

Document:-
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**Text of articles adopted by the Drafting Committee: amendments proposed by Mr. Kearney to alternative A of article 100 as submitted by the Drafting Committee (A/CN.4/L.168/Add.6)
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Topic:
Representation of States in their relations with international organizations

Extract from the Yearbook of the International Law Commission:-
1971, vol. I

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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.