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**Text of articles adopted by the Drafting Committee: articles 87 and 89-101 - reproduced in
A/CN.4/SR.1124 and SR.1126**

Topic:
Representation of States in their relations with international organizations

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Nations in the case of conferences convened under its auspices, namely, that it did not accept one delegation representing several States, but that, should the need arise, a member of a delegation could cease to belong to that delegation in order to represent another State. There was undoubtedly a problem, and the door should be left open for a more flexible solution where conferences were concerned.

87. Mr. CASTRÉN said that several governments had criticized article 83 (A/CN.4/240 and Add.1 to 7) on the grounds that it was too rigorous, particularly for small States. Several members of the Commission, including himself, shared their concern and had proposed amendments to make the text more flexible.¹⁷

88. Cases of multiple representation were not uncommon in practice. The Special Rapporteur himself had proposed that the wording be made more flexible by adding the words "As a rule" at the beginning of the article (A/CN.4/241/Add.5), and it had even been suggested that the article should be deleted. The possibility of being able to call on certain members of a delegation to represent another State was only a partial solution of the problem, and article 85, on the nationality of the members of the delegation, imposed further restrictions.

89. For those reasons, he would either vote against article 83 or abstain.

90. Mr. ROSENNE said that, in the light of the comments of governments and of discussion in the Sixth Committee, he was still not convinced that there was any justification for making article 83 more stringent than it had been in 1970. In particular, the addition of the words "of a State" seemed to him quite unnecessary.

91. He agreed with Mr. Reuter that there was a difference between a delegation to an organ and a delegation to a conference, and that what was involved in article 83 was not so much a delegation as an individual representative.

92. He could not accept article 83 in its present form; in his opinion, it should be deleted and an appropriate paragraph included in the commentary.

93. Mr. USTOR said he thought the Commission could accept article 83, provided that it was stated explicitly in the commentary that the Commission was fully aware of the reasons why the article departed from the corresponding articles of the Vienna Conventions on diplomatic and consular relations.

94. Alternatively, the article might be amended to read: "The delegation of a State to an organ or to a conference shall in principle represent only that State."

95. Sir Humphrey WALDOCK said he feared that article 83 in its present form was too strict and would not be accepted by States. He would prefer some such wording as "The delegation of a State to an organ or to a conference may represent more than one State if the rules of the organ or the conference so admit".

96. Mr. NAGENDRA SINGH said he agreed with

Sir Humphrey Waldoock that article 83 in its present form would not be acceptable to States. It would be better to leave the matter to be decided in accordance with the rules of the organ or conference.

97. Mr. USHAKOV said his impression from the discussion was that members were not divided on the substance of article 83 so much as on how to express the idea it contained.

98. The principle that the delegation of a State could represent only that State was incontestable, but there were possible exceptions, provided for in article 80 which the Commission had not yet examined since it was a general provision under which the provisions of article 83 were subject to the rules of procedure of a conference. Moreover, article 3 made the application of the draft articles as a whole subject to the relevant rules of the organization. He saw no objection to referring back to the provisions of articles 3 and 80 in article 83, though it seemed to be a needless repetition. In his view, the Commission could accept the article as it stood.

99. Mr. EUSTATHIADES said he thought the discussion showed that the provision was too rigid. Various amendments had been proposed. Personally, he was in favour of using a positive rather than a negative formulation and saying "The delegation of a State to an organ or to a conference shall represent only one State".

100. In addition, it should be explained in the commentary that the word "delegation" meant a delegation as a whole, but that some of its members could represent another State; that would make for more flexibility and take account of the exceptional cases.

101. The CHAIRMAN observed that the differences of opinion did not relate to the substance of the article, but several drafting changes had been proposed. If there were no objection he would take it that the Commission wished to refer article 83 back to the Drafting Committee for reconsideration in light of the proposals made.

*It was so agreed.*¹⁸

The meeting rose at 1.15 p.m.

¹⁸ For resumption of the discussion see next meeting, para. 19.

1124th MEETING

Friday, 25 June 1971, at 10.15 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

¹⁷ See 1105th meeting, para. 54 *et seq.* and 1106th meeting.

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 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168/Add.5 and 6; A/CN.4/L.170/Add.3)

[Item 1 of the agenda]

(continued)

1. Mr. ALBÓNICO said that as the present meeting was the last meeting of the Commission that he would be able to attend, he wished to take the opportunity of placing on record his thanks to the members of the Commission for the kindness they had shown him and of wishing them every success in their future work.

2. The CHAIRMAN said he was sure he had the support of the whole Commission in thanking Mr. Albónico for his valuable co-operation.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

3. He then invited the Commission to consider article 81 as adopted by the Drafting Committee on second reading (A/CN.4/L.170/Add.3).

ARTICLE 81

4. Mr. AGO (Chairman of the Drafting Committee) said that the main question raised by article 81 was whether the appointment of a head of delegation should be optional or compulsory. At the first reading, the Drafting Committee had replaced the words "the sending State may appoint a head" by the words "the sending State shall appoint a head", but some members of the Commission had objected to that change.¹ Having thought the matter over, the Drafting Committee had decided to maintain that amendment. It considered that the host State and the organization ought to know at all times who was the person responsible for the delegation. If no head of delegation was appointed, certain provisions of the draft could not be applied, for example, the provision in article 94 relating to the consent of the head of delegation to entry of the premises in case of some disaster that seriously endangered public safety.

5. The text proposed by the Drafting Committee for article 81 accordingly read:

Article 81

Composition of the delegation

A delegation to an organ or to a conference shall consist of one or more representatives of the sending State from among whom the sending State shall appoint a head. It may also include diplomatic staff, administrative and technical staff and service staff.

6. Mr. ROSENNE said that his position on article 81 remained unchanged. The responsible person in an emergency was clearly the permanent representative, not the

head of the delegation. Since the premises of a delegation would normally form part of the premises of the permanent mission, in the event of fire, for example, the authorities would undoubtedly have to contact the head of the permanent mission, not the head of the delegation.

7. Mr. USHAKOV said it was essential, not only for practical reasons, but also to preserve the logic of the draft articles, to provide that there must be a head of delegation, since several provisions in the draft, in particular article 86, on the acting head of the delegation, and article 94, on the inviolability of the premises, would otherwise lose some of their meaning.

8. As the question was of secondary importance and as a State which did not wish to appoint a head of delegation would not in any event be obliged to do so, there was no danger that governments would not accept that provision, so there was no reason why the Commission should not approve article 81.

9. Mr. AGO, referring to Mr. Rosenne's remarks, said that the premises of a delegation were not necessarily the same as those of the permanent mission; that applied, for example, to some delegations to the Committee on Disarmament, which enjoyed complete autonomy.

10. Again, the head of the permanent mission was not necessarily head of the delegation and it was the latter who was solely responsible for everything that concerned the delegation.

11. Mr. BARTOŠ said he shared Mr. Ushakov's opinion.

12. He also agreed with Mr. Ago. Although it was true that in many cases the permanent mission and a delegation to an organ or to a conference were one and the same, that was not always the case and the Drafting Committee had therefore been right to try to keep the two questions separate.

13. Mr. ROSENNE said that the main point at issue was that the text proposed by the Drafting Committee made it mandatory for the sending State to appoint a head of delegation, in contrast to the former draft, which had been in permissive form. In his view, the former draft would meet all the points of view expressed.

14. In normal cases, a head of delegation would be appointed, but there might be particular reasons that would make it difficult to do so. It was a question which should be left to States to decide for themselves. Where a delegation had separate premises, the sending State would obviously appoint someone to be in charge. Furthermore, it could not be argued that the appointment of a head of delegation was essential for purposes of communication, since communication with a delegation as such was a normal form of diplomatic communication. He believed, therefore, that it would be preferable to retain the previous wording of article 81.

15. Mr. NAGENDRA SINGH said that there were three basic reasons why the Drafting Committee had maintained its proposal. First, State practice required that, if a delegation consisted of more than one person, a head of delegation should be appointed. Secondly, there

¹ See previous meeting, para. 28 *et seq.*

was the problem of communication. The need to enter the premises of a delegation in the event of fire was a very rare occurrence, but communication between a member State and the organization or the conference secretariat was an everyday occurrence. Consequently, if a delegation consisted of several members, it was essential that a head should be appointed for communication purposes. Thirdly, as Mr. Ushakov had pointed out, there were references to the head of the delegation in other articles, and the draft would be incomplete if provision was not made for the appointment of a head of the delegation in the article dealing with its composition.

16. Where a delegation consisted of only one member, the question clearly did not arise, but where a head of delegation was needed, the mandatory form proposed by the Drafting Committee was preferable. He therefore supported the text proposed by the Drafting Committee.

17. Sir Humphrey WALDOCK said he too thought that, on balance, it would be better to retain the mandatory form.

18. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved the text of article 81 as adopted on second reading by the Drafting Committee.

It was so agreed.²

ARTICLE 83 (Principle of single representation)

19. The CHAIRMAN invited the Chairman of the Drafting Committee to explain the Drafting Committee's recommendation (A./CN.4/L.170/Add.3) concerning article 83 (A./CN.4/L.168/Add.5).

20. Mr. AGO (Chairman of the Drafting Committee) said that article 83, which stated the principle of single representation, had been criticized by some members of the Commission³ and by several governments, which had cited many instances of multiple representation.

21. After due consideration, the Drafting Committee had reached the conclusion that the article mainly concerned the procedures by which organizations and conferences took their decisions in particular voting which came under the internal law of organizations and conferences, rather than relations between States and international organizations. The Committee therefore recommended that article 83 be deleted and that the decision be clearly explained in the commentary.

22. Mr. YASSEEN supported that recommendation. Since the principle of single representation was not part of positive international law, the Commission should not prejudge the settlement of that question by taking a definite position.

23. Mr. EUSTATHIADES said that he too supported the Drafting Committee's recommendation. It might

perhaps be better to deal with the question in the commentary to article 81 by saying that one delegation could not represent more than one State, but that that did not prevent one or more of its members from being attached to another delegation.

24. It should also be made clear that the Commission had not wished to give formal approval to the principle of multiple representation. However, the solution proposed was flexible enough to allow extreme cases to be settled by the rules of procedure of the organ or the conference.

25. Sir Humphrey WALDOCK said he supported the proposal to delete article 83, but for reasons slightly different from those advanced by the Chairman of the Drafting Committee. Although the question of single representation had a certain interest in the context of the diplomatic law of relations between States and international organizations, it was of much greater interest in the context of the general law of international organizations, more especially in connexion with voting. Consequently, if the principle was to be codified, it would be preferable to do so in that more general context.

26. Mr. CASTRÉN endorsed Mr. Yasseen's opinion.

27. Mr. USHAKOV said that, in his view, it was a well-established principle of contemporary international law that the delegation of a State could represent only that State. It was on the basis of that principle that the Commission had drawn up its draft articles, which presupposed that each permanent mission, each permanent observer mission, and each delegation to an organ or to a conference, represented one State.

28. Derogation from that principle was permitted if the rules of the organization or the rules of procedure of the conference did not provide otherwise, so there was no reason why the rule should not be stated, so long as it was made subject to that reservation. The principle remained, however, and the situation would be unchanged even if article 83 were deleted. Consequently, he would not press for its retention.

29. Mr. SETTE CÂMARA said he supported the recommendation that article 83 be deleted. The Drafting Committee and the Commission itself had considered many different formulations stating the principle of single representation, but including a reservation which in many cases was tantamount to a denial of the principle. It would be better, therefore, to leave the question to the practice of international organizations.

30. It might prove useful at some time in the future to recognize the principle of multiple representation, since international organizations would be increasingly faced with the problem of proliferation of membership in the form of micro-States.

31. The CHAIRMAN said that if there were no objection he would take it that the Commission approved the Drafting Committee's recommendation to delete article 83.

It was so agreed.

² For resumption of the discussion see 1133rd meeting, para. 102.

³ See previous meeting, para. 82 *et seq.*

ARTICLE 84

32. Mr. AGO (Chairman of the Drafting Committee) said that in article 84, the Committee had made only a few drafting changes in the Spanish version. The text proposed read:

*Article 84**Appointment of the members of the delegation*

Subject to the provisions of articles 82 and 85, the sending State may freely appoint the members of its delegation to an organ or to a conference.

33. Mr. EUSTATHIADES said he wished to draw attention to the weakness of the content of article 84, which amounted to nothing more than a reservation concerning articles 82 and 85. The principle of the freedom of choice accorded to the sending State in the appointment of the members of its delegation was so self-evident a fact that it added nothing essential to the text. Thus the mention of that principle was justified only by the desire for uniformity with the other parts of the draft.

34. Mr. USTOR said that Mr. Eustathiades's point was a valid one, but article 84 should be looked at in the context of existing instruments or conventions, all of which contained a similar article. It would not be advisable to drop it altogether.

35. Mr. YASSEEN said he agreed with Mr. Eustathiades. The provision in article 84 added nothing to the draft articles. It was borrowed from the Vienna Convention on Diplomatic Relations,⁴ where it was clearly useful, if only to avoid any misunderstanding over the meaning and scope of the approval of the receiving State, which was in no sense a participation in the appointment of the head of the mission, that being left to the sending State. In the case of delegations, where no *agrément* was required, there was no need for a detailed explanation.

36. Sir Humphrey WALDOCK said that the same criticisms could be made of the text of the Convention on Diplomatic Relations. The main point of the article, which was now a familiar feature of drafts of that kind, was the reference to the restricting articles 82 and 85.

37. Mr. SETTE CÂMARA said he still thought it was useful to reaffirm the principle of freedom of appointment, since it was important to emphasize that there could be no opposition whatsoever to the appointment of members of a delegation.

38. Mr. CASTRÉN said he was in favour of retaining article 84, which laid down a very important principle. To avoid any misunderstanding, that principle should be clearly stated. The presence of the article in the draft could do no harm, whereas its deletion might cause difficulties.

39. Mr. ROSENNE said he shared the view that it was essential to include the principle of free appointment of

the members of the delegation. Although there were other ways in which that principle could have been included in the draft, it was preferable to retain the article as it stood.

40. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 84 as proposed by the Drafting Committee.

It was so agreed.⁵

ARTICLE 85

41. Mr. AGO (Chairman of the Drafting Committee) said that in article 85 the Committee had made only a few drafting changes in the Spanish version. The text proposed read:

*Article 85**Nationality of the members of the delegation*

The representatives and members of the diplomatic staff of a delegation to an organ or to a conference 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.

Article 85 was provisionally approved⁶

ARTICLE 86

42. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made two changes in article 86. In paragraph 1, it had replaced the words "an acting head may be designated" by the words "an acting head shall be designated". Articles 18 and 62 made the designation of a *chargé d'affaires ad interim* obligatory in the absence of a permanent representative or a permanent observer. It therefore seemed logical to adopt a similar provision with respect to the head of a delegation.

43. The Drafting Committee had thought that, in paragraph 2, the words "another person may be designated as in paragraph 1 of this article" were not a happy choice and had replaced them by the words "another person may be designated for that purpose".

44. The Committee had also made some minor drafting changes in the Spanish version.

45. The text proposed for article 86 read:

*Article 86**Acting head of the delegation*

1. If the head of a delegation to an organ or to a conference is absent or unable to perform his functions, an acting head shall be designated from among the other representatives in the delegation by the head of the delegation or, in case he is unable to do so, by a competent authority of the sending State. The

⁵ For resumption of the discussion see 1133rd meeting, para. 76.

⁶ For resumption of the discussion see 1135th meeting, para. 37.

⁴ United Nations, *Treaty Series*, vol. 500, p. 100, article 7.

name of the acting head shall be notified to the Organization or to the conference.

2. If a delegation does not have another representative available to serve as acting head, another person may be designated for that purpose. In such case credentials must be issued and transmitted in accordance with article 87.

46. Mr. ROSENNE said he was opposed to the change from the permissive to the mandatory in paragraph 1, for much the same reasons as in the case of article 81. Once that change had been made, however, it was hard to see the logic of leaving paragraph 2 in the permissive form, since that would allow a delegation to remain without a head.

47. The CHAIRMAN said that Mr. Rosenne's point would be noted. If there were no other objection he would take it that the Commission provisionally approved article 86 as proposed by the Drafting Committee.

It was so agreed.⁷

ARTICLE 87^a

48. Mr. AGO (Chairman of the Drafting Committee) said that the main change made by the Drafting Committee in article 87 was the replacement of the words "if that is allowed by the practice followed in the Organization", in paragraph 1, by the words "if the rules of the Organization so admit". The Committee had also changed the position of that clause so as to make it clear that it referred only to the case in which the credentials were issued by another competent authority of the sending State.

49. The Committee had considered the word "practice" too narrow and had preferred to use the word "rules", which already appeared in articles 6 and 52 as provisionally approved at the present session. In its commentary to article 3, which stated a general reservation regarding the relevant rules of the organization, the Commission had specified that "The expression 'relevant rules of the Organization'... is broad enough to include all relevant rules whatever their source: constituent instruments, resolutions of the organization concerned or the practice prevailing in that organization".⁸

50. The Drafting Committee had inserted the words "the competent organ of" between the words "shall be transmitted to" and "the Organization" in paragraph 1, so as to bring that paragraph into line with the corresponding provisions in articles 12 and 57. However, the Working Group might propose the adoption of the words "and shall be transmitted to the Organization" for all articles, so the Commission would be adopting a provisional text. The same applied to paragraph 2.

51. The text proposed by the Drafting Committee read:

⁷ For resumption of the discussion see 1133rd meeting, paras. 112-114.

⁸ For previous text see 1106th meeting, para. 51, 1133rd meeting, para. 112.

⁹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 198, para. (5).

Article 87

Credentials of representatives

1. The credentials of a representative to an organ shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or, if the rules of the Organization so admit, by another competent authority of the sending State, and shall be transmitted to the competent organ of the Organization.

2. The credentials of a representative in the delegation to a conference shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or, if the rules of procedure of the conference so admit, by another competent authority of the sending State, and shall be transmitted to the competent organ of the conference.

52. Mr. CASTAÑEDA referring to paragraph 1, said it was usual for the credentials of a representative to one of the main organs of the United Nations, such as the Security Council or the General Assembly, to be issued by the Ministry of Foreign Affairs, but in the case of representatives to subordinate bodies, some of which were extremely important politically, credentials were frequently issued by the head of the permanent mission. Although, technically and legally speaking, the phrase "by another competent authority of the sending State" could be interpreted as covering that possibility, he thought it would be preferable to include a specific reference to it in the article. Those considerations did not apply to paragraph 2.

53. Mr. AGO said he thought the words "another competent authority" covered all possible cases, including those in which the credentials were not transmitted, but actually issued, by the permanent representative. The word "credentials" was also sufficiently broad.

54. Mr. ROSENNE said he was inclined to share Mr. Castañeda's misgivings. Some rules of procedure required that credentials should be issued in the form specified in the article, but in other cases there was a great deal more flexibility.

55. The reference to "another competent authority" was somewhat ambiguous, since it was not clear whether it meant competent in the eyes of the sending State, or competent in the eyes of the organization. In the case of organs, it would perhaps be better not to limit the article to credentials, since in most cases all that was required, and the only document produced, was a letter of appointment. Perhaps a sub-paragraph might be included dealing with that practice.

56. Different considerations applied to conferences, and paragraph 2 was correctly formulated.

57. With regard to the comment by the Chairman of the Drafting Committee that the phrase "the competent organ of" might be deleted, he was not sure that that would be correct in the case of paragraph 2. It might, therefore, be preferable to have two separate articles, the first dealing with appointment to organs, distinguishing between principal and other organs, and the second with credentials to participate in a conference.

58. Mr. YASSEEN said that article 87 was well drafted. It had the merit of covering all the possible cases,

including the practice of international organizations. The Commission would be making a mistake if it clung to the ceremonial formulas of nineteenth century diplomacy and dwelt on subtle distinctions between different kinds of credentials. The credentials of a representative were an instrument showing that he was authorized to act on behalf of a State, and even a note from a permanent mission, which represented the sending State, should be sufficient for that purpose.

59. Mr. EUSTATHIADES said he thought that a permanent representative was covered by the words "another competent authority", but the question, which had been raised for the first time in the Commission by Mr. Castañeda, should be clarified, at least in the commentary. The confusion might be due to the use of the words "shall be issued by": credentials did not necessarily show the original source of a representative's authority, but might be a document attesting it, which could be issued by the permanent delegation under powers conferred, for example, by the Ministry of Foreign Affairs, or by virtue of an established practice. Such details were too subtle to be easily reflected in the text of the article. Nevertheless, it would be advisable to include Mr. Castañeda's observations in the Commentary.

60. The CHAIRMAN, speaking as a member of the Commission, said that he understood Mr. Castañeda's concern. The practice he had mentioned did exist and the Commission would be well advised not to minimize unduly the role and functions of permanent representatives, who had very wide powers.

61. Mr. CASTAÑEDA said his sole concern was that what most frequently occurred in practice was precisely the case that was not mentioned in the draft article. He agreed with the Chairman of the Drafting Committee that technically and legally it was covered by the phrase "another competent authority". In using that expression, however, the Commission had mainly had in mind the possibility that other ministries might issue the credentials of representatives to conferences dealing with their particular fields. It was not true to say that the permanent representative merely transmitted credentials; in many cases it was he who decided which member of his mission should act as representative to an organ and he who signed the credentials. Consequently, he still maintained that it was worth mentioning that practice in the article.

62. Mr. KEARNEY said it was quite clear from the discussion in both the Commission and the Drafting Committee that the phrase "by another competent authority of the sending State" was intended to include permanent representatives. It would only confuse the drafting to add a specific reference to permanent representatives and it was unlikely that the present text could be improved upon.

63. Mr. YASSEEN said that the words "another competent authority" certainly referred to permanent missions. There could be no doubt that such missions were competent to attest that the representative designated had in fact been appointed by the sending State.

64. Mr. NAGENDRA SINGH said he entirely agreed with Mr. Castañeda that the permanent representative did actually issue credentials, but in his view the case was adequately covered by the words "another competent authority". The most that could be done was to mention the issue of credentials by permanent representatives in the commentary. Article 87 should be approved as it stood.

65. Sir Humphrey WALDOCK said he agreed that the present text fully covered the situation.

66. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 87 as proposed by the Drafting Committee, on the understanding that Mr. Castañeda's observations would be covered in the commentary.

*It was so agreed.*¹⁰

Co-operation with other bodies

[Item 9 of the agenda]

(resumed from the 1108th meeting)

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

67. The CHAIRMAN invited Mr. Aja Espil, observer for the Inter-American Juridical Committee, to address the Commission.

68. Mr. AJA ESPIL (Observer for the Inter-American Juridical Committee) said that the fruitful co-operation between the Committee and the International Law Commission responded to the aspiration to universality in international law, to which the regional intergovernmental organizations contributed by providing multiple approaches to legal problems.

69. The Inter-American Juridical Committee, with its new structure as one of the main organs of the Organization of American States (OAS) and its expanded membership of eleven, had met for the first time in extraordinary session from 31 August to 6 October 1970 to examine, at the express request of the OAS General Assembly, the question of the formulation of one or more draft inter-American instruments on the subject of kidnapping and other attacks against persons which could affect international relations.

70. The Committee had taken as its starting point a resolution of the OAS General Assembly condemning all acts of terrorism, in particular kidnapping and related acts of extortion, and characterizing them as serious common crimes. The Committee had thus not been called upon to express an opinion on those principles, but merely to formulate them as rules. Nevertheless, bearing in mind the different views expressed in the Committee on the formulation of the draft, its members had placed it expressly on record that that absence of

¹⁰ For resumption of the discussion see 1133rd meeting, para. 79.

unanimity did not affect the general concensus on the repudiation and condemnation of terrorism.

71. The Committee had had to consider a number of preliminary questions, such as whether the acts in question constituted crimes against municipal law or against international law, and whether, in the case of the kidnapping of diplomats, the crime was primarily a matter for the international community or for the national community. The Committee had thus had to consider the problem of internationally wrongful acts, on which it had taken into account the views expressed by certain distinguished members of the International Law Commission.

72. The Committee had noted that, as far as municipal law was concerned, practically all States had adequate provisions in their criminal law to deal with the crimes considered, so that the essence of the problem lay in its international aspects. When kidnapping diplomats, for example, the offenders succeeded in creating an international conflict of interests by inducing the sending State to bring pressure to bear on the receiving State. The sending State was thus faced with the dilemma of choosing between its anxiety to save the life of its ambassador and its concern for the inviolability of the legal order of the receiving State. A process was thus set in motion whereby State authorities were led to contribute to the undermining of the very rule of law.

73. The draft convention prepared by the Committee dealt with two situations: first, acts of terrorism, in particular kidnapping and related acts and, secondly, the perpetration of those offences against the representatives of foreign States. The Committee considered that both categories of offences, although they occurred at the national level, mainly affected the international community and therefore came within the scope of international law. The draft Convention therefore described them as common crimes having international repercussions, but did not go so far as to regard them as international crimes proper. Its approach thus largely coincided with USSR doctrine, which drew a distinction between violations of international law and international crimes such as genocide, which destroyed the very foundations of international law.

74. The central idea of the Committee's draft was the prevention and punishment of acts of terrorism in so far as those acts constituted attacks against the international community and violations of human rights. It should be noted that subsequently, in January 1971 at Washington, the member States of the OAS had adopted a Convention on the subject, though it dealt only with attacks against the life and physical integrity of persons to whom the State had a duty to extend special protection in accordance with international law.

75. The Committee had held its regular session in March and April 1971 and had examined its own draft statute, following the decision of the OAS General Assembly not to adopt an earlier draft prepared by the Committee's predecessor. An interesting problem had arisen over article 2 of the draft statute, which stated that the members of the Committee served in a personal

capacity and did not represent the States which had nominated them for election by the OAS General Assembly. The same provision specified that the members of the Committee enjoyed the privileges and immunities laid down in article 140 of the Charter of the OAS. Since that article referred to the representatives of member States in the organs of the organization, a minority had put forward the view that the members of the Committee did not enjoy those privileges and immunities. The majority, however, had upheld a constructive interpretation of the rule in question and maintained that the members of the Committee, which represented the member States of the OAS as a whole, should enjoy such privileges and immunities.

76. The Committee had also dealt with the review and evaluation of the inter-American conventions on intellectual property. The existing inter-American conventions on patents and industrial designs were based on the same legal principles as the world-wide Paris Convention. Unlike the Paris Union, however, the inter-American system did not have any machinery for revision and therefore lacked the necessary flexibility to keep it abreast of current changes.

77. When the first inter-American conventions on patents had been signed, it had been assumed that all States had the same interest in the reciprocal protection of inventions. At the present time, however, the Latin American countries were in the process of development and lagged behind the more industrialized countries in technology; they were essentially importers of products and techniques invented abroad. Foreign technology had contributed to the welfare and progress of the Latin American States, but had nevertheless created certain situations which conflicted with the public interest. A patent often made it possible to obtain a monopoly of the market for a product and deprived the importing country of any share in the benefits of technological progress. It was therefore necessary to devise some new system for the protection for industrial property that would promote the active transfer of technology, which was vital to the accelerated development of Latin America.

78. The Committee had also examined the question of bills of exchange and cheques, a subject on which it was keeping in close touch with the work of the United Nations Commission on International Trade Law.

79. Lastly, the Committee had begun the study of the law of the sea, concerning which it believed that there were still a number of unsolved problems not covered by the codification of international law on the subject. Moreover, technical progress during the past decade had given a new dimension to the exploitation of the resources of the sea.

80. The first problem faced by the Committee in that connexion was that of determining whether there existed a Latin American position on the law of the sea. A number of principles and rules had been formulated between 1950 and 1956, but the new economic and social approach to the problem in the 1970 Declarations of

Montevideo and Lima had made it necessary to re-examine the whole question. Work had been started on the formulation of a new concept of special sea areas beyond the territorial sea, over which jurisdiction would be exercised for certain purposes by the coastal State. The existence of such areas was now a reality accepted by international law and confirmed by the general practice of States.

81. The next session of the Committee would open at Rio de Janeiro on 9 August 1971 and on the Committee's behalf he had pleasure in extending an invitation to the Chairman of the International Law Commission to attend the session as an observer or to send an observer on his behalf.

82. The CHAIRMAN, thanking the observer for the Inter-American Juridical Committee for his statement, said that the Committee's work was of great value both academically and practically. Like the Commission, the Committee's aim was the establishment of peace and order throughout the world. He hoped that the ties between the two bodies would grow even stronger as the years went by. He asked Mr. Aja Espil to thank the Inter-American Juridical Committee for having appointed an observer to attend the Commission's twenty-third session.

83. In reply to the invitation to send an observer to the Committee's next session, he said that he would very much like to attend it himself, but if that proved impossible, he would appoint a member of the Commission to represent him.

84. Mr. CASTAÑEDA said that, as a member from an American country, he was particularly glad to welcome the observer for the Inter-American Juridical Committee. Co-operation between the Commission had been close for many years and the studies prepared by the Committee had been very useful to the Commission in its work, just as the Committee had not failed to profit from the Commission's studies. A number of subjects, such as the law of the sea and diplomatic privileges and immunities, had been on the programme of work of both bodies.

85. The present occasion was of special significance as it was the first appearance before the Commission of an observer for the Inter-American Juridical Committee since its reorganization as one of the main organs of the OAS with new and broader functions.

86. He expressed the hope that the ties between the two bodies would continue to be strengthened for their mutual benefit and in the interest of the codification of international law.

87. Mr. SETTE CÂMARA said that he too welcomed the observer for the Inter-American Juridical Committee, whose attendance was in keeping with a now long-standing tradition of the Commission.

88. The Committee had dealt with the grave matter of the kidnapping of foreign diplomats and related problems; as a technical body, it could not ignore the appalling reality of that phenomenon. The Committee

had condemned such acts of terrorism as common crimes which had grave repercussions on international relations.

89. The draft convention prepared by the Committee on that subject was a very full instrument, which established all the principles necessary to combat the evil. Despite some difference of opinion in the Committee on questions of detail, its members had been unanimous in condemning crimes of terrorism and in recommending measures to eradicate them.

90. With regard to the new statute of the Committee, he was glad to note that its members, who acted in a personal capacity, would enjoy privileges and immunities. Brazil, his own country, was host to the Committee and was happy to extend privileges and immunities to its members. That precedent was of interest to the Commission.

91. In connexion with the revision of the Inter-American conventions on intellectual property, he noted with satisfaction the Committee's efforts to take into account the special interests of the developing countries.

92. It was also a matter for satisfaction that the Committee had undertaken work on the new aspects of the law of the sea.

93. He associated himself with the hope which had been expressed of continued co-operation between the Committee and the International Law Commission.

94. Mr. AGO warmly welcomed Mr. Aja Espil, who had so ably represented the Inter-American Juridical Committee. That body was studying a number of topics of direct interest to the Commission, particularly the protection of diplomats against kidnapping and the responsibility of States. He hoped that there would be particularly close relations between the Committee and the Commission on the latter subject, to which the Commission intended to devote a large part of its future work.

95. Mr. ROSENNE thanked the observer for his wide-ranging and thought-provoking oral report. When the Commission considered its long-term programme of work, that report should be taken into account.

96. He had been impressed by the observer's comments on the subject of acts of political terrorism directed against foreign diplomats; those comments would be of the greatest value to all who had to deal with that alarming phenomenon, which he hoped the Commission would soon consider.

97. He had noted with interest the observer's penetrating analysis of the component elements of those crimes and of the interests that had to be balanced at the inter-State level.

98. It had always been his feeling that co-operation between the Commission and regional bodies should not be confined to exchanges of information and documentation, and he therefore hoped that the Chairman of the Commission would be able to accept the invitation to attend the Committee's next session.

99. Mr. KEARNEY said that, as a member for one of the countries of the inter-American system, he wished

to commend the observer for his lucid report. He had been interested by the observer's remarks on the subject of political terrorism and the protection of diplomats, and by his profound analysis of the elements of the crime and of the various interests to be considered. Those remarks illustrated the need to give the subject serious and urgent consideration.

100. Mr. USHAKOV said that the Inter-American Juridical Committee was not only one of the oldest intergovernmental legal organizations, but also one of the most important. In its work, the Committee kept fully abreast of legal thought and of matters of world concern, as was shown by its study on political terrorism and, more particularly, the protection of diplomats. The close and fruitful links between the Commission and the Committee would undoubtedly make it easier to find a solution to that serious problem.

101. Mr. Aja Espil deserved the thanks of the Commission for his full and thorough report which was a real tribute to the work of the Inter-American Juridical Committee. He had been pleased to note that the Committee had adopted the Soviet Union concept of crimes with international implications.

102. The CHAIRMAN said that a communication had been received from Mr. Golsong, Director of Legal Affairs of the Council of Europe, to the effect that he would attend the Commission's meetings on 15 and 16 July as observer for the European Committee on Legal Co-operation.

The meeting rose at 1.5 p.m.

1125th MEETING

Monday, 28 June 1971, at 3.10 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Tribute to the memory of Mr. Matine-Daftary

1. On the proposal of the CHAIRMAN, the Commission observed one minute's silence in tribute to the memory of Mr. Matine-Daftary, the eminent jurist and President of the United Nations Association of Iran, who had been a member of the Commission from 1957 to 1961.

2. Mr. YASSEEN said he had heard with deep sorrow of the death of Mr. Matine-Daftary, whose merits he had highly appreciated and whose outstanding participation in the work of the Commission he well remembered. He proposed that the Chairman send a message of condolence in the name of the Commission to the family of the deceased.

It was so agreed.

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 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168/Add.6)

[Item 1 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

3. The CHAIRMAN invited the Commission to continue consideration of articles 87 to 101 as proposed by the Drafting Committee (A/CN.4/L.168/Add.6).

ARTICLE 88 (Full powers to represent the State in the conclusion of treaties)

4. Mr. AGO (Chairman of the Drafting Committee) said that the Commission had decided, on the proposal of Sir Humphrey Waldock, to refer article 88 to the Drafting Committee with a request that the Committee should consider whether such an article was appropriate for the draft or whether its subject-matter should be left to the law of treaties or to the topic of treaties concluded between States and international organizations or between two or more international organizations,¹ which was the topic being studied by the Sub-Committee presided over by Mr. Reuter.²

5. The Drafting Committee had considered that article 88 duplicated the relevant provisions of the Vienna Convention on the Law of Treaties.³ It therefore recommended that the article be deleted and that the reasons for its deletion be explained in the commentary.

6. Mr. YASSEEN said he supported the Drafting Committee's recommendation.

7. The CHAIRMAN said that if there were no objection he would take it that the Commission agreed to delete article 88.

It was so agreed.

¹ See 1106th meeting, para. 65.

² See *Yearbook of the International Law Commission, 1970*, vol. 1, p. 146, para. 82.

³ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 290, article 7 (United Nations publication, Sales No.: E.70.V.5).

ARTICLE 89

8. Mr. AGO (Chairman of the Drafting Committee) said that article 89 corresponded to articles 17 and 61 of the draft, with the exception of paragraph 1 (e) which read:

“(e) the location of the premises of the delegation and of the private accommodation enjoying inviolability under articles 94 and 99, as well as any other information that may be necessary to identify such premises and accommodation.”

9. The Drafting Committee considered it essential for the host State to know the exact location of all the premises and private accommodation whose inviolability it was called upon to ensure; the Committee therefore intended to propose to the Commission that, when the whole draft was reviewed, a similar provision be inserted in the article on notifications concerning permanent missions and permanent observer missions.

10. In the text of paragraph 1 (e) the Committee had replaced the words “premises occupied by”, which had been taken from article 11 of the 1969 Convention on Special Missions,⁴ by the words “premises of” the delegation, which corresponded more closely to the expression “premises of the permanent mission” used in article 25.

11. The text now proposed by the Drafting Committee for article 89 read:

Article 89
Notifications

1. The sending State, with regard to its delegation to an organ or to a conference, shall notify the Organization or, as the case may be, the conference of:

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

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

(c) the arrival and final departure of persons employed on the private staff of members of the delegation 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 delegation or as persons employed on the private staff enjoying privileges and immunities;

(e) the location of the premises of the delegation and of the private accommodation enjoying inviolability under articles 94 and 99, as well as any other information that may be necessary to identify such premises and accommodation.

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

3. The Organization or, as the case may be, the conference, 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.

⁴ See General Assembly resolution 2530 (XXIV), Annex.

12. Mr. USHAKOV proposed that article 89 be referred back to the Drafting Committee with the request that its wording be brought into line, not with that of the corresponding article on permanent missions, but with that of article 11 of the Convention on Special Missions, with which it was more closely analogous.

13. The CHAIRMAN said that if there were no objection he would take it that the Commission agreed to refer article 89 back to the Drafting Committee for reconsideration in the light of Mr. Ushakov's proposal.

It was so agreed.⁵

ARTICLE 90

14. Mr. AGO (Chairman of the Drafting Committee) said that article 90, as adopted in 1970,⁶ had laid down that “Precedence among delegations to an organ or to a conference shall be determined by the alphabetical order used in the host State.” But as the Special Rapporteur had pointed out, it was the alphabetical order used in the organization, not that used in the host State, which was generally followed in practice to determine precedence among delegations.

15. In the case of conferences, on the basis of the practice at conferences convened under the auspices of the United Nations and other international organizations, the Drafting Committee had decided to follow the same rule.

16. The text proposed for article 90 read:

Article 90
Precedence

1. Precedence among delegations to an organ shall be determined by the alphabetical order of the names of member States used in the Organization.

2. Precedence among delegations to a conference shall be determined by the alphabetical order of the names of participating States used in the Organization.

17. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 90 in the form proposed by the Drafting Committee.

It was so agreed.⁷

ARTICLE 91

18. Mr. AGO (Chairman of the Drafting Committee) said that at the end of paragraph 1 of article 91 the Committee had deleted the words “on an official visit”, which it considered superfluous.

19. The Committee thought it desirable to explain in the commentary that article 91 related only to privileges

⁵ For resumption of the discussion see 1133rd meeting, para. 108.

⁶ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

⁷ For resumption of the discussion see 1133rd meeting, para. 115.

and immunities of a legal character and not to ceremonial privileges and honours.

20. The text proposed for article 91 read:

Article 91

Status of the Head of State and persons of high rank

1. The Head of the sending State, when he leads a delegation to an organ or to a conference, shall enjoy in the host State or in a third State the facilities, privileges and immunities accorded by international law to Heads of State.

2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a delegation of the sending State to an organ or to a conference, shall enjoy in the host State or in a third State, in addition to what is granted by the present part, the facilities, privileges and immunities accorded by international law.

21. Mr. USHAKOV said that the words "in addition to what is granted by the present part", which appeared in paragraph 2, should also appear in paragraph 1, which would then be clearer and more accurate.

22. Mr. BARTOŠ said he thought the words "on an official visit" ought to be restored, since neither in theory nor in practice were any privileges or immunities recognized for a Head of State on a private visit. The Drafting Committee had, no doubt, believed that a Head of State's capacity as such would confer on him *ipso jure* the special privileges and immunities which the Commission wished a Head of State to enjoy when he led a delegation, but it was not certain that that would always be the case and it was therefore safer to refer to the status of a Head of State on an official visit.

23. Mr. ROSENNE said he wished to place on record his view that the problem with which article 91 ought to deal was quite different; it was the problem of whether the host State was under some higher degree of responsibility with regard to the protection of Heads of State and other persons of high rank than with regard to other members of a delegation.

24. He was thinking, in particular, of the obligation laid down in the last sentence of article 98, on personal inviolability: the duty of the host State to treat delegates with due respect and to "take all appropriate steps to prevent any attack on their persons, freedom or dignity". The question arose whether that provision acquired a special significance for the persons covered by article 91. The subject was one that would ultimately be included in the Commission's study of State responsibility.

25. Mr. KEARNEY said he maintained his view that article 91 was completely unnecessary. Its provisions stated that Heads of State and other persons of high rank would enjoy whatever facilities, privileges and immunities were accorded to them by international law. In fact, those facilities, privileges and immunities would apply whether the provisions of article 91 were included in the draft or not. The article should therefore be dropped.

26. Mr. AGO (Chairman of the Drafting Committee), referring to Mr. Kearney's remark, said that it would no doubt be possible to dispense with article 91, but the Commission had already specified in another article that

a member of an ordinary diplomatic mission continued to enjoy diplomatic privileges and immunities when he became a member of a delegation, and it would look strange to take such precautions for a mere diplomat, but not for a Head of State, Head of Government, or other person of high rank. Hence article 91 should not be deleted.

27. Mr. USHAKOV was right in saying that the words "in addition to what is granted by the present part" should be inserted in paragraph 1.

28. On the other hand, he did not think it was necessary to restore the words "on an official visit", as suggested by Mr. Bartoš. For as head of a delegation, the Head of State was not in the host State in a private capacity; but neither was he on an official visit to the host State, so it would not be fair to impose upon that State the special duties which such a visit entailed.

29. Mr. YASSEEN said he supported the text proposed by the Drafting Committee. No one would deny that Heads of State and the other persons of high rank mentioned in the article enjoyed special facilities, privileges and immunities under international law. The article was useful for the reasons given by the Chairman of the Drafting Committee.

30. The words "in addition to what is granted by the present part" could perhaps be added to paragraph 1, as Mr. Ushakov suggested, but it was not essential. He could accept the article as it stood.

31. Mr. CASTRÉN said he supported Mr. Ushakov's proposal, which would make paragraph 1 clearer and more accurate. Article 91 served a purpose and should be retained.

32. He agreed with Mr. Bartoš that the words "on an official visit" should be restored; they appeared in the corresponding provisions of other conventions prepared by the Commission. It was true that a Head of State was not in the host State in a private capacity when he headed a delegation, but there was a difference between representation as a member of a delegation and representation on an official visit: the facilities, privileges and immunities accorded in the latter case were more extensive. He was therefore in favour of restoring the words "on an official visit". However, if the majority of the Commission were prepared to accept the text proposed by the Drafting Committee, he would be satisfied with an explanation in the commentary.

33. Mr. USHAKOV said he thought the article was useful. It was, perhaps, difficult to specify what were the facilities, privileges and immunities accorded to a Head of State under international law, but among the privileges he should enjoy when in the host State to perform functions in an organization or at a conference, the use of the flag and the right to a suitable residence could be mentioned. It would not impose an unduly heavy obligation on the host State to grant a special status to the persons of high rank mentioned in article 91.

34. Mr. SETTE CÂMARA said he supported the Drafting Committee's decision to delete the words "on

an official visit". Those words appeared in the corresponding provision of the 1969 Convention on Special Missions, but the position in the present instance was different from that of special missions.

35. It was not uncommon for Heads of Government and even Heads of State to attend international conferences. He recalled a session of the General Assembly at which some twenty Heads of Government and several Heads of State had been present. It would be imposing an unduly heavy burden on a host State to expect it to extend to all those visitors the full honours to which their high rank entitled them.

36. Mr. CASTAÑEDA said that article 91 should be retained. If its provisions were not included in the draft, doubts might arise as to whether a Head of State who headed a delegation to an organ or a conference was entitled to enjoy the privileges and immunities normally extended to a Head of State. It might be argued that he was only entitled to the privileges and immunities pertaining to a delegate. Article 91 was useful because it showed that the Head of State did not lose his status as such because he happened to head a delegation.

37. Mr. ROSENNE said that on the whole the provisions of article 91 were useful, but they should be made more general, so as to apply to all categories of representatives to whom the present draft applied. In New York there were cases in which a permanent mission was headed by a person of a higher rank than ambassador. Certain permanent representatives held the rank of Deputy Minister for Foreign Affairs and the permanent representative of the United Kingdom had at one time been a member of the Government of his country.

38. The provisions of paragraph 1 probably applied only to delegations, but those of paragraph 2 should be made broader. They were designed to safeguard the special standing in law of certain persons of high rank and it was not right to limit the application of the paragraph to persons participating in delegations.

39. For those reasons, he suggested that article 91 be referred back to the Drafting Committee with instructions to examine whether the provisions of paragraph 2 should be made applicable to all categories of persons enjoying immunities under the draft articles.

40. Mr. BARTOŠ said that the Commission would have to choose between two alternatives: either to exalt democracy and make no distinction between members of delegations whoever they might be, or to recognize that the participation of a Head of State or some other person of high rank in an international event gave it a special importance, desired either by the organization itself or by the State concerned, in which case it would be wrong not to give the Head of State or other person of high rank a special status in keeping with that rank.

41. Moreover, judging by the security measures taken on the occasion of their visits and the opportunities afforded them to make formal statements, it was clear that United Nations practice recognized that such persons enjoyed special privileges and supported the second alternative.

42. The words "on an official visit" should therefore be retained, because amending a text already in force, to which a certain interpretation had been given, necessarily meant changing its meaning and, in the present case, the Commission would be going against the very point it wished to recognize. As a lawyer, he did not wish to take that responsibility.

43. Mr. AGO (Chairman of the Drafting Committee) said that he would like to reply to the comments of members of the Commission.

44. With regard to the difficult question raised by Mr. Rosenne, it was difficult to envisage a case in which one of the persons of high rank referred to in article 91 would be on a permanent mission. After all, they were persons who, by virtue of the functions they performed in their countries, were entitled *ipso facto* to special privileges and immunities and who could not serve on a permanent mission without abandoning those functions. Moreover, it was necessary to take account of their status as members of a delegation, since the régime provided for that case was not the same as for the head of a permanent mission. Thus the article was justified with respect to delegations, but not with respect to permanent missions.

45. With regard to the observations made by Mr. Bartoš, he thought the Commission need not be afraid to state in the commentary that it had adopted article 91 deliberately, with the intention of making a distinction between an official visit to the host State and a visit to the organization, for which it was necessary to provide privileges and immunities, though not the same ones as for an official visit to the host State, since that would put the latter to unwarranted expense.

46. Mr. REUTER said he was prepared to approve article 91, but he did not see what were the really exceptional privileges and immunities which international law conferred on Heads of State.

47. Mr. KEARNEY said he was still not convinced that there was any need for the provisions of article 91, but he would not object to its retention if other members wished to keep it. He would merely point out that there were no provisions on the status of the Head of State and other persons of high rank in the 1946 Convention on the Privileges and Immunities of the United Nations and other related instruments. Nevertheless, for over twenty years, Heads of State, Heads of Government and other persons of high rank had attended meetings of the General Assembly and no particular problem had arisen.

48. Mr. ROSENNE said that if his suggestion that the provisions of paragraph 2 be made more general was not adopted, it would be necessary to include in the commentary the explanation given by Mr. Ago, who had introduced an important nuance—the fact that the "high rank" referred to the functions of the person concerned in his home State.

49. He himself had had in mind the case of a person who, because of his functions as representative to an international organization, was given by his State a particularly high rank, often very close to that of a

Minister for Foreign Affairs. For instance, a permanent representative in New York was sometimes a "Secretary of State for United Nations Affairs", and he knew of one such representative whose visiting card indicated that he was a "Minister of State", not an ambassador or a permanent representative.

50. Mr. YASSEEN said that the exceptional privileges and immunities mentioned by Mr. Reuter did exist, notably immunity from jurisdiction, to which the Commission had provided for numerous exceptions which were clearly not applicable to Heads of State.

51. In his opinion the scope of the article could not be extended to permanent missions. In bilateral diplomacy, the categories of representation were fixed and well known, and others could not be created at will. The head of the mission had the rank of ambassador and although some heads of mission, like Lord Caradon, held important posts in their own government, they had never yet received different treatment from that accorded to a head of mission.

52. Mr. AGO thanked Mr. Rosenne for his explanation, which he found very much to the point.

53. With regard to the question raised by Mr. Reuter, the essential feature of the special privileges and immunities accorded to a Head of State was, as Mr. Yasseen had said, immunity from jurisdiction, which was complete for Heads of State and Government. The same applied to exemption from taxation.

54. Mr. REUTER said he was not sure that Heads of State enjoyed such complete immunity in French jurisprudence; nor was he sure that there was a rule of international law to that effect.

55. Mr. USTOR said he noted that the point raised by Mr. Rosenne had now been satisfactorily settled by an explanation which would be included in the commentary to article 91.

56. In order to make the record as nearly complete as possible, however, he wished to mention an exceptional case of permanent representatives holding higher rank than that of ambassador, namely, the permanent representatives of the States members of the Council for Mutual Economic Assistance (CMEA). Those permanent representatives were deputy Heads of Government, but they were not resident in the host country, to which they came only to attend meetings of organs of the CMEA and to perform other specific functions. The permanent missions to the CMEA were headed by deputy permanent representatives.

57. That special case was, of course, covered by article 3, which stated that the application of the draft articles was "without prejudice to any relevant rules of the Organization". He could accept article 91 on the understanding that the commentary would explain the position in such special cases.

58. Mr. AGO said that Mr. Ustor's observations were interesting, but the language used in the draft articles was rather unusual. For example, the "permanent representative" in the example mentioned by Mr. Ustor was

called a "delegate". Similarly, the ministers of labour who were permanent representatives on the Governing Body of the International Labour Office were called delegates in the draft articles.

59. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 91 in the form proposed by the Drafting Committee, on the understanding that the discussion would be reflected in the commentary.

*It was so agreed.*⁸

ARTICLE 92 (General facilities, assistance by the Organization and inviolability of archives and documents)

60. Mr. AGO (Chairman of the Drafting Committee) said that the Committee intended to revise the text of article 92, so it would be desirable for the Commission to postpone consideration of that provision.

61. The CHAIRMAN invited the Commission to consider article 93.

ARTICLE 93

62. Mr. AGO (Chairman of the Drafting Committee) said that in the last sentence of article 93, the Committee had inserted the words "or, as the case may be, the conference" after "The Organization", because it was not impossible that in some cases the conference might be in a better position than the organization to intervene with the host State, particularly if the conference was held at a place other than the headquarters of the organization.

63. The proposed text of article 93 read:

Article 93

Premises and accommodation

The host State shall assist a delegation to an organ or to a conference, if it so requests, in procuring the necessary premises and obtaining suitable accommodation for its members. The Organization or, as the case may be, the conference shall, where necessary, assist the delegation in this regard.

64. Mr. ROSENNE said he had the same reservations concerning the personification of the conference in article 93 as he had expressed on an earlier occasion. In his opinion the words "or, as the case may be, the conference" should be deleted.

65. Mr. USHAKOV said that the expression "The Organization or, as the case may be, the conference..." should be understood as meaning that in certain cases the conference could provide assistance at the same time as the organization. It was not intended to establish any opposition between the organization and the conference.

66. Mr. EUSTATHIADES said that a distinction should be made between conferences convened under the auspices of an organization and conferences that were independent of any organization. In its present form,

⁸ For resumption of the discussion see 1133rd meeting, para. 129.

the last sentence in article 93 only covered the case of a conference convened independently of any organization. In order to cover the other case as well, it might perhaps be appropriate to say "The Organization and the conference shall...".

67. Mr. BARTOŠ said that he supported the formula "or, as the case may be, the conference" proposed by the Drafting Committee; but the Commission should explain in the commentary that it considered that a conference possessed a separate legal personality, which made it possible to impose obligations on it. That concept—the theory of the *de facto* legal person—was to be found in Italian positive law, but was not universally recognized, so that the Commission should state its point of view clearly. It was inconceivable that the organization should have an obligation to assist delegations, while the organ of the organization which was best fitted to perform that task, namely, the conference itself, did not have that obligation.

68. Mr. USHAKOV observed that the expression "the delegation", at the end of the article, was just as applicable to a delegation to an organ as to a delegation to a conference, though it was an expression that had not yet been defined. That being so, it would be inadvisable to replace the expression "or, as the case may be", by "and" or "as well as", since in the case of a delegation to an organ, it was only the organization which had to furnish assistance.

69. Whatever the final wording adopted, article 93 should not present any difficulties of interpretation.

70. The CHAIRMAN said that if there were no objection he would consider that the Commission provisionally approved article 93.

*It was so agreed.**

ARTICLE 94

71. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had brought the text of article 94 into line with that of article 25, as provisionally approved by the Commission.¹⁰ In paragraph 1, it had accordingly deleted the provision that the consent of the head of the permanent diplomatic mission might be required before the agents of the host State could enter the premises of the delegation; on that point, the Committee had found it difficult to justify treating delegations differently from permanent missions. In addition, the organs or conferences to which delegations were sent often met in a city which was not the capital of the host State, and in such cases it would complicate matters unnecessarily to require the consent of the head of the permanent diplomatic mission.

72. The text proposed for article 94 read:

Article 94

Inviolability of the premises

1. The premises of the delegation to an organ or to a conference shall be inviolable. The agents of the host State may not enter them, except with the consent of the head of the delegation. 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 obtain the express consent of the head of the delegation.

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

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

73. Mr. ALCÍVAR said that he reserved his position on the last sentence of paragraph 1.

74. Mr. EUSTATHIADES said he could support the new wording of article 94, which seemed to be a compromise solution.

75. Mr. KEARNEY said that he too reserved his position on article 94. He still thought that the words "and only in the event that it has not been possible to obtain the express consent of the head of the delegation", in the last sentence of paragraph 1, should be deleted.

76. The CHAIRMAN suggested that the Commission provisionally approve article 94 in its present form.

It was so agreed.¹¹

ARTICLE 95¹²

77. Mr. AGO (Chairman of the Drafting Committee) said that the phrase "To the extent compatible with the nature and duration of the functions performed by a delegation to an organ or to a conference", at the beginning of paragraph 1 of article 95, had been taken from article 24 of the Convention on Special Missions and was not included in article 26 of the draft, on exemption of the premises of the permanent mission from taxation. The Drafting Committee had taken the view that, while such a provision was justified in a convention dealing with missions whose functions were as varied as those of special missions, it was not justified in the case of delegations to an organ or a conference. It had therefore been deleted from article 95.

78. The Committee had also made a number of minor drafting changes in the other provisions of article 95, and had brought the title into line with that of article 26. It had not, however, incorporated the amendment to article 26 adopted by the Commission at its 1113th meeting, which replaced the first part of paragraph 1 by the words "The premises of the permanent mission of which the sending State or any person acting on its

* For resumption of the discussion see 1134th meeting, para. 8.

¹⁰ See 1117th meeting, paras. 31-40.

¹¹ For resumption of the discussion see 1134th meeting, para. 18.

¹² For previous text see 1108th meeting, para. 4.

behalf is owner or lessee shall be exempt. . .". The Committee had taken the view that, as the duration of the functions of most delegations was short, that amendment would have no practical application to delegations.

79. The text proposed for article 95 read:

Article 95

Exemption of the premises from taxation

1. The sending State and the members of the delegation to an organ or to a conference acting on behalf of the delegation shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the delegation, 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 or with a member of the delegation.

80. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 95 as proposed by the Drafting Committee.

*It was so agreed.*¹³

ARTICLE 96

81. Mr. AGO (Chairman of the Drafting Committee), said that in article 96, the Committee had merely replaced the words "of a delegation" by the words "of the delegation". The text proposed read:

Article 96

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 to all members of the delegation to an organ or to a conference such freedom of movement and travel in its territory as is necessary for the performance of the functions of the delegation.

82. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 96 as proposed by the Drafting Committee.

*It was so agreed.*¹⁴

ARTICLE 97¹⁵

83. Mr. AGO (Chairman of the Drafting Committee) said the Committee considered that the wording of paragraph 1 of article 97 was better than that of paragraph 1 of article 29, on freedom of communication of permanent missions. When the draft was revised, it intended to bring paragraph 1 of the article on freedom of communication of permanent missions and permanent observer missions into line with paragraph 1 of article 97.

84. Article 29 did not contain provisions similar to those in paragraph 3 of article 97. The Committee believed that that difference between the two articles was justified, particularly in view of the short duration of the functions of most delegations.

85. The Drafting Committee had brought the rest of article 97 into line with article 29. It had, however, retained, in the last sentence of paragraph 8, the phrase "By arrangement with the appropriate authorities", to which, in order to avoid any ambiguity, it had added the words "of the host State". That phrase, which did not appear in article 29, was taken from article 28 of the Convention on Special Missions, which had followed article 35 of the Vienna Convention on Consular Relations.¹⁶ Although the phrase did not appear in article 27 of the Convention on Diplomatic Relations,¹⁷ the Committee thought that it was useful and was in line with general practice. It therefore intended to propose that the phrase be added to paragraph 1 of the draft article on freedom of communication of permanent missions and permanent observer missions.

86. The text proposed for article 97 read:

Article 97

Freedom of communication

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

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

3. Where practicable, the delegation shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission, of the permanent mission or of the permanent observer mission of the sending State.

4. The bag of the delegation shall not be opened or detained.

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

6. The courier of the delegation, 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.

7. The sending State or the delegation may designate couriers *ad hoc* of the delegation. In such cases the provisions of paragraph 6 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 delegation's bag in his charge.

¹³ For resumption of the discussion see 1134th meeting, para. 26.

¹⁴ For resumption of the discussion see 1134th meeting, para. 32.

¹⁵ For previous text see 1108th meeting, para. 29.

¹⁶ United Nations, *Treaty Series*, vol. 596, pp. 290-292.

¹⁷ *Op. cit.*, vol. 500, pp. 108-110.

8. The bag of the delegation 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 delegation. By arrangement with the appropriate authorities of the host State, the delegation 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.

87. Mr. CASTRÉN suggested that in the second sentence of paragraph 1, the word "other" should be inserted between the words "and" and "delegations"; that would bring the text of article 97 into line with the corresponding article on special missions.¹⁸ However, article 29 of the draft, concerning permanent missions, did not contain the word "other", so the Commission had a choice between two models.

88. Mr. USHAKOV said that the Commission should either clarify, in the commentary, the meaning of the words "its functions" at the end of paragraph 2, or delete them altogether. If it kept them, it should state that, in the absence of any provision concerning the functions of the delegation, the words "its functions" meant the general functions of a delegation.

89. Mr. KEARNEY said that Mr. Ushakov had made a good point. He proposed that the words "all correspondence relating to the delegation and its functions" be replaced by the words "all correspondence relating to the delegation and its activities".

90. The CHAIRMAN said that if there were no objection he would take it that the Commission accepted the amendment proposed by Mr. Kearney.

It was so agreed.

91. The CHAIRMAN suggested that the Commission provisionally approve article 97 as proposed by the Drafting Committee and amended by Mr. Kearney.

*It was so agreed.*¹⁹

ARTICLE 98

92. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had confined itself to replacing the words "in a delegation" by the words "in the delegation" in the first line of the article. The text proposed read:

Article 98

Personal inviolability

The persons of the representatives in the delegation to an organ or to a conference and of the members of its diplomatic staff 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.

¹⁸ See General Assembly resolution 2530 (XXIV), Annex, article 28.

¹⁹ For resumption of the discussion see 1134th meeting, para. 35.

93. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 98 as proposed by the Drafting Committee.

*It was so agreed.*²⁰

ARTICLE 99²¹

94. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made some minor drafting changes in the title and text of the article so as to bring it into line with article 31. In the French version, the word "logement" should not be regarded as final; it might be changed in the final concordance of the draft, as the Working Group seemed to prefer the word "demeure".

95. The text proposed for article 99 read:

Article 99

Inviolability of the private accommodation and property

1. The private accommodation of the representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff shall enjoy the same inviolability and protection as the premises of the delegation.

2. Their papers, correspondence and, except as provided in paragraph ... of article 100, their property shall likewise enjoy inviolability.

96. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 99 as proposed by the Drafting Committee.

*It was so agreed.*²²

ARTICLE 100²³

97. Mr. AGO (Chairman of the Drafting Committee) said that at its 1109th meeting the Commission had referred to the Drafting Committee the two versions of article 100 it had adopted in 1970. As there had been no clear majority in the Committee in favour of either version, both were being resubmitted to the Commission. The Drafting Committee suggested, however, that the Commission consider whether the addition to article 101 of a paragraph 5, relating to the settlement of civil actions, did not justify the adoption of alternative A.

98. The texts proposed for the two alternative versions of article 100 read:

Article 100

Immunity from jurisdiction

ALTERNATIVE A

1. The representatives in the delegation to an organ or to a conference and the members of its diplomatic staff shall enjoy

²⁰ For resumption of the discussion see 1134th meeting, para. 41.

²¹ For previous text see 1108th meeting, para. 44.

²² For resumption of the discussion see 1134th meeting, para. 44.

²³ For previous text see 1108th meeting, para. 52.

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 delegation;

(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 delegation where those damages are not recoverable from insurance.

2. The representatives in the delegation and the members of its diplomatic staff are not obliged to give evidence as witnesses.

3. No measures of execution may be taken in respect of a representative in the delegation or a member of its diplomatic staff 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 accommodation.

4. The immunity of the representatives in the delegation and of the members of its diplomatic staff from the jurisdiction of the host State does not exempt them from the jurisdiction of the sending State.

ALTERNATIVE B

1. The representatives in the delegation to an organ or to a conference and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the host State.

2. (a) The representatives and members of the diplomatic staff of the delegation shall enjoy immunity from the civil and administrative jurisdiction of the host State in respect of all acts performed in the exercise of their official functions.

(b) No measures of execution may be taken in respect of a representative or a member of the diplomatic staff of the delegation unless the measures concerned can be taken without infringing the inviolability of his person or his accommodation.

3. The representatives and members of the diplomatic staff of the delegation are not obliged to give evidence as witnesses.

4. The immunity from jurisdiction of the representatives and members of the diplomatic staff of the delegation does not exempt them from the jurisdiction of the sending State.

99. The CHAIRMAN said it would not be in conformity with the Commission's traditional methods of work to vote on the alternative texts at that stage. He suggested that the Commission should approve them provisionally and postpone making a choice until the final adoption of the draft, article by article.

100. Mr. USHAKOV said he supported the Chairman's suggestion.

101. Mr. KEARNEY said that, in the discussions on the article in the Commission and in the Drafting Committee, he had always made it clear that he preferred alternative B.

102. As a compromise, however, he would now like to propose the addition of a sub-paragraph (e) to para-

graph 1 of alternative A, which would read: "an action relating to any civil claim that does not arise out of the exercise of official functions by the person in question and that is not settled within two years after its accrual." That language would take care of the major problems which might arise in the case of representatives who might enter the host State for short periods of time, then return to the sending State, and subsequently be sent back to the host State.

103. Mr. CASTRÉN said he still preferred alternative B, which was closer to present practice and to the rules followed in conferences and in most organizations. What was more, the majority of the States which had submitted written observations on the article had chosen that alternative. In view of the temporary nature of meetings of organs and conferences, it was neither necessary nor appropriate to give the delegations and their members such extensive privileges and immunities as those enjoyed by diplomatic missions, permanent missions and permanent observer missions.

104. The compromise proposed by Mr. Kearney showed that the list of exceptions in paragraph 1 of alternative A was incomplete and did not even cover some quite common cases. Under the terms of Mr. Kearney's proposal, immunity from jurisdiction would continue for new cases over a rather long period, so that the person in question would not be disturbed in the exercise of his official functions during his first assignment or assignments in the host State. But continual abuse of that person's immunity from jurisdiction could not be tolerated; the sending State should refrain from sending such a person as its representative. He was therefore in favour of Mr. Kearney's proposal, because it improved alternative A.

105. Mr. USHAKOV said he thought the Commission could accept Mr. Kearney's proposal provisionally, pending a final decision in favour of one of the two alternatives.

106. It should be noted that Mr. Kearney's proposal was against the interests of the host State; it would have the effect of postponing for two years the obligation which paragraph 5 of article 101 imposed on the sending State.

107. Mr. AGO said he had always supported alternative A, because the other alternative introduced inadmissible differences of treatment between members of the permanent mission and members of the delegation. He did not agree with Mr. Castrén that alternative B reflected the practice of States; in particular it did not reflect that of the important host State of Switzerland.

108. The Commission should carefully examine the problems raised by article 100, so as not to have alternative versions in the draft it submitted to the General Assembly. The paragraph 5 added to article 101 should make its task easier.

109. The additional sub-paragraph proposed by Mr. Kearney should be submitted in writing for due consideration. The fears expressed by Mr. Ushakov about the effects of that proposal on the obligation stated

in paragraph 5 of article 101 might be dispelled if it were made clear that the provision proposed by Mr. Kearney was applicable only if a sending State had not discharged its obligation under article 101 within two years.

110. Mr. ROSENNE said he supported Mr. Ago's view that the Commission should finish its work with a single text, which would not be one adopted by a small majority, but would represent the view of the Commission as a whole. He too believed that there was a close connexion between article 100 and paragraph 5 of article 101, which represented a compromise between two radically opposed points of view.

111. He also believed that alternative A, as a matter of law and practice, came much closer to the mark than alternative B, especially in view of the addition of the new paragraph 5 to article 101.

112. He thought Mr. Kearney had made a convincing case for his proposal. That proposal appeared to refer to certain kinds of claim involving specific sums of money, such as hotel, restaurant and shop bills, but he (Mr. Rosenne) had previously drawn attention to a different kind of claim, namely, a continuing and unliquidated claim, arising out of a continuing legal dispute²⁴ and he assumed that Mr. Kearney's proposal did not apply to that. He also hoped that Mr. Kearney would clarify the relationship between his proposal and paragraph 5 of article 101, as well as its relationship with the procedure for consultations envisaged in article 50.

113. Mr. KEARNEY said he did not think that Mr. Ago had represented the position of the Swiss Government quite accurately, since in paragraph 3 on the comments of governments on article 100 in the Special Rapporteur's sixth report (A/CN.4/241/Add.6) it was stated that the governments of Canada, Pakistan, Switzerland, Finland, Japan, the Netherlands, Sweden, the United States, France and Turkey had expressed a preference for alternative B. That paragraph went on to say: "In support of their position the Government of Switzerland drew attention to 'the fairly loose ties delegates have in the host State where their stay is only temporary' and added that 'In the circumstances, this wording of the text ensures adequate protection'". He realized, of course, that the Swiss Government had a variety of arrangements for international organizations, some of which, like the International Labour Organisation, appeared to be in a better position than other of the agencies of the United Nations.

114. On the question whether paragraph 5 of article 101 met the needs of the present draft, he pointed out that it had been taken over from an earlier article on waiver of immunity, which had been couched in even stronger terms. All the States which had expressed their preference for alternative B, many of which were host States, had made their choice in the light of that stronger text.

The meeting rose at 6.10 p.m.

²⁴ See 1108th meeting, para. 82.

1126th MEETING

Wednesday, 30 June 1971, at 10.5 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, 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 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168/Add.6 and 7; A/CN.4/L.175)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 100 (Immunity from jurisdiction) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of the two alternatives A and B for article 100 submitted by the Drafting Committee (A/CN.4/L.168/Add.6).

2. Mr. AGO (Chairman of the Drafting Committee) said that after considering the question at some length the Drafting Committee had come to the conclusion that it would be better to continue the discussion of the two alternatives in the Commission itself.

3. Several members of the Drafting Committee preferred alternative A, but generally speaking, they did not think they could accept Mr. Kearney's amendment (A/CN.4/L.175) which, in their opinion, would nullify the principle involved and make the article difficult to apply. Other members of the Drafting Committee were in favour of alternative B. They were prepared to accept Mr. Kearney's amendment, but preferred the text of alternative B as it stood.

4. In general, therefore, the Drafting Committee believed that Mr. Kearney's amendment did not provide a solution, so that the choice remained between alternatives A and B, which were already before the Commission.

5. Mr. KEARNEY said he had proposed his amendment to alternative A for article 100¹ merely in the hope that it might help the Commission to achieve a compromise. He himself preferred alternative B. He therefore withdrew his amendment.

¹ See previous meeting, para. 102.

6. Mr. ROSENNE said experience showed that texts adopted in the Commission by only a small majority were not conducive to success in the diplomatic phase of the codification process. Since alternatives A and B were both adequate from a technical point of view, and since the views of members appeared to be evenly divided, he would suggest that, as an exception, the Commission put forward both texts. That would provide a convenient point of departure for the diplomatic phase of the codification work.

7. Sir Humphrey WALDOCK said that, although his first choice was alternative B, he would not hesitate to accept alternative A if there were not enough support for alternative B; his views were probably shared by some others. The position of certain other members, on the other hand, was perhaps the opposite: they would prefer alternative A but, failing its general approval, might be prepared to accept alternative B.

8. Mr. USHAKOV said that if the Commission opted for alternative B, paragraph 5 of article 101 would become pointless.

9. Mr. AGO (Chairman of the Drafting Committee) said that as the Special Rapporteur had proposed alternative A, which was also closer to the corresponding provision on permanent missions, alternative B was a sort of amendment and, as such, should be put to the vote first.

10. He himself was prepared to accept either of the proposed alternatives, but he could not agree that there should be any difference in treatment between permanent missions and delegations. If the Commission adopted alternative B, it would therefore have to amend corresponding provisions relating to permanent missions and permanent observer missions. If it was not prepared to amend those provisions, he thought it had no choice but to adopt alternative A.

11. Mr. USTOR suggested that in order to avoid discussion on the question of priority, successive votes should be taken on the two texts in order to ascertain which had more support; in that way a vote would be taken on alternative B even if a majority pronounced in favour of alternative A.

12. Mr. BARTOŠ said that if the first text put to the vote were adopted, the second would be automatically excluded. The two alternatives were not separate texts which could exist side by side; only one of them could be adopted. It was for the Commission to decide which should be put to the vote first.

13. Mr. CASTRÉN said he was in favour of alternative B. If that alternative were adopted, he did not think it would be necessary to amend the corresponding provision relating to permanent missions, since there was a fundamental difference between permanent missions and delegations.

14. With regard to the order in which the two texts should be put to the vote, alternative B should be voted on first since it was an amendment to the text proposed by the Special Rapporteur.

15. Mr. ROSENNE said he would prefer alternative A, provided that paragraph 5 of article 101 was retained; the provisions of that paragraph were really an integral part of alternative A.

16. Mr. AGO (Chairman of the Drafting Committee) suggested that since, for certain members of the Commission, the choice between alternatives A and B depended on the retention of paragraph 5 of article 101, the best course would be to suspend the discussion on article 100 and pass on to article 101.

17. The CHAIRMAN said that, for the reason given by the Chairman of the Drafting Committee and in view of the absence of some members, it would seem desirable to defer a decision on article 100. Consequently, if there were no objection, he would take it that the Commission agreed to suspend consideration of article 100 for the time being.

It was so agreed.²

ARTICLE 101

18. Mr. AGO (Chairman of the Drafting Committee) said that paragraphs 1 to 4 of article 101 were based on article 33, which was the corresponding provision for permanent missions.

19. The Drafting Committee had thought it advisable to add a new provision, paragraph 5, based on the recommendation in resolution II, on consideration of civil claims, adopted by the United Nations Conference on Diplomatic Intercourse and Immunities.³ In the draft articles, the provision was no longer a recommendation, but placed the sending State under a legal obligation, when there was a civil action, either to waive the immunity of the person concerned or to use its best endeavours to bring about a just settlement. Thus, articles 100 and 101, taken together, would guarantee the practical settlement of nearly all civil cases.

20. Furthermore, the legal obligation to seek a just settlement might lead to the initiation of the consultation and conciliation procedure provided for in article 50, to which the host State could have recourse if it considered that the sending State was not really trying to find a means of settlement; and that would provide an additional guarantee of the settlement of civil cases. Thus paragraph 5 was extremely important.

21. The text proposed for article 101 read:

Article 101

Waiver of immunity

1. The immunity from jurisdiction of the representatives of the delegation to an organ or to a conference and members of its diplomatic staff and of persons enjoying immunity under article 105 may be waived by the sending State.

2. Waiver must always be expressed.

3. The initiation of proceedings by any of the persons referred to in paragraph 1 of this article shall preclude them from

² For resumption of the discussion see 1134th meeting, para. 47.

³ United Nations, *Treaty Series*, vol. 500, pp. 218-220.

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.

5. If the sending State does not waive the immunity of any of the persons mentioned in paragraph 1 in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

22. Mr. USTOR said that article 32 of the 1961 Vienna Convention on Diplomatic Relations⁴ contained an identical provision on waiver of immunity, but without any title. The corresponding article 45 of the 1963 Vienna Convention on Consular Relations,⁵ however, was entitled "Waiver of privileges and immunities" and stated in paragraph 1 that the sending State might waive "any of the privileges and immunities provided for in Articles 41, 43 and 44" of that Convention. On the other hand, article 41 of the 1969 Convention on Special Missions⁶ was entitled "Waiver of immunity" and made no reference to privileges; it referred specifically to "Waiver of immunity from jurisdiction".

23. Since article 101, like article 41 of the Convention on Special Missions and unlike article 45 of the Vienna Convention on Consular Relations, did not refer in any way to privileges, the waiver of which was not in any case a practical proposition, he proposed that the present title, "Waiver of immunity" be amended to read: "Waiver of immunity from jurisdiction".

24. Mr. AGO (Chairman of the Drafting Committee) said he could accept that proposal.

25. Mr. TAMMES said that in view of the importance attached to paragraph 5, he would like to have some clarification from the Chairman of the Drafting Committee on a specific point. Was it a matter for unilateral decision by the sending State whether it should "use its best endeavours to bring about a just settlement of the case"?

26. It was worth noting that section 14 of the 1946 Convention on the Privileges and Immunities of the United Nations⁷ provided that a Member State was "under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice and it can be waived without prejudice to the purpose for which that immunity is accorded". That language made it clear that the matter was one for the unilateral decision of the Member State concerned and was therefore not open to judgment by a third party in the context of any applicable procedure for the settlement of disputes.

27. Mr. AGO (Chairman of the Drafting Committee) said that the decision whether or not to waive immunity

was clearly unilateral and was left to the discretion of the sending State, which was not obliged to explain its decision to anyone. On the other hand, paragraph 5 imposed an objective obligation on the sending State; the host State would therefore have grounds for complaint if that obligation were not fulfilled and would be free to resort to the consultation or conciliation procedure.

28. Sir Humphrey WALDOCK said he agreed with the Chairman of the Drafting Committee. The provisions of paragraph 5 were also of importance in relation to those of paragraph 1, sub-paragraphs (a), (b) and (c) of alternative A for article 100.

29. The question whether an act should be considered as having been performed in the course of official functions, in other words "on behalf of the sending State", or "outside" the official functions of the person concerned, was a critical factor for determining whether the act was covered by immunity or not. Consequently, on the question of the application of the exceptions set forth in the various sub-paragraphs of alternative A, paragraph 1, a conflict of views could arise between the sending State and the courts of the host State. The sending State could take an extensive view of what constituted the official duties of the person concerned and claim that if the courts of the host State assumed jurisdiction in a particular case, they were violating the terms of the convention that would emerge from the present draft articles. The sending State would thus be claiming that the dispute related to the interpretation of that convention.

30. In his view, paragraph 5 of article 101 had very general importance; for regardless of any dispute on the proper interpretation of the provisions of article 100, the obligation to ensure a just settlement of the case, set forth in paragraph 5 of article 101 would exist.

31. Mr. REUTER said that, in general, he agreed with Mr. Ago. However, paragraph 5 was not so exceptionally important as Mr. Ago believed it to be, unless it was considered from the point of view of procedure rather than substance.

32. With regard to the substance, paragraph 5 did not add anything to the obligations of the sending State, since privileges and immunities were accorded only for the performance of functions, and no one enjoyed them in his personal capacity. In fact, therefore, the sending State was merely required by an obligation of good faith to do everything possible to avoid obstructing the administration of justice.

33. From the procedural point of view, on the other hand, paragraph 5 might be extremely important, but the Commission could not yet say what its effect would be, for two reasons. The first reason was that the present text referred only to a dispute between a representative and a private person, in other words a private dispute and not a dispute between governments. Since private disputes involved delicate questions of judgment, the sending State could not be asked to bring excessive pressure to bear on its representative, so the obligation stated in paragraph 5 could only relate to conduct. If

⁴ *Ibid.*, p. 112.

⁵ *Op. cit.*, vol. 596, pp. 298-300.

⁶ See General Assembly resolution 2530 (XXIV), Annex.

⁷ United Nations, *Treaty Series*, vol. 1, p. 22.

the Commission wished to go further, it would have to amend the text of the paragraph.

34. The second reason was that the Commission had not yet decided what to do about procedures for the settlement of disputes. Paragraph 5 could be of major importance if—and only if—the procedures adopted were sound.

35. Mr. USHAKOV reiterated that if the Commission adopted alternative B for article 100, paragraph 5 of article 101 would be completely pointless.

36. Paragraph 2 (a) of alternative B for article 100 provided for immunity from the civil and administrative jurisdiction of the host State in respect of all acts performed in the exercise of official functions. That meant that the immunity from jurisdiction did not apply where the acts complained of were performed outside the exercise of official functions. Hence it could only be in the case of acts performed in the exercise of official functions that the sending State must either waive immunity or use its best endeavours to bring about a just settlement of the case, as provided in paragraph 5 of article 101. He could not accept a provision to that effect. If the Commission adopted alternative B for article 100 and paragraph 5 of article 101, diplomats would no longer enjoy immunity from civil jurisdiction.

37. Mr. CASTRÉN said that paragraph 5 of article 101 was very valuable and important. He could not agree with Mr. Reuter that it did not impose any obligation on the sending State; the obligation, although not a strong one, did exist.

38. However, the new provision did not provide a complete guarantee of the settlement of disputes, as Mr. Ago had said. There was still the possibility of recourse to consultations and conciliation, which would not guarantee a positive result either. The guarantee was further weakened by the fact that, in both cases, the sending State would be taking a unilateral decision, and unfortunately States were not always objective.

39. He agreed with Mr. Ushakov that the Commission could not adopt both alternative B for article 100 and paragraph 5 of article 101. He would prefer it to adopt alternative B and delete paragraph 5.

40. Mr. ROSENNE said he agreed that the provisions of paragraph 5 of article 101 were essential to alternative A for article 100. Nevertheless, they were also highly desirable, and would have an independent function to perform, if alternative B were adopted.

41. He noted that the word "case", at the end of paragraph 5, was rendered in the French version by the word "*litige*" and in the Spanish version by the word "*litigio*". Bearing in mind the provisions of the corresponding articles on permanent missions and permanent observer missions, the word "case" should be construed in the broad sense of "matter" rather than in the narrow sense of "lawsuit", which was perhaps conveyed by the French "*litige*" and the Spanish "*litigio*". He therefore suggested that the French and Spanish terms be reconsidered.

42. Mr. REUTER explained that he had not said that paragraph 5 did not establish an obligation. On the contrary, it did establish an obligation relating to conduct, which was of some importance.

43. With reference to Mr. Ushakov's comments, he said that in the exercise of his functions a representative was not only covered by immunity from proceedings, but also enjoyed a real irresponsibility. According to alternative A, proceedings could be taken against a representative only for acts committed outside the exercise of his official functions. A representative who travelled by car from his home to the headquarters of the organization was acting in the exercise of his official functions and was therefore covered by immunity from jurisdiction; but if he caused an accident, any State of good faith would consider itself obliged to use its best endeavours to bring about a just settlement of the case.

44. Mr. YASSEEN said that immunity was not synonymous with irresponsibility. Immunity from jurisdiction did not mean that the person concerned was presumed to be irresponsible and that the case must not be settled. The reason why he was reluctant to accept paragraph 5 was that he thought it unnecessary to state a rule prescribing conduct which was in any case required as a matter of good faith between States. In general, States did not hesitate to compensate persons injured by one of their representatives.

45. However, if the Commission adopted alternative A for article 100, he could accept paragraph 5, although it stated an obligation relating to method and not to result, since it might open the way for procedures for the international settlement of disputes.

46. Mr. USTOR said that no doubt there could be differences between the view of the sending State and the pronouncements of the courts of the host State on the question whether a particular act was to be regarded as performed in the exercise of the official functions of the person concerned. That type of difficulty was, however, a general feature of diplomatic law and could arise in connexion with all matters of immunity.

47. With regard to the provisions of paragraph 5, the main issue was the legal nature of the immunity from civil jurisdiction in the case of acts performed in the exercise of official functions. In most of those cases, the immunity belonged to the sending State itself and not to the person concerned. The act in question was an act of the State on whose instructions the person concerned had acted. It was not so much a matter of the diplomatic immunity of an individual as of the absence of jurisdiction over the acts of foreign States.

48. What the drafters of paragraph 5 had had in mind was the case of a person enjoying diplomatic immunity, but acting on his own behalf, not the case of an act of State. There had been no intention to prejudge the question whether a State would be prepared to submit certain of its acts to adjudication by the courts of another State.

49. It was therefore clear that if alternative A were chosen for article 100, it would rule out paragraph 5 of

article 101, because that paragraph had not been intended to apply to acts of State.

50. Mr. KEARNEY said that not all of those who had drafted paragraph 5 had had in mind non-official acts exclusively. As far as he was concerned, he had envisaged such cases as court action resulting from an accident caused by a diplomatic agent in a hurry to attend an official meeting.

51. The point raised by Mr. Rosenne on the meaning of the word "case" raised the important question how far it was necessary to go before the provisions of paragraph 5 went into operation.

52. On a broad interpretation, it might be considered sufficient for the claimant to write to the permanent representative asking him to make arrangements for a waiver of immunity; a refusal by the latter to do so would then bring the provisions of paragraph 5 into play. A second and narrower approach would be to require the claimant to institute court proceedings; if objection were raised by the defendant on grounds of immunity and his objection were upheld by the court, the provisions of paragraph 5 would then operate.

53. Personally, he preferred the first approach. The term "case" should not be taken as a formal requirement; it should be construed in the broad sense of a claim rather than in the narrow sense of a lawsuit.

54. Mr. AGO (Chairman of the Drafting Committee) said he agreed with Mr. Kearney that, to be effective, paragraph 5 had to be interpreted as broadly as possible. The Drafting Committee might examine whether the wording could be improved in that respect.

55. Mr. Reuter had said that paragraph 5 added nothing to the obligations of the sending State. He himself did not share that view. Paragraph 5 imposed on the sending State the obligation to endeavour to find an extra-judicial settlement of a claim. He thought it was the first time that international law had included such an obligation, which went far beyond good faith.

56. Mr. Reuter had also said that paragraph 5 could only refer to actions between private persons. But if the sending State did not use its best endeavours to bring about a just settlement of the case and the host State accused it of having failed to fulfil the obligation provided for in paragraph 5, such an action would become a dispute between States.

57. Mr. Castrén had said he would prefer to drop paragraph 5 of article 101 so as to be able to adopt alternative B for article 100. Actually, when taken together, the provisions of alternative A of article 100 and paragraph 5 of article 101 should lead more frequently to complete settlement of cases than the provisions of alternative B. Because it granted wider immunities, alternative A limited the possibility of recourse to judicial procedures, but the system provided that when an action was brought, it could be settled either by judicial means, if the sending State chose to waive immunity, or out of court if it did not, inasmuch as the sending State was under an obligation to seek means of reaching a practical settlement.

58. On the other hand, while alternative B of article 100 did not grant such extensive immunities, it provided no guarantee that the victim would be adequately compensated after winning a case, since representatives of States also enjoyed immunity from measures of execution. Consequently, the end in view was better achieved by the combination of alternative A for article 100 and paragraph 5 of article 101.

59. Mr. CASTRÉN said he maintained his position despite the explanations given by the Chairman of the Drafting Committee.

60. Mr. REUTER suggested that the words "*du litige*" in the French version of paragraph 5, be replaced by the words "*de l'affaire*".

61. In reply to Mr. Ago, he said that the whole of his own previous statement had been based on the distinction between obligations of substance and obligations of procedure. So far as substance was concerned, he entirely agreed with Mr. Yasseen. When a State had recourse to immunity from measures of execution contrary to equity and good faith, it violated a fundamental rule of public international law.

62. Mr. AGO (Chairman of the Drafting Committee) said he accepted Mr. Reuter's suggestion.

63. Mr. USHAKOV said that the only possible interpretation of the provisions under consideration was that civil jurisdiction operated only with respect to acts committed outside the exercise of official functions, so that paragraph 5 of article 101 could refer only to acts committed in the exercise of official functions. Those provisions were not concerned with immunity from measures of execution.

64. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 101 as proposed by the Drafting Committee, subject to a possible amendment of the title and to the replacement, in the French version, of the word "*litige*" by the word "*affaire*". A similar change should be made in the Spanish version.

*It was so agreed.*⁸

65. The CHAIRMAN invited the Commission to consider articles 102 to 108 as proposed by the Drafting Committee (A/CN.4/L.168/Add.7).

ARTICLE 102

66. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that article 102 was based on article 34 of the Vienna Convention on Diplomatic Relations,⁹ article 33 of the Convention on Special Missions¹⁰ and article 36 of the present draft. The only difference of substance between articles 102 and 36 related to sub-paragraph (f). In article 36 that sub-paragraph read: "registration, court or record fees, mortgage dues and stamp

⁸ For resumption of the discussion see 1134th meeting, para. 56.

⁹ United Nations, *Treaty Series*, vol. 500, p. 114.

¹⁰ See General Assembly resolution 2530 (XXIV), Annex.

duty, with respect to immovable property, subject to the provisions of article 26". The clause "with respect to immovable property" appeared both in article 34 of the Vienna Convention and in article 33 in the draft on Special Missions as adopted by the Commission in 1967,¹¹ but it had been deleted from the Convention on Special Missions as a result of the adoption, by 24 votes to 23, with 39 abstentions, of an oral amendment proposed by the representative of France in the Sixth Committee.¹² The clause had not been included in paragraph (f) of article 102, because in 1970 the International Law Commission had followed the Convention on Special Missions.

67. But if the clause were now omitted from article 102 and retained in article 36, the result would be that permanent missions would have to pay registration, court or record fees, mortgage dues and stamp duty with respect to movable property only, whereas delegations would have to pay them on all property, movable and immovable. The practical effect of such a difference in treatment would be very small, since such charges rarely applied to movable property. The Drafting Committee therefore proposed that permanent missions and delegations should be treated on an equal footing in that respect, the clause in question being retained in article 36 and added to article 102.

68. A minor change had been made at the end of sub-paragraph (c): since the Drafting Committee had made article 109 into paragraph 4 of article 108, the reference had been amended accordingly.

69. The text proposed for article 102 read:

Article 102

Exemption from dues and taxes

The representatives in the delegation to an organ or to a conference and the members of its diplomatic staff 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 delegation;

(c) estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 108;

(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 95.

70. Mr. EUSTATHIADES said that the insertion of the words "with respect to immovable property" had

the effect of exempting the persons concerned from taxes on movable property. In view of the relatively short duration of the functions of delegations, it might not be appropriate to grant them such exemption. Possibly the Commission had been too liberal in its draft on Special Missions.

71. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee was simply proposing that the Commission return to the position it had taken with regard to special missions. The French amendment submitted in the Sixth Committee had only been adopted by the barest majority and in the present case it might well be that the Commission's point of view would be endorsed by the Conference of Plenipotentiaries.

72. The drafting of sub-paragraph (f) had been complicated by the fact that, with respect to movable property, it contained an exception to an exception. That exception had been included because taxes on movable property were generally payable by the person concerned, whereas taxes on immovable property were borne by the State.

73. Mr. REUTER said he considered article 102 acceptable. In fact, the exception to the exception contained in sub-paragraph (f) related only to very rare eventualities, such as the case of a lien on a ship. Hence the change made by the Drafting Committee was of only minor practical significance.

74. Instead of choosing that solution, the Drafting Committee could have left sub-paragraph (f) applicable to all property, movable and immovable, which would have been slightly more advantageous to the host State. The most important question was which wording would make the convention more acceptable.

75. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 102 as proposed by the Drafting Committee.

*It was so agreed.*¹³

ARTICLE 103

76. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had brought article 103 into line with article 38 of the draft. In doing so, it had eliminated a number of differences in drafting, the main one being at the beginning of paragraph 1, where the phrase "Within the limits of such laws and regulations as it may adopt" had been replaced by the phrase "in accordance with such laws and regulations as it may adopt". The Committee had considered the two phrases to be very similar. The first appeared in article 35 of the Commission's 1967 draft on Special Missions, while the second was used in article 38 of the present draft and in article 36 of the Vienna Convention on Diplomatic Relations. In its commentary to the draft Convention on Special Missions, the Commission had not indicated why it had not followed the wording of the

¹¹ See *Yearbook of the International Law Commission, 1967*, vol. II, pp. 362-363.

¹² See *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda item 87, document A/7799*, paras. 47-49.

¹³ For resumption of the discussion see 1134th meeting, para. 63.

Vienna Convention, thereby implying that the difference between the two phrases was not significant.

77. The Drafting Committee had not inserted in paragraph 1 (b) the phrase "including articles intended for his establishment", which appeared in the corresponding sub-paragraph 38; since article 103 dealt with delegations, whose functions were generally of short duration, that phrase would be out of place.

78. The text proposed for article 103 read:

Article 103

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 delegation to an organ or to a conference;

(b) articles for the personal use of a representative in the delegation or a member of its diplomatic staff.

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

79. Mr. EUSTATHIADES said he would like the commentary to contain an explanation of how the first phrase in paragraph 1 was to be understood.

80. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 103 as proposed by the Drafting Committee, subject to Mr. Eustathiades's remark concerning the commentary.

*It was so agreed.*¹⁴

ARTICLE 104 (Exemption from social security legislation, personal services and laws concerning acquisition of nationality)

81. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had placed article 104 in square brackets, because the Working Group was considering making it a general provision. The Committee therefore proposed that the Commission defer consideration of the article for the time being.

82. The CHAIRMAN said that if there were no objection he would take it that the Commission accepted the Drafting Committee's proposal,

*It was so agreed.*¹⁵

¹⁴ For resumption of the discussion see 1134th meeting, para. 69.

¹⁵ For resumption of the discussion see 1134th meeting, para. 60.

ARTICLE 105

83. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had slightly changed the wording of the first two paragraphs of article 105¹⁶ so as to bring them into line with article 40, but had left intact those differences which it considered justified. In particular, the Committee had thought it necessary to retain the distinction between the members of the family who accompanied members of delegations, in article 105, and the members of the family forming part of the household of members of permanent missions, in article 40. The verb "accompany" was appropriate in article 105, because of the temporary character of delegations.

84. In paragraph 1, the Drafting Committee had retained the words "or permanently resident in the host State". Thus the paragraph applied to members of the family of a representative in a delegation or of a member of the diplomatic staff of a delegation on two conditions: that such members of the family were neither nationals of the host State nor permanently resident in the host State. Those words were not included in paragraph 1 of article 40, since that provision applied to the members of the family of a permanent representative or of a member of the diplomatic staff of a permanent mission on condition only that such members of the family were not nationals of the host State. The Committee had considered that the difference in treatment thus established between delegations and permanent missions was justified, in view of the short time spent by members of delegations in host States. If they joined a member of their family permanently resident in the host State, there seemed to be no reason why that person should enjoy the privileges and immunities referred to in article 105, paragraph 1, for the duration of the delegation's functions.

85. In paragraphs 3 and 4 of article 105 the Commission had not, in 1970, reproduced the clause "who are not nationals of or permanently resident in the host State". In the corresponding paragraphs of article 40, that clause concerned members of the service staff of permanent missions and private staff; it was unnecessary there because the point was covered by article 41, which dealt with members of permanent missions and persons on the private staff who were nationals of or permanently resident in the host State. Since article 106 specified that the provisions of article 41 applied also in the case of delegations, the Drafting Committee had not included that clause in article 105; it also intended to propose that the clause be deleted from article 40 when the draft articles were revised.

86. The title of article 105 had been brought into line with that of article 40.

87. The last sentence of paragraph 4 of article 105 had been slightly changed in the French version, in order to provide a better rendering of the idea expressed in the

¹⁶ For previous text see 1109th meeting, para. 62.

English. The Drafting Committee intended to make the same change in the French version of article 40.

88. The text proposed for article 105 read:

Article 105

Privileges and immunities of persons other than the representatives in the delegation to an organ or to a conference or than the members of its diplomatic staff

1. The members of the family of a representative in the delegation to an organ or to a conference who accompany him and the members of the family of a member of the diplomatic staff of the delegation who accompany him shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 98, 99, 100, 102, in paragraphs 1(b) and 2 of article 103 and in article 104.

2. Members of the administrative and technical staff of the delegation, together with members of their families who accompany them and who are not nationals of or permanently resident in the host State, shall enjoy the privileges and immunities specified in articles 98, 99, 100, 102 and 104, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 100 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 103 in respect of articles imported at the time of their entry into the territory of the host State to attend the meeting of the organ or conference.

3. Members of the service staff of the delegation 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 from social security legislation provided for in article 104.

4. Private staff of members of the delegation shall 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 delegation.

89. Mr. EUSTATHIADES, referring to paragraph 2, said he must reiterate his doubts about the advisability of granting the privileges and immunities referred to in articles 98 and 99, 100, 102 and 104 to members of the families of the administrative and technical staff of delegations to an organ. Such privileges and immunities could only be justified by the need to ensure the regular performance of functions.

90. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the phrase, in paragraph 2, "except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 100 shall not extend to acts performed outside the course of their duties" had been drafted in case the Commission adopted alternative A for article 100. It would have to be revised if alternative B were adopted.

91. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 105 as proposed by the Drafting Committee.

*It was so agreed.*¹⁷

¹⁷ For resumption of the discussion see 1135th meeting, para. 14.

ARTICLE 106

92. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had made no change in article 106, the text of which read:

Article 106

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

The provisions of article 41 shall apply also in the case of a delegation to an organ or to a conference.

*Article 106 was provisionally approved.*¹⁸

ARTICLE 107 (Privileges and immunities in case of multiple functions)

93. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had placed article 107 in square brackets, because the Working Group intended to make it a general provision. The Commission therefore proposed that the Commission defer consideration of the article for the time being.

94. The CHAIRMAN said that if there were no objection he would take it that the Commission accepted the Drafting Committee's proposal.

*It was so agreed.*¹⁹

ARTICLE 108

95. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that in the text adopted by the Commission in 1970, article 108 had consisted of three paragraphs, corresponding to the first three paragraphs of article 42.²⁰ Article 109 had had two paragraphs, the provisions of which corresponded to those of paragraph 4 of article 42. In order to bring articles 108 and 109 as closely into line with article 42 as possible, the Drafting Committee had converted article 109 into paragraph 4 of article 108. For the last sentence of that paragraph it had, however, preferred the wording adopted by the Commission in 1970 for article 109, paragraph 2, although it differed slightly from the corresponding provisions of article 42 of the draft and article 39 of the Vienna Convention on Diplomatic Relations. When the draft was reviewed, the Committee intended to use the same wording for article 42.

96. The text proposed for article 108 read:

Article 108

Duration of privileges and immunities

1. Every person entitled to privileges and immunities under the provisions of this part shall enjoy such privileges and immunities from the moment he enters the territory of the host State on the occasion of the meeting of an organ or conference, or,

¹⁸ For resumption of the discussion see 1135th meeting, para. 19.

¹⁹ For resumption of the discussion see 1135th meeting, para. 43.

²⁰ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

if he is already in its territory, from the moment when his appointment is notified to the host State by the Organization, by the conference or by the sending State.

2. When the functions of a person entitled to privileges and immunities under this part 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 delegation to an organ or to a conference, immunity shall continue to subsist.

3. In case of the death of a member of the delegation, 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 delegation not a national of or permanently resident in the host State or of a member of his family accompanying him, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property which is in the host State solely because of the presence there of the deceased as a member of the delegation or of the family of a member of the delegation.

*Article 108 was provisionally approved.*²¹

The meeting rose at 1 p.m.

²¹ For resumption of the discussion see 1135th meeting, para. 22.

1127th MEETING

Thursday, 1 July 1971, at 4.15 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Alcívar, Mr. Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Reuter, Mr. Rosenne, Mr. Ruda, 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 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168/Add.7)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

1. The CHAIRMAN invited the Commission to consider the texts of articles 110 to 116 *bis* as proposed by the Drafting Committee (A/CN.4/L.168/Add.7).

ARTICLE 110

2. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that article 110¹ corresponded to article 43 of the draft. The essential difference between the two articles had lain in the provisions of paragraph 4 of article 110, which were not included in article 43 or in the corresponding article 40 of the Vienna Convention on Diplomatic Relations.² Those provisions had read:

“4. The third State shall be bound to comply with its obligations in respect of the persons mentioned in paragraphs 1, 2 and 3 of this article only if it has been informed in advance, either in the visa application or by notification, of the transit of those persons as members of the delegation, members of their families or couriers and has raised no objection to it.”

3. On the other hand, the opening sentence of paragraph 1 of article 43, which was based on article 40 of the Vienna Convention on Diplomatic Relations, contained a clause not included in article 110, reading: “which has granted him a passport visa if such visa was necessary”. A similar clause was to be found in paragraph 3 of article 43 where it applied to couriers of the permanent mission.

4. There was thus a major difference of substance between article 43 of the draft and article 40 of the Vienna Convention on the one hand, and article 110 on the other. Under the terms of the first two articles, it was sufficient that the third State should have been asked for a visa, if a visa was necessary. Under the terms of article 110, even if a visa was not necessary, the third State had to be informed of the transit in advance, so that it could object if need be.

5. The Drafting Committee had noted that the provisions of paragraph 4 of article 110 were based on paragraph 4 of article 42 of the Convention on Special Missions³ and had considered that while they might be justified in the case of special missions in view of the great variety of their functions and nature, such provisions were hardly justified in the case of delegations to an organ or a conference. It had therefore deleted paragraph 4 of article 110 and had inserted the clause relating to a visa in paragraphs 1 and 3.

6. In the French version of paragraph 3, the Committee had departed slightly from the wording of the Vienna Convention on Diplomatic Relations in order to bring paragraph 3 into line with paragraph 1. It intended to do the same in article 43.

7. For the rest, the Committee had modelled article 110 as closely as possible on article 43. In the interests of clarity and concision, however, in the second sentence of

¹ For previous text see 1109th meeting, para. 83.

² United Nations, *Treaty Series*, vol. 500, pp. 118-120.

³ See General Assembly resolution 2530 (XXIV), Annex.