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**Summary record of the 1108th meeting**

Topic:  
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convention, articles that disregarded the facts of life. He therefore proposed that the first sentence of paragraph 1 should be amended to read:

“The premises, other than hotel rooms, where the delegation to an organ or to a conference is established shall be inviolable.”

105. Mr. REUTER said that, if an article such as article 94, and in particular paragraph 2, was to be of any practical value, it was essential that the host State should be notified of the premises assigned to delegations.

106. Mr. USHAKOV said he thought the situation of delegations to organs or conferences was the same as that of special missions. Since they were temporary delegations, their premises, but not necessarily the private accommodation of their members, were in hotels. It was therefore appropriate that article 94 should be modelled on the corresponding article relating to special missions.

107. It was obvious that notification of the host State covered only the premises used as offices and not, as was provided in article 11, sub-paragraph (f) of the Convention on Special Missions, the private accommodation of members of the delegation. That was how he interpreted Mr. Kearney's proposal.

108. Mr. CASTRÉN said that in spite of the difficulties that might arise in practice in obtaining hotel rooms, the article should be retained as it stood, subject only to the drafting changes that had been proposed, on the understanding that it must be interpreted in a reasonable manner.

109. Paragraph 1 was an important provision that could easily be respected if the host State had been notified of the address of the premises occupied by the delegation.

110. Mr. ROSENNE, referring to Mr. Kearney's proposal, said that the Commission should be careful about adopting a text which might even appear to leave open the possibility that hotel rooms could be entered by agents of the host State.

111. He thought Mr. Ustor's proposal for the second sentence of paragraph 1 would needlessly overload the article; the problem would only arise when the conference was not held in the capital of the host State or near the site of a permanent mission. A conference might be held in a city such as San Francisco, where many countries maintained consulates-general; to cover that possibility it would be necessary to include a reference to the head of the consular post. Such cases could be multiplied *ad infinitum*.

112. He suggested that the Drafting Committee should consider adding some such provision as that of article 11, sub-paragraph (f), of the Convention on Special Missions.

113. Sir Humphrey WALDOCK said he agreed in principle with those members of the Commission who believed that article 94 should be kept as it stood. If the Commission was over-zealous in seeking further improvements, the result might be only minor differences in the

text which would offer loopholes for astute lawyers in the future. He would suggest, however, that the words “if appropriate” in the second sentence of paragraph 1 might be replaced by the words “as the case may be”.

114. The CHAIRMAN suggested that article 94 should be referred to the Drafting Committee with the comments made during the debate.

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

The meeting rose at 12.55 p.m.

<sup>14</sup> For resumption of the discussion see 1125th meeting, para. 71.

## 1108th MEETING

*Thursday, 27 May 1971, at 9.40 a.m.*

*Chairman: Mr. Senjin TSURUOKA*

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

### Co-operation with other Bodies

[Item 9 of the agenda]

1. The CHAIRMAN read out a letter from the Director of Legal Affairs of the Council of Europe to the Legal Counsel of the United Nations, inviting the International Law Commission to be represented at the forthcoming meeting of the European Committee on Legal Co-operation, to be held at the headquarters of the Council of Europe, Strasbourg, from 14 to 18 June.

2. After an exchange of views in which Sir Humphrey WALDOCK, Mr. YASSEEN, Mr. ROSENNE and Mr. USHAKOV took part, the CHAIRMAN said he understood it to be the wish of the members that he should represent the Commission at the meeting of the European Committee on Legal Co-operation but that, since his duties as Chairman would prevent him from absenting himself while the Commission was in session, he should nominate a substitute in due course.

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

[Item 1 of the agenda]

(resumed from the previous meeting)

#### ARTICLE 95

3. The CHAIRMAN invited the Commission to consider article 95, on exemption of the premises of the delegation from taxation. He drew attention to the Special Rapporteur's proposal that the Commission should revert to the model of article 26, in order to maintain uniformity and consistency among the various parts of the same draft (A/CN.4/241/Add.6). That proposal called for the deletion of 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.

4.

#### Article 95

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

1. To the extent compatible with the nature and duration of the functions performed by a delegation to an organ or to a conference, the sending State and the members of the delegation acting on behalf of the delegation shall be exempt from all national, regional or municipal dues and taxes in respect of the premises occupied by 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.

5. Mr. USHAKOV observed that the Drafting Committee would have to align article 95 with the new wording it had proposed for article 26 (A/CN.4/L.168).

6. Mr. ROSENNE said it would be difficult to decide to align article 95 with article 26, first, because the Drafting Committee's new version of article 26 was not yet before the Commission and secondly, because the Special Rapporteur had made substantial changes in the text of article 95 in response to the proposals of governments.

7. Sir Humphrey WALDOCK noted that the Special Rapporteur justified his deletion of 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" by considerations of uniformity and consistency. However, one of the complaints made against the Commission by governments was that it seemed to be granting privileges and immunities throughout the draft articles without any reference to the principle of functional necessity. The Special Rapporteur's reasoning in that passage, therefore, could only give the impression that the Commission was following exactly the opposite principle to that which the governments in question wished it to follow. It was important to justify the rules proposed on their own merits rather than simply on grounds of uniformity.

8. Mr. SETTE CÂMARA pointed out that article 95 was based on article 24 of the Convention on Special Missions,<sup>1</sup> in which the rather nebulous phrase "nature of the functions" had presented some difficulties. The Government of Switzerland had proposed the deletion of that phrase from article 95 (A/CN.4/240, section C) and the Special Rapporteur, out of respect for tradition, had preferred to revert to the language of article 26 of the present draft. However, it seemed necessary to make some reference to the duration of the functions performed by the delegation, since in all probability the host State would insist on placing some time-limit on the exemption granted; the Drafting Committee should take that point into consideration.

9. Mr. CASTRÉN said that the deletion of the opening phrase of the text adopted at first reading did not clarify the provision as certain governments had requested. He proposed that the Commission should retain the text as it stood in order to bring out the difference between the functions of a temporary delegation and the functions of a permanent observer mission.

10. It would be advisable to add, at the end of paragraph 2, the words "acting on behalf of the delegation", which were used both in article 95, paragraph 1, and *mutatis mutandis* at the end of article 26, paragraph 2.

11. Mr. USTOR supported the Special Rapporteur's proposal that article 95 should be aligned with article 26, on exemption of the premises of the permanent mission from taxation. Apart from considerations of consistency, the underlying reason for deleting the opening phrase was that exemption from taxation in general was based, not on functional necessity, but on the representative character of the delegation.

12. Mr. ROSENNE said that, in principle, he also supported the text proposed by the Special Rapporteur. The question of the duration of exemption should be considered by the Drafting Committee, but he wondered whether it was not already covered by article 108, on the duration of privileges and immunities. If so, to refer to it in article 95 would only make for confusion.

13. With reference to Sir Humphrey Waldock's remarks, he thought that consistency in drafting should not be a criterion and should not be mentioned in the commentary. On the other hand, the commentary should mention both the representative character of the delegation and the principle of functional necessity.

14. Mr. NAGENDRA SINGH said that the reference to the nature of the functions performed by a delegation was bound to create difficulties of interpretation, and he supported the Swiss Government's proposal that it be deleted. He agreed with Mr. Ustor that the primary consideration in article 95 was the representative character of the delegation and that exemption from taxation should not be based on considerations of functional necessity.

15. The question of consistency in drafting had been discussed at a recent conference on water pollution which

<sup>1</sup> General Assembly resolution 2530 (XXIV), Annex.

he had attended at Montreal. Some participants had thought that the conference should depart from the so-called "Helsinki rules" wherever that seemed appropriate, although those rules had been approved by the International Law Association. But the conference had concluded that failure to abide by a text which had already been approved might lead to much misunderstanding. For that reason he thought the Commission should, in general, abide by texts which it had already approved. He therefore proposed that, when considering article 95, the Drafting Committee should be asked to take into account any parallel texts which already existed. It should also be asked to delete the reference to the nature of the delegation's functions and to consider the inclusion of a reference to the duration of exemption.

16. Mr. ELIAS said that the amended text proposed by the Special Rapporteur did not seem to meet the United States Government's request for clarification (A/CN.4/240/Add.4, section B.11) or to be calculated to allay the Canadian Government's fears that the article might create practical administrative problems (A/CN.4/240, section B.2). He did not think the Drafting Committee should base its approach to article 95 on article 26, because the two articles dealt with different matters. During the discussion in the Sixth Committee, several governments had stressed the need to take into account the functions which had to be performed by delegations to organs or to conferences. The Special Rapporteur had removed the reference to the nature of the functions, but had not dealt adequately with the question of the duration of the conference. He agreed with those who thought that article 95 should be redrafted to take account of the very serious points which had been raised by governments.

17. Mr. ROSENNE said that, if the Drafting Committee's revised text of article 26 (A/CN.4/L.168) was compared with the previous version, it would be seen that the Drafting Committee had changed the text quite substantially by shifting the emphasis from the sending State and its representatives to premises owned or leased by or on behalf of the sending State. That confirmed him in the opinion that the Drafting Committee should consider article 95 on its own merits and not assume *a priori* that it must be aligned with article 26. The problems relating to delegations and to permanent missions might be rather different.

18. Mr. KEARNEY said that one substantial difference between article 26 and article 95 was that the latter made no reference to the fact that the premises were owned or leased. Such a reference had been included both in the original article 26, modelled on the Vienna Convention on Diplomatic Relations,<sup>2</sup> and in the Drafting Committee's revised article 26, modelled on the Vienna Convention on Consular Relations.<sup>3</sup> Governments had appeared to be confused by the phrase "To the extent compatible with the nature and duration of the functions", which could be interpreted in either a liberal or a narrow sense. In view of the limited duration and

specific purpose of their stay in the host State, delegations did not usually buy or lease premises, but used hotels. The exemption, therefore, would be from a tax on occupancy of hotel premises. On the other hand, it could be said that delegations did not require exemption from taxation in order to perform the functions connected with a conference. If the purpose of article 95 was to exempt delegations from hotel taxes, that should be made clear in the text.

19. Sir Humphrey WALDOCK said he agreed with Mr. Rosenne that consistency in drafting was not the right criterion. The present language of article 95 was that adopted in article 24 of the Convention on Special Missions. Consequently, if the words "To the extent compatible with the nature and duration of the functions" were deleted, governments would say that the Commission followed the text of the Convention on Special Missions when it found that convenient for the purpose of granting maximum privileges and immunities, and abandoned that text when it seemed too restrictive. The difficulty was that the language of article 24 of the Convention on Special Missions was not easy to apply in practice. All the Commission could do was to ask the Drafting Committee to consider article 95, not from the point of view of consistency, but with a view to producing a text that would meet the practical needs of delegations to organs and conferences.

20. The CHAIRMAN suggested that article 95 should be referred to the Drafting Committee with the comments made during the discussion.

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

#### ARTICLE 96

21. The CHAIRMAN invited the Commission to consider article 96, on freedom of movement, to which the Special Rapporteur had proposed no change.

22.

#### *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 a 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.

23. Mr. YASSEEN said that the last phrase, "as is necessary for the performance of the functions of the delegation", called for the same comments as the corresponding article relating to permanent missions. The principle of freedom of movement was not based on the theory of function, but on other fundamental principles relating to human rights.

24. Mr. USTOR pointed out that article 96 was based on article 27 of the Draft Convention on Special Missions. It should be made clear in the commentary that the phrase beginning with the words "as is necessary" was not to be interpreted too strictly.

<sup>2</sup> United Nations, *Treaty Series*, vol. 500, p. 108, article 23.

<sup>3</sup> *Op. cit.*, vol. 596, p. 312, article 60.

<sup>4</sup> For resumption of the discussion see 1125th meeting, para. 77.

25. It should be noted that neither article 96 nor its model granted the same freedom of movement to the families of members of delegations as to the members themselves. Nor did article 96 make any reference to article 105, on the privileges and immunities of other persons. He suggested that the Commission should draw attention to that problem in its commentary.

26. The CHAIRMAN, speaking as a member of the Commission, said that the commentary to article 96 should be very carefully worded and should not place too much emphasis on the relationship between freedom of movement and human rights or function.

27. Speaking as Chairman, he said that, if there were no further comments, he would take it that the Commission was prepared to refer article 96 to the Drafting Committee for examination in the light of the discussion.

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

#### ARTICLE 97

28. The CHAIRMAN invited the Commission to consider article 97, on freedom of communication, to which the Special Rapporteur had proposed no change.

29.

#### *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.

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. The captain 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, 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.

30. Mr. USHAKOV said that, in considering article 97, the Drafting Committee should devote particular attention to appropriate use of the singular and plural and of the definite and indefinite articles before the word "delegation". In addition, it should revise the drafting of the second sentence of paragraph 1, in the light of the corresponding sentence of article 27, paragraph 1, of the Vienna Convention on Diplomatic Relations, which was clearer.

31. Mr. ELIAS observed that there was no dispute about the substance of article 97 and that the minor drafting problems which had been mentioned could be dealt with by the Drafting Committee.

32. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission was prepared to refer article 97 to the Drafting Committee.

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

#### ARTICLE 98

33. The CHAIRMAN invited the Commission to consider article 98, on personal inviolability, to which the Special Rapporteur had proposed no change.

34.

#### *Article 98*

##### *Personal inviolability*

The persons of the representatives in a 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.

35. Mr. USHAKOV said that the Drafting Committee should revise articles 98 and 99, using wording similar to that of articles 29 and 30 of the Vienna Convention on Diplomatic Relations, which referred to "The person of a diplomatic agent" and "The private residence of a diplomatic agent" in the singular.

36. Mr. ROSENNE drew attention to the Finnish Government's observation that the provisions of the article had gained additional significance as a result of the recent kidnappings of diplomats (A/CN.4/240/Add.2, section B.8). More incidents of that kind had occurred since the comment had been made, and he thought the Commission should take a firmer position on the matter.

<sup>5</sup> For resumption of the discussion see 1125th meeting, para. 81.

<sup>6</sup> For resumption of the discussion see 1125th meeting, para. 83.

37. Mr. ALBÓNICO proposed that, to that end, the words "all appropriate steps" should be replaced by the words "all necessary steps".

38. Sir Humphrey WALDOCK said that the present language of article 98 went back to the Vienna Convention on Diplomatic Relations; he hoped that the Commission would not, in search of absolute perfection, decide to adopt a different version. In his opinion nothing would be gained by replacing the word "appropriate" by some other word.

39. Mr. KEARNEY agreed with Sir Humphrey WaldoCK that it would be undesirable to change the present language of article 98. The use of such words as "all necessary steps" could be interpreted as placing an obligation on the host State to take extreme measures for the protection of delegations, for instance, by segregating them in barracks under armed guard. The word "appropriate", on the other hand, related both to the delegation and to the host State and recognized a balancing of their respective interests.

40. Mr. CASTRÉN pointed out that the Finnish Government had not proposed any amendment, but had merely stressed the importance of the principle of the inviolability of diplomats in general.

41. As to Mr. Albónico's proposal, there was little practical difference between the words "appropriate" and "necessary". The latter was stronger, but the former was sufficient.

42. The CHAIRMAN said that, if there were no objections, he would take it that the Commission was prepared to refer article 98 to the Drafting Committee for consideration in the light of the discussion.

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

#### ARTICLE 99

43. The CHAIRMAN invited the Commission to consider article 99, on the inviolability of the private accommodation, to which the Special Rapporteur had proposed no change.

44.

##### *Article 99*

##### *Inviolability of the private accommodation*

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

45. Mr. KEARNEY said that the concern which had been expressed about article 94<sup>8</sup> also applied to article 99.

46. Mr. ROSENNE noted that several governments had made comments on article 99, which had been sum-

marized by the Special Rapporteur (A/CN.4/241/Add.6). He wondered how the Drafting Committee dealt with an article on which comments had been made by governments, but not by members of the Commission.

47. Mr. USTOR said it was essential for the Commission to follow the suggestion made by Sir Humphrey WaldoCK that the commentary attached to each article should refer to the relevant government observations and, where the suggestions they contained were not followed, give the reasons.

48. Mr. ELIAS suggested that, when an article was referred to the Drafting Committee, the Committee should be invited to take government observations into account in addition to any comments made by members of the Commission.

49. Mr. ROSENNE found both those suggestions acceptable.

50. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 99 to the Drafting Committee for consideration in the light of the discussion and of the observations made by governments.

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

#### ARTICLE 100

51. The CHAIRMAN invited the Commission to consider article 100, to which the Special Rapporteur had proposed no change. Two alternative texts had been adopted at the first reading for submission to governments and the secretariats of international organizations.

52.

##### *Article 100*

##### *Immunity from jurisdiction*

##### ALTERNATIVE A

1. The representatives in a 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. They shall also enjoy immunity from the civil and administrative jurisdiction of the host State, 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 concerned holds it on behalf of the sending State for the purposes of the delegation;

(b) an action relating to succession in which the person concerned 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 concerned in the host State outside his official functions;

(d) an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person concerned.

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

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

<sup>7</sup> For resumption of the discussion see 1125th meeting, para. 92.

<sup>8</sup> See previous meeting, para. 95 *et seq.*

<sup>9</sup> For resumption of the discussion see 1125th meeting, para. 94.

staff except in the cases coming under sub-paragraphs (a), (b), (c) and (d) of paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person or his accommodation.

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

#### ALTERNATIVE B

1. The representative in a 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.

53. Mr. ELIAS said that the preferences expressed by the delegations which had spoken on article 100 in the Sixth Committee had been almost equally divided between alternatives A and B. Of the governments and secretariats of organizations which had submitted written comments, three favoured alternative A and ten alternative B. He hoped the Commission would now take a decision in favour of one alternative or the other, with such changes as it might consider appropriate.

54. Mr. USHAKOV said he maintained the preference for alternative A which he had expressed at the previous session. That alternative was based directly on other conventions drafted by the Commission, and he saw no compelling reason to depart from them. The main difference between alternatives A and B lay in paragraph 2. In alternative A the principle of immunity from the civil and administrative jurisdiction of the host State was expressly stated, but was subject to a number of exceptions. In alternative B, that principle was from the outset restricted to acts performed in the exercise of official functions, which made it much weaker.

55. Mr. CASTRÉN said he was even more strongly in favour of alternative B than he had been at the previous session. For since then about ten governments had expressed a preference for alternative B, while only two had opted for alternative A. Alternative B seemed to him to be closer to existing practice and more consistent with the conventions relating to international organizations. In view of the temporary character of delegations to organs and conferences, it was inadvisable to draw analogies with other missions. For delegations, alternative A was too liberal.

56. Mr. ROSENNE said that at the previous session he had favoured alternative A, but he now wished to reserve his position. He drew attention to paragraph (4) of the

commentary to article 100;<sup>10</sup> it was his understanding that the Drafting Committee had now decided to delete article 34 (Settlement of civil claims). If the Commission were to endorse that decision and decide not to include any provision on the settlement of civil claims, the whole question of article 100 would appear in a different light. He could therefore take no final position until the Drafting Committee had explained the implications of the omission of article 34 for the alternative texts.

57. Mr. KEARNEY said that, as at the previous session, he favoured alternative B. The Special Rapporteur's analysis of government comments showed a strong current of opinion in favour of that alternative. Several governments had expressed dissatisfaction even with that text because it, too, provided complete immunity from criminal jurisdiction; they had suggested that such immunity should be limited to acts performed in the exercise of official functions.

58. In the circumstances, alternative B could be regarded as a compromise between those who favoured extensive immunities and those who wished to adhere to the pattern of the existing instruments, such as the 1946 Convention on the Privileges and Immunities of the United Nations,<sup>11</sup> and it should be accepted on that basis.

59. Mr. USTOR said that the considerations which had led to the granting of a wide measure of immunity to diplomatic agents and permanent representatives argued in favour of alternative A in the case of delegates to organs and conferences. The element of representation inherent in their functions justified the thesis that such immunity should be granted to persons who represented their country temporarily at conferences or meetings.

60. Experience during the twenty-five years since the adoption of the 1946 and 1947 Conventions on privileges and immunities showed that host States had not tried to impose their jurisdiction in virtue of those Conventions. Any problems which had arisen had been settled by methods of quiet diplomacy. The inference was that it was not really in the interests of host States to impose their jurisdiction, whether civil or criminal, on members of delegations.

61. The written observations in favour of alternative B accounted for only one-tenth of the membership of the United Nations and thus provided little indication of the trends that would emerge at a conference with worldwide participation. His own feeling was that, at any such conference, the majority would favour complete immunity for delegates, not only because host States were in the minority, but also because in practice those States did not exercise their jurisdiction with respect to delegates.

62. Paragraph 2 (d) of alternative A excluded from the scope of the immunity from civil and administrative jurisdiction an action for damages arising out of a traffic

<sup>10</sup> See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

<sup>11</sup> United Nations, *Treaty Series*, vol. 1, p. 16.

accident outside official functions. For reasons of principle he could not approve of that exception, but if the majority of the Commission favoured its retention the wording should be brought into line with that of article 32, paragraph 1 (d) (A/CN.4/L.168).

63. Mr. ALCÍVAR said that, in the discussions in the Sixth Committee which had led to the adoption of the 1969 Convention on Special Missions, there had been a division of opinion between a group of delegations which wished to reduce the privileges of special missions to the consular level and the advocates of the Commission's draft, which had been based on the corresponding provisions of the 1961 Convention on Diplomatic Relations. A similar disagreement had arisen concerning delegations to organs and conferences. The fact was that there was no reason to deny delegates the benefit of full immunity from jurisdiction. They were representatives of their countries in exactly the same way as permanent representatives; the only difference was that their functions were temporary, and that did not justify any distinction in the matter of privileges and immunities.

64. As Mr. Ustor had pointed out, the total number of written replies received concerning alternatives A and B represented such a small fraction of the total membership of the United Nations that it could not provide any guidance as to the views which the majority of countries would take at a conference of plenipotentiaries. The fact that in the Sixth Committee there had been as many speakers in favour of alternative A as of alternative B was a useful indication, but a number of countries including his own, had not expressed any views. His own preference was for alternative A, and he felt certain it was the text which would be adopted by a conference of plenipotentiaries.

65. At the end of paragraph 2 (d) of alternative A, the words "and only if those damages are not covered by insurance" should be inserted, to make the text consistent with the wording adopted by the Drafting Committee for article 32, paragraph 1 (d) (A/CN.4/L.168).

66. Mr. REUTER said he was not clear about the practical differences between the two alternatives, but preferred alternative B. For although certain governments had not accepted or might not accept alternative B, and even though there were certain arguments in favour of alternative A, it must be noted that several host States with wide experience had expressed their preference for alternative B.

67. It would be dangerous for the Commission to follow those of its members who were speculating on the majority which one alternative or the other might obtain in the Sixth Committee or at a plenipotentiary conference. As in the past, the Commission should make every possible effort to reconcile the conflicting interests involved; otherwise some governments would gain the impression that their wishes had been ignored. The Commission was not a legislator; it prepared draft treaties for adoption not only by the majority of States, but also by the main groups of States.

68. Sir Humphrey WALDOCK said it was not easy to choose between the alternative texts. At the previous

session he had favoured alternative A, because its drafting was more specific and its provisions might therefore be less difficult to apply, but the choice depended very much on the final form given to article 45, on respect for the laws and regulations of the host State.

69. The observations of governments did not provide much guidance. Host States were inclined to favour alternative B or provisions even closer to those of the 1946 and 1947 Conventions on privileges and immunities; sending States on the whole seemed to prefer alternative A.

70. He now believed that either of the two texts could be made to work in practice, but if a vote were taken he would favour alternative B. It should be remembered that the host State was somewhat defenceless because of the absence of the *persona non grata* remedy, which would in any case not be very effective against a temporary representative. It would be disastrous if the Commission's draft should prove so unattractive to host States that they would reject it and insist on retaining what they regarded as the existing law. It should also be borne in mind that a host State was not altogether free in the matter. In his own country the Government was not free to give or refuse privileges and immunities; the matter was governed by local law, and special legislation would have to be introduced.

71. Mr. AGO said he agreed with much of what Sir Humphrey Waldock had said, but nevertheless preferred alternative A.

72. The Commission would certainly have to choose between the alternatives. The practical importance of the problem had perhaps been exaggerated, for members of a delegation did not often violate the civil law of the host State. The commonest cases were those relating to traffic accidents, which in alternative A were covered specifically by paragraph 2, sub-paragraph (d), so that it would be rather inelegant to restrict immunity from civil and administrative jurisdiction solely to acts performed in the exercise of official functions, as in alternative B. The exceptions specified in alternative A, paragraph 2, covered all the cases that might arise.

73. The CHAIRMAN asked the members of the Commission whether they were prepared to vote on the alternative texts.

74. Mr. ROSENNE said it was too early for a vote; the Drafting Committee should first be requested to examine the whole matter in the light of the observations of governments and of the present discussion.

75. He drew attention to the vote taken in the Sixth Committee on the corresponding provision of the draft on special missions,<sup>12</sup> which provided some indication of the kind of proposal likely to attract the support of a two-thirds majority at a conference of plenipotentiaries. The Commission should bear in mind that, in the

<sup>12</sup> See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 85, document A/7375, para. 236.



words of paragraph 7 of General Assembly resolution 2166 (XXI) convening the United Nations Conference on the Law of Treaties, its draft articles would serve as "the basic proposal for consideration" by a future diplomatic conference. The Commission should take great care in the formulation of such "a basic proposal", bearing in mind the conditions under which votes were usually taken at conferences.

76. Mr. ELIAS said that the Commission was faced with a dilemma. Even if it adopted a text which attracted the support of a two-thirds majority at a conference, its work would be in vain if the minority of countries which did not ratify the future convention included many host States; for the provisions of the draft were intended for application primarily by host States.

77. His own preference was for alternative A, but he agreed with Mr. Ustor and Mr. Alcívar that paragraph 2 (d) should be made consistent with the Drafting Committee's text for article 32, paragraph 1 (d). The language of alternative A was more precise than that of alternative B; paragraph 2 (b) of which, in particular, was unduly vague. However, he believed that in practical application either text would produce very much the same results.

78. He agreed with Mr. Rosenne that a vote should be taken only when the Drafting Committee had reported on the article.

79. Sir Humphrey WALDOCK said it would help him to take a final position if Mr. Kearney, from his experience in the matter, could explain the real differences in operation between alternatives A and B. It might well be that immunity from civil jurisdiction was more important to temporary representatives than to others, because even the initial steps of civil proceedings might impede the performance of their official duties during the short period involved.

80. He understood that the real difficulties which had arisen were those connected with contracts of lease or purchase entered into by representatives, which were not strictly within the exercise of official functions. The fact that small debts were sometimes left outstanding constituted a nuisance and an injustice.

81. Mr. KEARNEY said that some of the difficulties which had arisen were indeed connected with incidents involving unpaid hotel and other bills. Cases of that kind explained the attitude of certain host States to article 100. The problem was to determine the extent of the remedies available to local citizens in such cases. Immunity from civil jurisdiction meant that no action lay in the civil courts and it had resulted in losses to businesses in the host State.

82. Mr. ROSENNE said that from his own experience he could cite a case in which a sending State's basic freedom of appointment had been prejudiced by the institution of civil proceedings against a delegate. The person concerned had been known to be likely to be appointed sooner or later as a delegate to a meeting in a particular host State. A firm of lawyers acting for his

former spouse in a matrimonial dispute going back some ten years had been waiting for his arrival to institute legal proceedings. He had thus become involved in a lawsuit virtually upon his arrival and had been unable to perform his functions because his whole attention was taken up by the legal proceedings.

83. That example showed that the narrow formulation of privileges and immunities in the 1946 and 1947 Conventions might not be suitable for present-day circumstances.

84. Mr. USTOR said that the temporary character of a delegate's functions was an argument against making him liable to civil proceedings in the host country. In civil matters, the exercise of jurisdiction by the local courts constituted a useful remedy only if the defendant was likely to stay a long time in the host State. That remedy was of little use against a traveller who was spending only a short period in the country; the claimant would simply not have the time to take any really effective action in the civil courts.

85. Mr. ELIAS pointed out that the duty to respect the laws and regulations of the host State, prescribed in article 45, paragraph 1, applied not only to criminal law, but also to civil law. It was therefore of direct relevance to the provisions of article 100 in both alternative texts.

86. The example which had been given of rare cases of unpaid hotel and restaurant bills showed how difficult it was to find practical examples to illustrate the difference between alternative texts A and B. Hotel and restaurant owners, like other merchants, made allowance in their prices for the contingency of unpaid bills; that precaution was their only practical remedy in such cases.

87. Mr. USHAKOV said that he too doubted whether the cases mentioned by Mr. Elias occurred very frequently. In any event, misconduct of that kind was not relevant to the question of privileges and immunities. The purpose of privileges and immunities, as proclaimed in the preamble to the Vienna Conventions of 1961 and 1963 on diplomatic and consular relations, and in the preamble to the Convention on Special Missions, was not to benefit individuals, but to ensure the efficient performance of functions.

88. Mr. CASTRÉN said he still preferred alternative B, not only for reasons of principle but also for practical reasons. Alternative A did not enumerate all the possible exceptions to immunity from civil and administrative jurisdiction. The general formulation used in alternative B, on the other hand, restricted such immunity to acts performed in the exercise of official functions, without any exceptions.

The meeting rose at 12.45 p.m.