice of the Organization”, which, as Mr. Ustor had pointed out, constituted a reference to article 3. He saw no danger that the present wording would impose an obligation on organizations to accept permanent observer missions from non-member States.

40. In his opinion, the reference to article 75 was justified for the reason given by the Chairman of the Drafting Committee. He would support the new article 52 as it stood.

41. Mr. AGO (Chairman of the Drafting Committee) said that in his previous statement he had merely tried to justify the drafting of article 52, without expressing any views on the problems of substance it raised. Some members of the Commission appeared to be mainly concerned with the substance.

42. The question raised by Mr. Tammes and Mr. Albónico related to drafting. It was indeed open to question whether the phrase “in accordance with the rules or practice of the Organization” made it sufficiently clear that the organization was not obliged to accept permanent observer missions. He would have no objection to changing that phrase if the Commission could find a better one; but it would then be necessary to amend article 6 accordingly.

43. Mr. Kearney had also raised a question of drafting when he had expressed the opinion that the reference to article 75 should be deleted because that article was a general provision applicable to the whole draft, which therefore need not be mentioned expressly. However, Mr. Ushakov's remarks concerning the implicit reference to article 3 suggested that there were reasons for retaining the reference. He would have been tempted to agree with Mr. Kearney purely on the basis of drafting, but Mr. Reuter had advocated the deletion of the reference on grounds of substance, namely, the need to uphold the organization's freedom to judge for itself.

44. It was no use asking the Drafting Committee to revise a text when the Commission had not decided

exactly what it was to express. The Commission should decide whether the principle of non-discrimination was or was not applicable to the establishment of permanent observer missions by non-member States. Once that question had been settled, the choice of wording would be easy.

45. Mr. REUTER said that he had not intended to take a position on the scope of a rule of non-discrimination in general international law. He had simply meant to say that the real question was who was to decide whether a refusal did or did not amount to discrimination in a particular case. In his opinion it was clearly the organization itself which should decide, and it was in that connexion that he had referred to its sovereignty. He could not imagine that the Commission proposed to change the rule on admission to membership in the United Nations laid down in Article 4 of the Charter; nor could he imagine that the Organization had fewer rights in regard to non-member States than it had in regard to Member States.

46. Mr. ROSENNE asked whether the Chairman of the Drafting Committee could explain the relationship in time between articles 75 and 52. Specifically, what was the point in time at which the rule of non-discrimination came into operation: was it the moment when a permanent observer mission was established by the sending State, or did the rule apply retroactively or in a timeless way?

47. Mr. AGO (Chairman of the Drafting Committee) said that that was a very delicate question and deserved careful study. At first sight, it seemed that the rule of non-discrimination should apply from the moment when the organization decided to accept permanent observer missions; but that could not properly be called retroactive application. For a State which was not a member of an organization could request permission to establish a permanent observer mission at a time when the organization did not wish such missions to be established. Subsequently, that State might cease to exist, or become a member of the organization or decide not to establish a permanent observer mission. If it was still in existence, was still not a member and still wished to establish a mission when the organization decided to accept such missions, the State would probably make a new application to the organization.

48. Mr. NAGENDRA SINGH endorsed the explanations given by the Chairman of the Drafting Committee. But since article 75, on non-discrimination, applied to all the draft articles on permanent observer missions, he saw no reason to mention it specially in article 52. If the reference was nevertheless retained, the words “and with article 75” should be replaced by some such phrase as “and subject to the provisions of article 75”.

49. Mr. EUSTATHIADES said that, having commented on the drafting of article 52, he wished to add three remarks on the substance. First, it was not clear whether the article simply reflected existing practice or whether it was designed to give a general direction to the practice of organizations by establishing a rule to be followed in the future.

<sup>9</sup> *I.C.J. Reports 1950*, p. 4.

50. Secondly, neither article 52 nor the commentary to it specified which organ of the organization was to give or refuse permission for the establishment of a mission, or on what criteria its decision would be based. The article referred only to the rules or practice of the organization; but there might be no rule and no uniform practice concerning the establishment of observer missions.

51. Thirdly, it would not be appropriate for a provision in a convention binding certain States to require organizations—which might mean their secretariats—to take a decision on a political matter and to make them responsible for settling such a delicate question as whether a given entity constituted a State. In some cases, however, an organization would have to decide that question because, as various members of the Commission had pointed out, only States could establish permanent observer missions. Since article 52 did not do so, each organization could be expected to establish appropriate procedure for the acceptance of observer missions.

52. Mr. KEARNEY observed that the discussion had revealed some concern at the difficulty of determining the meaning of paragraph 1. He proposed that the words “in accordance with the rules or practice of the Organization and with article 75” should be replaced by the words “when authorized by the Organization”. That change would have three beneficial results. The first was that the organization would be left to determine how the establishment of a permanent observer mission was to be authorized. The second was that any claim that a reference to article 75 was needed in article 52 would be disposed of. The third was that the confusion as to what constituted the “practice” of the organization would be removed.

53. In reply to a question by Mr. Ushakov, he said that his proposal did not affect article 6. He saw no connexion between article 6 and article 52. The constitution of an international organization invariably contained rules on the selection of its members; the reference to “Member States” in article 6 was an allusion to an established fact. The position with regard to article 52 was entirely different, in that the constituent instrument of no international organization contained provisions relating to non-member States.

54. Mr. USHAKOV said that Mr. Kearney’s amendment should be considered by the Drafting Committee. For his part he thought that if a non-member State had to obtain permission to establish a permanent observer mission, a member State should have to obtain permission to establish a permanent mission. Mr. Kearney’s amendment should therefore apply to article 6 as well as article 52.

55. The CHAIRMAN noted that article 52 had given rise to differences of opinion. He suggested that the article should be referred back to the Drafting Committee for reconsideration in the light of the discussion.

*It was so agreed.*<sup>10</sup>

<sup>10</sup> For resumption of the discussion see 1118th meeting, para. 1.

56. Mr. TAMMES reminded the Commission that he had submitted an amendment to article 52.

57. The CHAIRMAN said that the Drafting Committee would take that amendment into account.

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

#### ARTICLE 53

58. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that article 53 had been completely redrafted and simplified, but the substance was not affected. The text proposed by the Drafting Committee read:

##### *Article 53*

##### *Functions of a permanent observer mission*

The functions of a permanent observer mission consist *inter alia* in:

(a) ensuring the representation of the sending State to the Organization and maintaining liaison with it;

(b) ascertaining activities in the Organization and reporting thereon to the Government of the sending State;

(c) promoting co-operation with the Organization and, when required, negotiating with it.

59. Mr. USHAKOV reminded the Commission that in article 7, on the functions of a permanent mission, it had replaced the words “ensuring representation” by the words “ensuring the representation”.<sup>11</sup>

60. The CHAIRMAN,\* speaking as a member of the Commission, expressed regret at that change. The representation of a State to an organization was not provided exclusively by its permanent mission. But since the change had been made in article 7, it had had to be made in article 53 as well.

61. Mr. REUTER said he thought the expression “ensuring the representation” was correct in article 53, but that in article 7 it should be “ensuring representation”. However, he deferred to the Commission’s decision.

62. Mr. ALBÓNICO welcomed the Drafting Committee’s version of article 53 as an improvement on the former text.

63. Mr. KEARNEY noted that the first part of subparagraph (a) of the Drafting Committee’s text of article 53 was identical with subparagraph (a) of article 7 as provisionally approved by the Commission. The former difference between the two texts had served the purpose of making a minor distinction between the representation of a non-member State by its permanent observer mission and the representation of a member State by its permanent mission.

64. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that although the wording of

<sup>11</sup> See 1110th meeting, paras. 47 and 62.

\* Mr. Ago.

the opening phrase was now the same in both articles, article 53 mentioned the function of maintaining liaison with the organization in sub-paragraph (a), whereas article 7 mentioned that function in sub-paragraph (b). Apart from that, it had seemed that the difference between the functions of permanent missions and those of permanent observer missions should be brought out more by the commentaries than by the texts of articles 7 and 53.

65. Mr. KEARNEY observed that the difference in the organization of the sub-paragraphs did not really establish a significant distinction between the two types of representation. The function of representation would still be defined in the same terms for both types of mission, and he saw no justification for placing permanent observer missions on a par with permanent missions in that respect.

66. The CHAIRMAN,\* speaking as a member of the Commission, said that the character of the representation was the same in both cases, although the permanent mission of a member State normally acted more frequently in its representative capacity than a permanent observer mission. The person appointed by the sending State was always a representative, whether he was at the head of a permanent mission or of a permanent observer mission.

67. Mr. KEARNEY reminded the Commission that, in its discussions on article 7, attention had been drawn to the difference between the representation of a member State "in" the organization by a permanent mission and the representation of a non-member State "at" the organization by a permanent observer mission.<sup>12</sup> That difference in wording had established a distinction which had now been lost through the use of the same preposition "to" in sub-paragraph (a) of both article 7 and article 53.

68. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that it was not possible to use the preposition "in"; it had been pointed out in discussion that a permanent mission represented the sending State "at" the organization, but never "in" the organization. In certain cases, the permanent representative might be authorized to represent the sending State "in" an organ of the organization, but that did not affect the position so far as the permanent mission was concerned. It would be regrettable if, in order to try to make a distinction between permanent missions and permanent observer missions, the erroneous concept of representation "in" the organization by a permanent mission were introduced into article 7.

69. Mr. USHAKOV considered that the point raised by Mr. Kearney was a matter of substance, since the representation of a member State and that of a non-member State were different in purpose. The same difference was to be found in bilateral diplomacy, between the purpose of an ordinary diplomatic mission and that of a

special mission. A special mission represented the sending State only for certain specific purposes, as could be seen from article 1, sub-paragraph (a), of the Convention on Special Missions.<sup>13</sup> The commentary to article 53 should therefore make it clear that the purpose of a permanent mission and that of a permanent observer mission were not the same, although they both had a representative character.

70. Mr. REUTER said that a permanent observer mission had a monopoly of representation, which the permanent mission of a member State did not. That paradoxical situation probably explained the differences in wording between article 7 and article 53.

71. Sir Humphrey WALDOCK reminded the Commission that the text of article 53 referred to the Drafting Committee had used the words "at the Organization"; on the whole he preferred that phrase to the formula "to the Organization" now proposed by the Drafting Committee. However, he did not attach great importance to the use of one preposition rather than the other, and he noted that the corresponding French phrase "*auprès de l'Organisation*" had been given preference throughout the discussions. In his opinion the preposition used did not reflect on the character of the representation, which depended essentially on the functions performed by the mission concerned.

72. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that to the best of his recollection Sir Humphrey Waldox had explained in the Drafting Committee that the preposition "at" was the equivalent of the French "*auprès de*".

73. Mr. SETTE CÂMARA agreed with Mr. Kearney that the use of similar language in articles 7 and 53 would make it appear that the permanent mission and the permanent observer mission had the same functions. In reality, the main function of a permanent observer mission was that defined in article 53, sub-paragraph (b): namely, "ascertaining activities in the Organization and reporting thereon to the Government of the sending State". The function of representation, defined in sub-paragraph (a), did not have the same importance; that difference from a permanent mission was significant. He therefore suggested that the order of sub-paragraphs (a) and (b) in article 53 should be reversed. The resulting difference from article 7 would establish the necessary distinction between the functions of permanent missions and those of permanent observer missions.

74. Mr. ROSENNE pointed out that the character of representation depended not only on the functions of the mission concerned, but also on the sending State which the mission represented. In practice certain permanent observer missions, both at Geneva and in New York, had much greater representative activities than certain permanent missions. There were permanent missions whose activities could be quite nominal.

75. He did not believe that the use of the preposition "to" instead of "at" or "in" was very important. On the

\* Mr. Ago.

<sup>12</sup> See 1089th meeting, para. 60 *et seq.* and 1110th meeting, para. 34 *et seq.*

<sup>13</sup> See General Assembly resolution 2530 (XXIV), Annex.

other hand, the introduction of the definite article "the" before the word "representation" made some difference to the meaning of the text. In its present form, he thought that article 53, sub-paragraph (a), did not adequately reflect the elements which, taken together, distinguished a permanent observer mission from a permanent mission.

76. As he recollected it, Mr. Yasseen's proposal that the article "the" should be inserted before the word "representation" in article 7, sub-paragraph (a), had originally related to the French text. The Chairman had summarized the discussion in both English and French, and had referred to the insertion of the definite article "the" in the English text; article 7 had then been provisionally approved with that change.<sup>14</sup> As a matter of language, the use of the definite article "the" in the English text of both article 7 and article 53 needed further scrutiny; it affected the structure of the sentence differently from the use of the article "la" in French.

77. Sir Humphrey WALDOCK agreed that in English it was better to say "Ensuring representation" than "Ensuring the representation", but he did not feel that there was any real difference in meaning. The changes which had been made in article 53 were simply the result of changes approved for article 7.

78. Mr. EUSTATHIADES observed that the difference between the expressions "maintaining the necessary liaison" and "maintaining liaison", used in articles 7 and 53 respectively, was certainly justified. The use of the expression "ensuring the representation" in both articles should not give rise to any difficulty because the commentaries could explain that the representation of a State by its mission did not preclude representation by other means.

The meeting rose at 1.5 p.m.

<sup>14</sup> See 1110th meeting, paras. 47 and 62.

### 1117th MEETING

Monday, 14 June 1971, at 3.5 p.m.

Chairman: Mr. Senjin TSURUOKA

*Present:* Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bar-toš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiadés, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldox, Mr. Yasseen.

### Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168 and Add.1 to 3; A/CN.4/L.169; A/CN.4/L.170 and Add.1; A/CN.4/L.171; A/CN.4/L.172)

[Item 1 of the agenda]

(continued)

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

#### ARTICLE 53 (Functions of a permanent observer mission) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 53 as proposed by the Drafting Committee.

2. Mr. AGO (Chairman of the Drafting Committee) said that the Drafting Committee now proposed that sub-paragraph (a) of article 53 should be worded differently from sub-paragraph (a) of article 7 (A/CN.4/L.168), so as to reflect the difference between the functions of permanent missions and those of permanent observer missions, as several members of the Commission had suggested. The new text read:

"(a) ensuring, in relations with the Organization, the representation of the sending State and maintaining liaison with the Organization;"

The Drafting Committee left it to the English-speaking members to decide whether the definite article should be used before the word "representation" in the English text.

3. Mr. YASSEEN said he accepted the new wording, which removed the doubt about the scope of representation of a sending State by a permanent observer mission.

4. Mr. NAGENDRA SINGH said he agreed with Mr. Yasseen; the revised text was a distinct improvement.

5. Sir Humphrey WALDOCK said that if the French-speaking members of the Commission wished to use the words "*la représentation*", he could accept the inclusion of the word "the" before the word "representation" in the English version. But if the wording in French was to be "*une représentation*", then the English word "representation" should not be preceded by any article.

6. Mr. ALBÓNICO said that the text proposed by the Drafting Committee for sub-paragraph (a) was a marked improvement from the point of view of drafting. He still thought, however, that from the point of view of substance, there was a fundamental distinction between the institution of permanent missions, as described in article 7, and that of permanent observer missions, and that that distinction had not been brought out with sufficient clarity.

7. Mr. EUSTATHIADES said that the definite article should be retained in the French version, because it showed the difference between a permanent mission, which might not provide the only representation of the