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Summary record of the 1109th meeting

Topic:
Representation of States in their relations with international organizations

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1109th MEETING

Friday, 28 May 1971, at 9.35 a.m.

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

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

[Item 1 of the agenda]

(continued)

ARTICLE 100 (Immunity from jurisdiction) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 100, on immunity from jurisdiction.

2. Mr. ALBÓNICO said that, subject to one reservation, he fully supported the idea of granting the persons concerned full immunity from the criminal jurisdiction of the host State, as provided in paragraph 1 of both alternative texts. His reservation related to traffic accidents.

3. The action for damages arising out of an accident caused by a vehicle used outside the official functions of the person concerned was an exception to the immunity from civil and administrative jurisdiction. That exception was specified in alternative A, paragraph 2 (d), but, of course, also followed from the exclusion of all non-official acts from the immunity under alternative B, paragraph 2 (a). In countries like his own, however, which did not recognize the concept of "absolute" or "objective" liability, an action for damages in respect of a traffic accident would succeed only if the fault of the driver was established. Under that system of subjective liability, the only way to prove that the driver had been at fault was to institute proceedings in a court dealing with traffic offences. In most countries that meant trial in a criminal court, even though the offence might only be a petty one.

4. He did not propose any amendment to article 100, paragraph 2, but suggested that the commentary should make it clear that, in the case of a claim for damages resulting from a traffic accident, the necessary proceedings could be instituted even if they were technically criminal proceedings.

5. As to exemption from civil and administrative jurisdiction in general, he supported the formulation in alternative B, which confined the scope of the exemption

to "acts performed in the exercise of their official functions". That limitation had its origin in the provisions of the 1946 and 1947 Conventions on privileges and immunities,¹ which had functioned adequately in practice and from which there was no need to depart.

6. In alternative A, paragraph 2, only one of the four exceptions provided for constituted a genuine exception: that in sub-paragraph (a), concerning an action relating to private immovable property. An action relating to succession, specified in sub-paragraph (b), would in any case fall within the jurisdiction of the courts of the country of last domicile of the deceased person *de cuius bonis agitur*. The actions referred to in sub-paragraphs (c) and (d) would have to be introduced in the courts of the country where the defendant had his domicile. In all those three cases, under the normal rules governing jurisdiction, the actions in question would not fall within the jurisdiction of the courts of the host State.

7. As to measures of execution, he preferred the system of alternative B, paragraph 2, which confined the exemption to cases affecting official functions. The system of alternative A, paragraph 4, on the other hand, allowed measures of execution only in the four cases mentioned in paragraph 2.

8. He could not accept the restriction imposed by the concluding words of alternative B, paragraph 2 (b), which allowed only such measures of execution as could be taken without infringing the inviolability of the person or his accommodation. In most cases, such a proviso would render inoperative the submission of the persons concerned to the civil and administrative jurisdiction of the host State in respect of acts not performed in the exercise of their official functions. The rule which allowed a civil claim to be made in the courts of the host State if the action arose from non-official acts was virtually nullified by the exemption of the persons concerned from measures of execution which infringed the inviolability of their accommodation; for in most cases it would be extremely difficult, if not impossible, to carry out such measures without entering the premises in question. He therefore suggested that, in alternative B, the language of paragraph 2 (b) should be brought into line with that of paragraph 2 (a).

9. Article 100 should be referred to the Drafting Committee, which should deal with the problems raised by both the alternative texts.

10. Mr. TAMMES observed that many governments had criticized the provisions of Part IV, mainly on the grounds that they were modelled too closely on the 1969 Convention on Special Missions,² to the neglect of the 1946 and 1947 Conventions on privileges and immunities and of the principle of functional necessity. The widespread uneasiness regarding the cumulative effect of many small extensions of privileges and immunities explained the preference expressed by a number of governments for alternative B as the text of article 100,

¹ United Nations, *Treaty Series*, vol. 1, p. 16 and vol. 33, p. 262.

² General Assembly resolution 2530 (XXIV), Annex.

although the practical differences between that text and alternative A were perhaps not very great.

11. He noted that there had been no real attack on the one major deviation from the existing conventions, namely, the system of complete immunity from criminal jurisdiction which it was proposed to introduce in place of the "functional necessity" system embodied in the conventions at present in force. The same applied to the optional waiver of immunity provided for in article 101, paragraph 1, in place of the duty to waive immunity laid down by such existing provisions as article IV, section 14, of the 1946 Convention on the Privileges and Immunities of the United Nations. Only the United Kingdom Government had expressly rejected the extension of the immunity from criminal jurisdiction (A/CN.4/240/Add.3, section B.12); the objections by France were more general in character (A/CN.4/240/Add.5). No other host State had made any reservation on the provisions of article 100, paragraph 1, which were identical in the two alternatives, nor had the Commission heard any opposition from members to that extension of the immunity from criminal jurisdiction.

12. The Drafting Committee should not find it difficult to bridge the remaining differences between the two alternative texts, particularly with regard to civil jurisdiction.

13. The Commission should realize, however, that the many small deviations from the existing system of immunity would lead to a somewhat confused legal situation which could last for some time. It was likely that some host State, but not others, would accept the new convention. In a host State where it was not in force, the previous conventions would apply to all delegations. In a host State where the new convention was in force, two régimes for delegations would exist side by side, one for sending States which had ratified the new convention and one for sending States which had not; and a sending State could have good reasons for not ratifying that convention if it happened also to be a host State. Only in those cases where the host State and all the sending States had ratified the new convention would the new régime apply in a uniform manner to all delegations.

14. Furthermore the legal position of the organization presented a separate problem in all those cases.

15. Of course, such problems arose in all cases of the application of successive treaties relating to the same subject-matter—a contingency well covered by the provisions of article 30 of the 1969 Vienna Convention on the Law of Treaties.³ Nevertheless a confusing situation would result, inasmuch as a protective régime intended to be uniform would in fact coexist with quite different legal provisions.

16. Mr. NAGENDRA SINGH said that he favoured alternative B, which in the view of most governments went far enough in the direction of extending immunity from jurisdiction; that text should be acceptable both

to host States and to sending States. The majority of States did not favour alternative A, which was based on the rather inappropriate model of the 1969 Convention on Special Missions.

17. The CHAIRMAN suggested that article 100 should be referred to the Drafting Committee for consideration in the light of the observations of governments and the views expressed during the discussion.

*It was so agreed.*⁴

ARTICLE 101

18. The CHAIRMAN invited the Commission to consider article 101, to which the Special Rapporteur had proposed no change.

19.

Article 101

Waiver of immunity

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

2. Waiver must always be express.

3. The initiation of proceedings by any of the persons referred to in paragraph 1 of this article shall preclude them from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

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

20. Mr. AGO said that the wording of article 101 should be more or less similar to that of the corresponding provisions in other parts of the draft and, like those provisions, should be accompanied by a recommendation similar to that in resolution II adopted on 14 April 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities.⁵

21. The CHAIRMAN suggested that article 101 should be referred to the Drafting Committee for consideration in the light of that remark and of the observations of governments.

*It was so agreed.*⁶

ARTICLE 102

22. The CHAIRMAN invited the Commission to consider article 102, to which the Special Rapporteur had proposed no change.

23.

Article 102

Exemption from dues and taxes

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

⁴ For resumption of the discussion see 1125th meeting, para. 97.

⁵ United Nations, *Treaty Series*, vol. 500, pp. 218-220.

⁶ For resumption of the discussion see 1126th meeting, para. 18.

³ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 293 (United Nations publication, Sales No.: E.70.V.5).

from all dues and taxes, personal or real, national, regional or municipal, except:

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

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

(c) estate, succession or inheritance duties levied by the host State, subject to the provisions of article 109;

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

(e) charges levied for specific services rendered;

(f) registration, court or record fees, mortgage dues and stamp duty, subject to the provisions of article 95.

24. Mr. KEARNEY noted that only four governments, all belonging to host States, had commented on article 102. They had expressed misgivings regarding the text of the article and had suggested a number of improvements.

25. The Government of Switzerland had suggested a rather complex formula which attempted to draw a distinction between, on the one hand, taxes to which persons were liable whether they were in the territory of the country concerned or not and, on the other hand, all other taxes, which were "generally based on the existence of a domicile or sojourn in the territory of a host country" (A/CN.4/240, section C). Such a distinction seemed likely to prove difficult to apply. The Government of the United States had expressed the view that it was impractical to exempt members of a delegation from sales taxes and other similar taxes, and that their brief stay in the host country and the small amounts involved did not warrant the significant administrative burden of arranging for the refund of such taxes (A/CN.4/240/Add.4, section B.11). The United Kingdom Government had not accepted the proposed departure from the provisions of the 1946 and 1947 Conventions on privileges and immunities (A/CN.4/240/Add.3, section B.11), which were more restrictive. The Government of Canada had expressed uneasiness about the practical difficulties that would arise for host States applying the provisions of article 102 (A/CN.4/240, section B.2).

26. Article 102 thus provided a further example of the dissatisfaction of host States with the draft, which they believed to impose excessive burdens on them. There was a reasonably good case for taking their misgivings into account.

27. It was worth noting that the classification in article 102, sub-paragraph (a)—that of indirect taxes normally incorporated in the price of goods or services—reflected the need to take into account the administrative inconvenience which total exemption would cause the host State. It would be very difficult to calculate the amounts to be refunded in respect of such taxes as turnover taxes, which were imposed at various stages in the manufacture, distribution and sale of a product, and for that reason the Vienna Conventions on diplomatic and consular relations provided for exclusion of such taxes. He suggested that the same approach should be

adopted for other cases as well, and that a general provision should be introduced into article 102 making tax exemption inapplicable to all direct or indirect taxes on the price of goods or services. Such a provision would not impose substantial burdens on delegations, but would save the host State considerable administrative costs.

28. Mr. ROSENNE observed that, when the 1946 and 1947 Conventions on privileges and immunities had been drawn up, sales tax had been relatively rare in the major host countries and, where it existed, had been levied at such a low rate that its impact was insignificant. The situation had now changed completely; sales tax had become a common form of taxation, and in some cases was quite heavy. That was the kind of development which the Commission should take into account.

29. Sales tax and similar taxes were imposed in a variety of ways. In some systems they were not incorporated in the price of goods or services, but were shown separately on the invoice; some printed invoices provided a special space for insertion of the amount of tax. Furthermore, meetings now lasted a comparatively long time: it could not be seriously claimed that a regular session of the General Assembly or a fourteen-week session of a commission constituted a brief stay for a representative in the host State.

30. Consequently, he was not convinced by the arguments put forward by some host States. He suggested that the commentary to article 102⁷ should be expanded. At present it merely indicated the source of the provisions of the article, which was modelled on article 33 of the 1969 Convention on Special Missions; it should explain that those provisions were intended to deal with the new phenomena of comparatively heavy sales taxes and relatively long conferences or sessions of organs.

31. Mr. USTOR said that the exemption from dues and taxes was not based on the principle of functional necessity. The functions of a delegation could be performed even if taxes were paid in the host State. The exemption was based on the equality of States, a corollary of which was that States were not expected to contribute to each other's budgets. Any tax imposed on a servant of the sending State would ultimately come from his salary and hence from the budget of that State. The considerations which had led the Commission to adopt as broad as possible a system of tax exemption for permanent missions and permanent observer missions should lead it to adopt the same system for delegations.

32. It was true that a host State whose indirect taxes were normally incorporated in the price of goods or services would find itself in a better position than a host State which did not have such a system. But that disparity of situations did not lead him to the conclusion reached by Mr. Kearney. His conclusion was that some means should be found whereby taxes incorporated in the price of goods or services could be refunded to delegations. No means of doing that had yet been devised but in the meantime delegations should be exempted

⁷ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

from all taxes which were clearly identifiable and whose imposition would be contrary to the principle of the equality of States. That applied particularly to delegations to conferences and meetings of organs, because the host State already derived an indirect financial advantage from their presence. There should therefore be no reduction in the system of tax exemption.

33. Sir Humphrey WALDOCK said that, although he felt some sympathy for the position of the host States, he did not think it would be appropriate to make any departure from the tax exemption system embodied in the 1969 Convention on Special Missions. In practice there might be little to be gained from adopting a more restrictive system, since in many cases a delegate might be able to obtain the duty-free commodities he required through his permanent mission.

34. Mr. EUSTATHIADES said that he was against exempting delegations to organs and to conferences from dues and taxes, as he had been in the case of special missions. Emmerich de Vattel, in his day, had already questioned whether the payment of taxes could prevent a diplomat from performing his functions properly. That comment was still valid for the delegations under consideration, because of their temporary nature. In view of the precedent of special missions, however, he would not vote against article 102, but he supported those governments which had suggested that the Commission should at least take a more restrictive position.

35. Mr. BARTOŠ said that the commodities mentioned by Sir Humphrey Waldock caused difficulties even for permanent diplomatic missions. Some governments had made regulations limiting the quantities of goods which such missions could import duty-free, but with an exception for official receptions. The Government of the United Kingdom had gone so far as to tax—rightly, in his opinion—persons who received such goods from diplomatic missions as gifts. It should be remembered that in practice such goods were very often procured for special missions, permanent observer missions or delegations through permanent diplomatic missions. The question of exemption from dues and taxes thus had practical effects which were quite general. A solution which would apply both to permanent missions and to temporary missions and delegations should be found, even if host States had to accept some fiscal sacrifices.

36. Mr. CASTAÑEDA said that in matters of tax exemption practical considerations usually prevailed over questions of principle. Exemption usually depended on the ease with which it could be applied. It was simply because of the difficulty, or in some cases the impossibility, of applying exemption in practice that privileged persons had to bear certain taxes. Those practical considerations were the reason why exemption from such taxes as import duties was applied very liberally by host States. At the opposite extreme, he did not see how a host State could be expected to set up administrative machinery to exempt two or three thousand delegates, for the duration of a conference, from the application of a tax which was incorporated in the price of goods or services.

37. At the same time, increasingly high sales taxes were imposing heavy burdens on delegates. Some countries levied a heavy tax on hotel bills, which was not paid by permanent representatives, but was paid by delegates to conferences. He believed that complete exemption was justified in those cases.

38. The CHAIRMAN suggested that article 102 should be referred to the Drafting Committee for consideration in the light of the observations of governments and the views expressed during the discussion.

*It was so agreed.**

ARTICLE 103

39. The CHAIRMAN invited the Commission to consider article 103, to which the Special Rapporteur had proposed no change.

40.

Article 103

Exemption from customs duties and inspection

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

(a) articles for the official use of a delegation to an organ or to a conference;

(b) articles for the personal use of the representatives in the delegation and the members of its diplomatic staff.

2. The personal baggage of the representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. In such cases, inspection shall be conducted only in the presence of the person concerned or of his authorized representative.

41. Mr. KEARNEY noted that the text of article 103 differed from that of the corresponding article 38 in Part II. The reason for the discrepancy was that the two articles were based on different sources. He suggested that the two texts should be harmonized; it was undesirable to use different language for similar provisions. Of course, it was possible that both articles would ultimately be merged in a more general provision.

42. Mr. CASTRÉN said he agreed with Mr. Kearney and the Government of the United States (A/CN.4/240/Add.4, section B.11) that the wording of articles 103 and 38 should be made uniform. Article 103 was the better drafted and should be used as the model.

43. Mr. ALBÓNICO supported the Canadian Government's suggestion for shortening the article (A/CN.4/240, section B.2); the simpler formulation suggested would be more in keeping with the general spirit of the 1946 and 1947 Conventions on privileges and immunities.

* For resumption of the discussion see 1126th meeting, para. 66.

44. Mr. ROSENNE said he noted that the Drafting Committee had adopted article 38 substantially in its original form (A/CN.4/L.168). It was difficult to see at what stage the language of articles 38 and 103 would be harmonized.

45. Sir Humphrey WALDOCK said that articles 38 and 103 would probably be replaced by a more general provision. In any case, the Drafting Committee would adopt the more suitable text.

46. The CHAIRMAN suggested that article 103 should be referred to the Drafting Committee for consideration in the light of the observations of governments and the views expressed by members.

It was so agreed.⁹

ARTICLE 104

47. The CHAIRMAN invited the Commission to consider article 104, to which the Special Rapporteur had proposed no change.

48.

Article 104

Exemption from social security legislation, personal services and laws concerning acquisition of nationality

The provisions of articles 35, 37 and 39 shall apply also in the case of a delegation to an organ or to a conference.

49. Mr. USHAKOV observed that the article was drafted in the form of references to articles 35, 37 and 39. He agreed with Mr. Ago that cross references should not be made from Part IV to Part II of the draft. In the case under discussion it was not self-evident that the persons referred to in article 104 could be assimilated to those mentioned in articles 35, 37 and 39. For instance, it was hard to see how the members of a delegation to an organ or to a conference could all be put on the same footing as the permanent representative referred to in article 35.

50. When it took up article 105, the Commission would find in paragraph 1 a reference to article 104, which in turn referred to articles 35, 37 and 39. A double reference of that sort marred all clarity and the Drafting Committee should try to avoid it.

51. Mr. ELIAS pointed out that the same problems arose in connexion with article 92. The Drafting Committee should apply the same solution to both articles.

52. Mr. ALBÓNICO endorsed that remark.

53. Mr. BARTOŠ said he agreed with Mr. Ushakov's comments. Drafting by reference could be used only for situations which were identical or closely similar and had to be handled in exactly the same way. In the case in point, only the head of a delegation to an organ or to a conference could be assimilated to the head of a permanent mission; the other members of the delegation

could not. That assimilation could not be extended to the representatives on the delegation, for although they were in a special category they were not part of the diplomatic staff of the delegation and consequently could not be given the same treatment as the diplomatic staff of the permanent mission; but they should have a special, higher position. Hence each of the situations covered by articles 35, 37 and 39 should be dealt with in a separate article in Part IV of the draft.

54. Mr. CASTRÉN said he agreed with much of what Mr. Ushakov had said and considered that the drafting of article 104 could be improved. It was clear, however, that members of the diplomatic staff of a delegation to an organ or conference could be assimilated to members of the diplomatic staff of a permanent mission, and that the same should apply to persons of higher rank.

55. With regard to the cross-reference in article 105, it would suffice to amend article 104 so as to refer not to "the case of a delegation to an organ or to a conference", but to "the case of representatives in a delegation to an organ or to a conference and members of its diplomatic staff".

56. Mr. AGO said he still thought that Part IV of the draft, and the part which might be devoted to observer delegations to organs and to conferences, should be quite separate from the parts relating to permanent missions and permanent observer missions. He supported Mr. Rosenne's idea of drafting two separate conventions or a single convention divided into two parts, so as to avoid the cross-referencing which marred the present draft. In the case of delegations it was not feasible merely to refer to provisions dealing with such matters as exemption from social security legislation and the private staff. Since delegations were temporary, the terms used for permanent missions were not suitable for them. They should be covered by separate, simplified articles.

57. Sir Humphrey WALDOCK said that the Drafting Committee would deal with all those questions. His own feeling was that the draft might ultimately be divided into two parts, rather than into two separate draft conventions. The first part would deal with permanent missions and permanent observer missions and the second with delegations to organs and conferences. Some articles were likely to be suitable for inclusion in a general section applicable to both parts of the draft; other articles could not be dealt with in that way although they were similar in subject-matter.

58. In the present case, the solution should be based on the corresponding provisions of the 1969 Convention on Special Missions. In many countries social security legislation, for example, applied immediately and directly, and it would be necessary to state what exemption was appropriate for delegates.

59. Mr. AGO associated himself with Sir Humphrey Waldock's views. Generally speaking, for the part of the draft concerning delegations to organs and conferences, the text of the Convention on Special Missions was a better model than the other parts of the present draft.

⁹ For resumption of the discussion see 1126th meeting, para. 76.

60. The CHAIRMAN suggested that article 104 should be referred to the Drafting Committee for consideration in the light of the observations of governments and the views expressed during the discussion.

*It was so agreed.*¹⁰

ARTICLE 105

61. The CHAIRMAN invited the Commission to consider article 105 to which the Special Rapporteur had proposed no change.

62.

Article 105

Privileges and immunities of other persons

1. If representatives in a delegation to an organ or to a conference or members of its diplomatic staff are accompanied by members of their families, the latter shall enjoy the privileges and immunities specified in articles 98, 99, 100, 101, 102, 103 and 104 provided they are not nationals of or permanently resident in the host State.

2. Members of the administrative and technical staff of the delegation shall enjoy the privileges and immunities specified in articles 98, 99, 100, 101, 102 and 104, except that the immunities specified in paragraph 2 of article 100 from the civil and administrative jurisdiction of the host State, shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges mentioned in paragraph 1 of article 103 in respect of articles imported at the time of their entry into the territory of the host State to attend the meeting of the organ or conference. Members of their families who accompany them and who are not nationals of or permanently resident in the host State shall enjoy the same privileges and immunities.

3. Members of the service staff of the delegation shall enjoy immunity from the jurisdiction of the host State in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment, and exemption from social security legislation as provided in article 104.

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

63. Mr. EUSTATHIADES said he did not see why the members of the family of a representative to an international conference should enjoy all the privileges and immunities enumerated in the article.

64. Mr. KEARNEY said that article 105 would triple the administrative burdens on the host State with respect to the tax problems he had raised in connexion with article 102; in his opinion there was no justifiable basis for it.

65. The CHAIRMAN, speaking as a member of the Commission, said that the Drafting Committee should

¹⁰ For resumption of the discussion see 1126th meeting, para. 81.

replace the words "other persons", in the title, by something more appropriate.

66. Speaking as Chairman he said that, if there was no objection, he would take it that the Commission was prepared to refer article 105 to the Drafting Committee.

*It was so agreed.*¹¹

ARTICLE 106

67. The CHAIRMAN invited the Commission to consider article 106, to which the Special Rapporteur had proposed no change.

68.

Article 106

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

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

69. The CHAIRMAN said that, if there was no objection, he would take it that the Commission was prepared to refer article 106 to the Drafting Committee.

*It was so agreed.*¹²

ARTICLE 107

70. The CHAIRMAN invited the Commission to consider article 107, to which the Special Rapporteur had proposed no change.

71.

Article 107

Privileges and immunities in case of multiple functions

When members of a permanent diplomatic mission, a consular post, a permanent mission or a permanent observer mission, in the host State, are included in a delegation to an organ or to a conference, their privileges and immunities as members of their respective missions or consular post shall not be affected.

72. Mr. ROSENNE said that article 107 was an important provision which should be generalized and made applicable to the draft articles as a whole.

73. The CHAIRMAN suggested that article 107 should be referred to the Drafting Committee for consideration in the light of the observations of governments and of Mr. Rosenne's comment.

*It was so agreed.*¹³

ARTICLE 108

74. The CHAIRMAN invited the Commission to consider article 108. He drew attention to the drafting change recommended by the Special Rapporteur, which consisted in the deletion of the words "continue to" at the end of paragraph 2 (A/CN.4/241/Add.6).

¹¹ For resumption of the discussion see 1126th meeting, para. 83.

¹² For resumption of the discussion see 1126th meeting, para. 92.

¹³ For resumption of the discussion see 1126th meeting, para. 93.

75.

*Article 108**Duration of privileges and immunities*

1. Every person entitled to privileges and immunities under the provisions of this part shall enjoy such privileges and immunities from the moment he enters the territory of the host State in connexion with the meeting of an organ or conference or, if he is already in its territory, from the moment when his appointment is notified to the host State by the Organization, by the conference or by the sending State.

2. When the functions of a person entitled to privileges and immunities under this part have come to an end, the privileges and immunities of such person shall normally cease at the moment when he leaves the territory of the host State, or on the expiry of a reasonable period in which to do so, but shall subsist until that time. However, with respect to acts performed by such a person in the exercise of his functions as a member of a delegation to an organ or to a conference, immunity shall continue to subsist.

3. In the event of the death of a member of a delegation, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the territory of the host State.

76. Mr. ROSENNE suggested that the Drafting Committee should give sympathetic consideration to the comment made by the Government of Switzerland (A/CN.4/240, section C).

77. Mr. EUSTATHIADES said that in considering article 108 the Drafting Committee might take into account the wording it had given to article 42 (A/CN.4/L.168).

78. The CHAIRMAN suggested that article 108 should be referred to the Drafting Committee for consideration in the light of the Special Rapporteur's report (A/CN.4/241/Add.6) and of the comments made in the Commission.

*It was so agreed.*¹⁴

ARTICLE 109

79. The CHAIRMAN invited the Commission to consider article 109. He drew attention to the change in the wording of paragraph 2 proposed by the Special Rapporteur in his report (A/CN.4/241/Add.6).

80.

*Article 109**Property of a member of a delegation or of a member of his family in the event of death*

1. In the event of the death of a member of a delegation to an organ or to a conference or of a member of his family accompanying him, if the deceased was not a national of or permanently resident in the host State, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death.

2. Estate, succession and inheritance duties shall not be levied on movable property which is in the host State solely because

of the presence there of the deceased as a member of the delegation or of the family of a member of the delegation.

81. The CHAIRMAN suggested that if there were no comments, article 109 should be referred to the Drafting Committee.

*It was so agreed.*¹⁵

ARTICLE 110

82. The CHAIRMAN invited the Commission to consider article 110, to which the Special Rapporteur had proposed no change.

83.

*Article 110**Transit through the territory of a third State*

1. If a representative in a delegation to an organ or to a conference or a member of its diplomatic staff passes through or is in the territory of a third State while proceeding to take up his function or returning to the sending State, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the person referred to in this paragraph, whether travelling with him or travelling separately to join him or to return to their country.

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

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as the host State is bound to accord under the present part. Subject to the provisions of paragraph 4 of this article, they shall accord to the couriers and bags of the delegation in transit the same inviolability and protection as the host State is bound to accord under the present part.

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

5. The obligations of third States under paragraph 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to the official communications and the bags of the delegation, when the use of the territory of the third State is due to *force majeure*.

84. Mr. BARTOŠ said that, for States which did not become parties to the convention resulting from the draft articles, he thought the subject-matter of article 110 would be governed by customary law, so that even in that case the immunities necessary for the regular exercise of the international functions of delegations would be assured.

85. Mr. USTOR said it might be best to deal with the subject-matter of article 110 in a general article applying to all the parts of the draft.

¹⁴ For resumption of the discussion see 1126th meeting, para. 95.

¹⁵ Article 109 was subsequently combined with article 108; see 1126th meeting, para. 95.

86. The CHAIRMAN suggested that article 110 should be referred to the Drafting Committee for consideration in the light of the comments made and of the Special Rapporteur's report (A/CN.4/241/Add.6).

*It was so agreed.*¹⁶

ARTICLE 111

87. The CHAIRMAN invited the Commission to consider article 111 on non-discrimination. He drew attention to the drafting change recommended by the Special Rapporteur, which consisted in inserting the word "as" before the words "between States" (A/CN.4/241/Add.6).

88.

Article 111

Non-discrimination

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

89. Mr. ROSENNE said he would hesitate to say that article 111 was an article which could be generalized. With regard to the drafting change proposed by the Special Rapporteur, he questioned whether the word "as" was necessary in the phrase "as between States".

90. Sir Humphrey WALDOCK said that the word "as" had been included in the corresponding articles of all previous conventions.

91. Mr. ALCÍVAR said he could accept article 111 in principle, but the Drafting Committee should try to improve the text.

92. The CHAIRMAN suggested that article 111 should be referred to the Drafting Committee for consideration in the light of the comments made and the Special Rapporteur's report (A/CN.4/241/Add.6).

*It was so agreed.*¹⁷

ARTICLE 112

93. The CHAIRMAN invited the Commission to consider article 112, to which the Special Rapporteur had proposed no change.

94.

Article 112

Respect for the laws and regulations of the host State

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

2. In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from criminal jurisdiction, the sending State shall, unless it waives this immunity, recall the person concerned, terminate his functions with the delegation or secure his departure, as appropriate.

¹⁶ For resumption of the discussion see 1127th meeting, para. 2.

¹⁷ For resumption of the discussion see 1127th meeting, para. 18.

This provision shall not apply in the case of any act that the person concerned performed in carrying out the functions of the delegation in the premises where the organ or conference is meeting or the premises of the delegation.

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

95. Mr. AGO pointed out that the Drafting Committee had revised the text of the corresponding article on permanent missions, article 45 (A/CN.4/L.168/Add.1), which could therefore serve as a model for article 112, provided that the Commission agreed with the Drafting Committee's conclusions. The Commission might therefore defer consideration of article 112 until it had examined the revised text of article 45.

96. Mr. USHAKOV agreed.

97. He doubted whether paragraph 2 was applicable to conferences, which were temporary and were held only from time to time. The Drafting Committee should try to find a way of excluding conferences from the field of application of paragraph 2.

98. Mr. ROSENNE proposed that the Commission should defer consideration of article 112 until it had seen the revised text of article 45.

99. Mr. CASTRÉN said that the Drafting Committee had simply inserted in paragraph 2 of article 45 a reference to the duty, stated in paragraph 1, not to interfere in the internal affairs of the host State. In case of a grave breach of that duty, the measures to be applied were those provided for in paragraph 2. If paragraph 1 of article 112 was retained, paragraph 2 would have to be worded in the form proposed by the Drafting Committee for article 45.

100. Mr. BARTOŠ said that the Commission could either refer article 112 to the Drafting Committee for alignment with article 45, or wait until it had considered article 45 in its revised form.

101. With regard to Mr. Ushakov's comment on paragraph 2, the calendar of conferences of the United Nations clearly showed that international meetings were numerous and were held in many different States, not only in three or four host States which were always the same.

102. Mr. ELIAS observed that paragraph 2 was just as essential in article 112 as in the article on permanent missions.

103. He could not support Mr. Rosenne's proposal; article 112 should be referred to the Drafting Committee on the understanding that the Commission would have an opportunity of discussing it later.

104. Mr. ALCÍVAR reserved his position on article 112; he had doubts about both that article and article 45.

105. The CHAIRMAN suggested that, in view of Mr. Rosenne's proposal and the suggestion made by Mr. Elias, the Commission should refer article 112 to

the Drafting Committee, leaving it free either to revise the article on the model of the revised article 45 or to defer action until the Commission had considered that text.

*It was so agreed.*¹⁸

ARTICLE 113

106. The CHAIRMAN invited the Commission to consider article 113. He drew attention to the amended title "Professional or commercial activity" proposed by the Special Rapporteur (A/CN.4/241/Add.6).

107.

Article 113

Professional activity

The provisions of article 46 shall apply also in the case of a delegation to an organ or to a conference.

108. Mr. USHAKOV said it would be better to draft a complete article expressly, instead of merely referring to article 46.

109. Mr. EUSTATHIADES questioned whether there was any real justification for prohibiting professional or commercial activity by a representative to an international conference, since someone in a profession or in commerce might be the most appropriate person to represent a State and his functions as a representative would necessarily be of brief duration.

110. Mr. ROSENNE said that the Drafting Committee should examine article 113 very closely, because some serious problems arose, not only with respect to permanent missions, but also with respect to delegations to organs or conferences, in cases where the members were nationals of, or permanent residents in, the host State. The relationship between articles 41 and 45 presented a similar problem.

111. Mr. ALCÍVAR said he had grave doubts about article 113. Many governments including his own, sometimes appointed nationals of their countries engaged in business and resident in the host State to represent them in organs or at conferences.

112. Mr. CASTRÉN observed that the Government of Finland had formulated the same objection as Mr. Eustathiades (A/CN.4/240/Add.2, section B.8). However, the prohibition was designed to prevent the abuse of privileges and immunities for professional or commercial ends. The article was therefore justified and should be retained.

113. Mr. EUSTATHIADES said he still thought it was going too far to prohibit all professional activity by a delegate to a conference; such a provision could, in particular, be a hindrance to States which had difficulty in finding suitable representatives.

114. Mr. REUTER said he agreed with Mr. Eustathiades. If a great musician, for example, was a member

of a delegation to a conference sponsored by UNESCO, there would seem to be no justification for prohibiting him from giving a concert in the host country. Of course, privileges and immunities could not be invoked for the purposes of carrying on a professional activity, but an absolute ban on such activity raised a problem of substance which required closer consideration.

115. Mr. USHAKOV said that article 113, like article 46, stated a general principle to which exceptions could be made, for example, in the case mentioned by Mr. Reuter. The Commission should therefore state the principle in the draft articles and give explanations in the commentary.

116. Mr. BARTOŠ reminded the Commission that, when considering the draft articles on diplomatic intercourse and immunities, it had taken the view that only activities practised without the authorization of the host State should be prohibited; but the United Nations Conference on Diplomatic Intercourse and Immunities had not maintained that reservation.¹⁹ Perhaps it should be revived; for the principle set out in articles 46 and 113 was intended to protect the interests of the host State, and it seemed logical to allow that State to be the sole judge of those interests.

117. Mr. ROSENNE questioned whether the situation of delegations to organs and conferences was so similar to that of permanent missions and permanent observer missions as to justify the application of the legal rule which was laid down in categorical terms in article 46. Members of delegations did not usually engage in outside activities which might bring them pecuniary rewards and which might therefore be taxable by the host State. Persons permanently resident in the host State would have extremely limited privileges and immunities under article 106; hence the question arose whether article 113 was really necessary at all.

118. Mr. ALCÍVAR said he was still concerned about the article, because the governments of developing countries with limited resources frequently employed nationals of their countries who were resident in the host State to represent them in organs and at conferences. Such persons should not enjoy the same privileges and immunities as members of permanent missions, but he thought the Drafting Committee should either take their situation into account or delete article 113 altogether.

119. Mr. EUSTATHIADES observed that the question he had raised could be of some importance in several respects, as other members of the Commission had pointed out. True, it could be explained in the commentary that a distinction should be made between persons permanently resident in the host State and non-residents, between persons who had been practising a professional activity in the host State before the conference and those practising such an activity only during the conference, and so on, but such explanations would not have the same force as an article.

¹⁸ For resumption of the discussion see 1127th meeting, para. 20.

¹⁹ United Nations, *Treaty Series*, vol. 500, p. 120, article 42.

120. Mr. AGO said that the Drafting Committee would have to be very cautious. There was a difference between the head of a permanent mission, who was usually a diplomat, and the members of a delegation, who might be experts such as doctors or lawyers; it would be inadvisable to limit their normal exercise of their profession merely because they were serving as members of a delegation.

121. Sir Humphrey WALDOCK said that the Commission was confronted with the usual difficulty of drafting an article on the basis of analogous provisions in texts which related primarily to diplomatic personnel. Nationals of the host State, or nationals of the sending State permanently resident in the host State, who were employed at meetings of organs or at conferences, could not normally be regarded as performing a representative function. The question did arise, however, whether the employment by a sending State of experts who were nationals of the host State might not lead to some embarrassment. In his opinion, that was a problem which should be left to the good sense of the Drafting Committee.

122. Mr. KEARNEY noted that reference had been made to the problem which might arise out of the employment of experts at meetings of organs or at conferences. In his own country such persons, who might be either business, technical or medical experts, were generally referred to as "advisers". He was not sure, however, whether they should really be regarded as diplomatic staff.

123. Mr. AGO said there was all the more reason for caution precisely because, under article 78 on the use of terms, members of the delegation, "including experts and advisers", were classed as members of the diplomatic staff.

124. Mr. KEARNEY pointed out that article 1, subparagraph (h), defined members of the diplomatic staff as "members of the staff of the permanent mission, including experts and advisers, who have diplomatic status". He wondered what was the status of advisers who were members of delegations to organs or to conferences.

125. Mr. ROSENNE said that many such persons would probably be shocked at the idea that they did not enjoy diplomatic status; in practice, distinguished individuals such as Nobel prize winners had been included in delegations.

126. Mr. ELIAS said that, if third secretaries and clerks in diplomatic missions enjoyed diplomatic status, it would appear strange if Nobel prize winners were reduced to some inferior status.

127. Sir Humphrey WALDOCK said that the Commission would either have to adhere to the present text of article 113, because it was hallowed by tradition, or else try to take into account the special circumstances which might exist in particular cases.

128. Mr. ROSENNE said that, from a purely quantitative point of view, there were probably far more temporary delegations to organs and to conferences than there were members of the special missions contemplated in the 1969 Convention on Special Missions. So while the Commission could always take that Convention as a model for its draft, it would be justified in departing from that model when the analysis of a particular situation showed that no real analogy existed.

129. Mr. USTOR said he saw much merit in the idea that persons sent abroad to represent their country should devote their full time to the purpose for which they had been sent. He would prefer to follow the previous instruments, which embodied that principle, though some mention might be made in the commentary of the need to apply it in a liberal way.

130. Mr. AGO stressed that, in the matter under discussion, the analogy between delegations to an organ or a conference and special missions was not so close as in certain other respects. He did not see why, for example, a great surgeon who was a member of a delegation and whose visit to the host State was awaited in medical circles, should be debarred from performing an operation on the ground that it was against a rule of the present draft. It was absurd to state a principle based on purely formal criteria which had no connexion with reality.

131. Mr. BARTOŠ reminded the Commission that, originally, the sole purpose of the prohibition had been to prevent unfair commercial competition. But there was no need for the Commission to go out of its way to impose prohibitions which, in the last analysis, depended on the host State, which alone was competent to protect its own interests. It would be wiser to revert to the Commission's original idea and insert in the text of the article the words "without the authorization of the host State".

132. Referring to a comment by Mr. Ustor, he said that neither in judicial decisions nor in comparative law were authors' royalties treated as income deriving from a professional activity. It was possible to be an author without making a profession of writing.

133. The CHAIRMAN said that, if there were no objections, he would take it that the Commission was prepared to refer article 113 to the Drafting Committee for consideration in light of the discussion.

It was so agreed.²⁰

The meeting rose at 11.45 a.m.

²⁰ For resumption of the discussion see 1127th meeting, para. 18.