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*Summary records
of the twenty-third session*

26 April—30 July 1971

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INTRODUCTORY NOTE

The summary records in this volume include the corrections to the provisional summary records requested by members of the Commission and such editorial changes as were considered necessary.

The symbols appearing in the text, consisting of letters combined with figures, serve to identify United Nations documents.

The Special Rapporteur's reports discussed at the session and certain other documents, including the Commission's report to the General Assembly, are printed in volume II of this *Yearbook*.

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MEMBERS OF THE COMMISSION

<i>Name</i>	<i>Country of nationality</i>	<i>Name</i>	<i>Country of nationality</i>
Mr. Roberto AGO	Italy	Mr. Paul REUTER	France
Mr. Fernando ALBÓNICO	Chile	Mr. Shabtai ROSENNE	Israel
Mr. Gonzalo ALCÍVAR	Ecuador	Mr. José María RUDA	Argentina
Mr. Milan BARTOŠ	Yugoslavia	Mr. José SETTE CÂMARA	Brazil
Mr. Mohammed BEDJAOUI	Algeria	Mr. Abdul Hakim TABIBI	Afghanistan
Mr. Jorge CASTAÑEDA	Mexico	Mr. Arnold J. P. TAMMES	Netherlands
Mr. Erik CASTRÉN	Finland	Mr. Doudou THIAM	Senegal
Mr. Abdullah EL-ERIAN	United Arab Republic	Mr. Senjin TSURUOKA	Japan
Mr. Taslim O. ELIAS	Nigeria	Mr. Nikolai USHAKOV	Union of Soviet Socialist Republics
Mr. Constantin Th. EUSTATHIADES	Greece	Mr. Endre USTOR	Hungary
Mr. Richard D. KEARNEY	United States of America	Sir Humphrey WALDOCK	United Kingdom of Great Britain and Northern Ireland
Mr. NAGENDRA SINGH	India	Mr. Mustafa Kamil YASSEEN	Iraq
Mr. Alfred RAMANGASOAVINA	Madagascar		

OFFICERS

<i>Chairman:</i>	Mr. Senjin TSURUOKA
<i>First Vice-Chairman:</i>	Mr. Roberto AGO
<i>Second Vice-Chairman:</i>	Mr. Milan BARTOŠ
<i>Rapporteur:</i>	Mr. José SETTE CÂMARA

Mr. Anatoly P. Movchan, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

AGENDA

The Commission adopted the following agenda at its 1087th meeting, held on 26 April 1971:

1. Relations between States and international organizations
2. Succession of States:
 - (a) Succession in respect of treaties
 - (b) Succession in respect of matters other than treaties
3. State responsibility
4. Most-favoured-nation clause
5. Question of treaties concluded between States and international organizations or between two or more international organizations
6. General Assembly resolution 1669 (XXV) on progressive development and codification of the rules of international law relating to international water-courses
7. Review of the Commission's long-term programme of work
8. Organization of future work
9. Co-operation with other bodies
10. Date and place of the twenty-fourth session
11. Other business

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE TWENTY-THIRD SESSION

Held at Geneva from 26 April to 30 July 1971

1087th MEETING

Monday, 26 April 1971, at 3.25 p.m.

Chairman: Mr. Taslim O. ELIAS
later: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Opening of the Session

1. The CHAIRMAN, after declaring the twenty-third session of the International Law Commission open, said that in accordance with the decision taken at the last session¹ he had represented the Commission at the twenty-fifth session of the General Assembly, where he had participated in the work of the Sixth Committee from 28 September till 12 October 1970. After he had given it a fairly detailed account of the Commission's report, the Sixth Committee had begun its debate on 1 October 1970.

2. The representative of Jamaica had observed that, while it was usual for the Committee to take the International Law Commission's report as the first item on its agenda, it would be preferable in future to take that item later, in order to allow members of the Committee more time to study the report before its introduction by the Chairman of the Commission. The Committee had thereupon considered, first, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

3. With regard to the topic of relations between States and international organizations, the Commission's draft articles² had received general approval. A number of specific suggestions had, however, been made, one being that, as promised in the Commission's report,³ an effort

should be made to reduce the length of the draft considerably by adopting the device of drafting by reference. Some members had expressed a preference for a code rather than a convention.

4. Most members had criticized articles 52 and 53 as being too restrictive. Articles 82 and 83 had been criticized on the ground that they did not sufficiently reflect existing practice and agreements. Some members had held that article 94 placed unacceptable obligations on the host State, while others had considered that the provision in article 112 giving the host State the right to demand the recall of a person violating its criminal law was not entirely satisfactory.

5. Some representatives, notably those of the United Kingdom and France, had observed that articles 78 to 116, on delegations of States to organs of international organizations and to conferences, did not sufficiently reflect existing practice and agreements, from which the Commission appeared to have departed by adopting provisions based on those of the Convention on Special Missions; in their view, privileges and immunities should be limited rather than extended, and be based solely on functional need.

6. With regard to the two alternatives proposed by the Commission for article 100, representatives appeared to be almost equally divided in their preferences, the tendency being for the western group of States to prefer alternative B, and the States of eastern Europe, Asia and Africa to favour alternative A.

7. The draft articles on State responsibility⁴ submitted by the Special Rapporteur on that topic had evoked lively discussion; members of the Sixth Committee had appeared to welcome the general approach adopted by the Commission so far. The view had been generally expressed that the articles should deal simultaneously with all forms of unlawful and lawful acts, and should continue to reflect the elements of progressive development in the Commission's task of codifying that branch of international law.

8. The majority of representatives had supported the draft articles on succession in respect of treaties submitted by the Special Rapporteur⁵ which, they thought, contained encouraging elements of progressive development of international law. Of particular interest to most

¹ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, para. 105.

² *Ibid.*, para. 26.

³ *Ibid.*, para. 20.

⁴ *Ibid.*, document A/CN.4/233.

⁵ *Op. cit.*, 1969, vol. II, document A/CN.4/214 and Add.1 and 2; vol. II, document A/CN.4/224 and Add.1.

States were articles 3 and 6, which were considered to be progressive. A small number of States, however, favoured the principle of continuity, as being more in accordance with State practice.

9. The representatives of Jamaica and a few other States had proposed that the International Law Commission should consider instituting an annual memorial lecture in honour of the late Gilberto Amado and make suitable recommendations to the General Assembly through the Secretary-General.

10. Some States had expressed the wish that the volumes of the United Nations *Treaty Series* should be published with greater regularity. The Netherlands representative had noted that no action had been taken on that matter despite his warning in the Sixth Committee the previous year, and had suggested that there should be no more than twelve months' interval between the registration and publication of treaties. He had also expressed a wish for the early publication of a list of sources of State practice.

11. It had become clear during the discussion of the Commission's request for an extended session of fourteen weeks in 1971 that the overwhelming majority were in favour of such a session; in the voting in the General Assembly in December, 100 delegations had voted in favour, 10 had abstained and only 3 had voted against it. In the Sixth Committee, the Liberian representative had asked why the Commission had not made any recommendation regarding the extension of the term of office of its members, although the Committee had invited it to give further consideration to the matter.⁶

12. The report on the Seminar on International Law⁷ had been almost unanimously approved. Representatives had noted with satisfaction the offers of scholarships and fellowships for the annual seminar which had been made by the Netherlands, Sweden and Israel in the Sixth Committee.

13. The representative of Denmark had expressed the view that, in drawing up its future programme of work, the Commission should arrange topics in order of priority, even if several were to be dealt with simultaneously. Among the topics suggested by various members for inclusion were historic bays, international waterways, unlawful seizure or "hijacking" of aircraft, and the protection of diplomats.

14. Owing to other engagements, he had been unable to attend the November 1970 session of the Council of Europe's European Committee on Legal Co-operation but, at the suggestion of the Commission's Secretary, he had cabled to Mr. Paul Reuter appointing him to attend in his place. Mr. J. M. Ruda had been appointed to represent the Commission at the meeting of the Inter-American Juridical Committee at Rio de Janeiro. Finally, he had himself attended the twelfth session of the Asian-

African Legal Consultative Committee, held at Colombo from 18 to 28 January 1971, a report on which would be submitted to the Commission in due course.⁸

Election of Officers

15. The CHAIRMAN called for nominations for the office of Chairman.

16. Mr. YASSEEN, after paying a tribute to the outgoing Chairman for the able manner in which he had represented the Commission at the General Assembly, proposed Mr. Tsuruoka, whose culture, objectivity and legal ability were well known to all members, and whose diplomatic talent had been displayed in other United Nations bodies, particularly during his Presidency of the Security Council.

17. Mr. NAGENDRA SINGH, seconding the proposal, said that Mr. Tsuruoka's impartiality and the fact that he enjoyed the full confidence of all the members of the Commission eminently fitted him for the office of Chairman. He wished to associate himself with the tribute paid to the outgoing Chairman, who had represented the Commission so well at the twelfth session of the Asian-African Legal Consultative Committee.

18. Mr. AGO, Mr. CASTRÉN, Mr. USHAKOV, Mr. BARTOŠ, Mr. REUTER, Mr. EUSTATHIADES, and Mr. EL-ERIAN associated themselves with the tribute to the outgoing Chairman and expressed their support for the nomination of Mr. Tsuruoka.

Mr. Tsuruoka was unanimously elected Chairman and took the Chair.

19. The CHAIRMAN thanked the Commission for the honour it had done him and the confidence it had placed in him by electing him to the Chair. With the co-operation of his colleagues and by following the example of his predecessor he hoped to contribute to the success of the work of the present important session of the Commission.

20. He associated himself with the tributes paid to the outgoing Chairman and expressed his gratitude to Mr. Reuter, who had represented the Commission at the November session of the European Committee on Legal Co-operation.

21. He called for nominations for the office of First Vice-Chairman.

22. Mr. KEARNEY congratulated the Chairman on his election and proposed Mr. Ago.

23. Mr. YASSEEN seconded the proposal.

24. Mr. USTOR, Mr. USHAKOV, Mr. BARTOŠ and Mr. ALCÍVAR supported the proposal.

25. Mr. EL-ERIAN, also supporting the proposal, said that as a Special Rapporteur, he wished to take that opportunity of expressing his appreciation and thanks to Mr. Kearney for his resourcefulness and patience as Chairman of the Drafting Committee at the previous session.

⁶ See *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, Agenda items 86 and 94 (b), document A/7746, paras. 99-103 and 117.

⁷ *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, paras. 106-110.

⁸ A/CN.4/248.

26. Mr. ROSENNE joined in the tributes paid to the outgoing Chairman. In congratulating the newly elected Chairman, he drew attention to his outstanding contribution as President of the Security Council in very difficult circumstances. He supported the nomination of Mr. Ago for the office of First Vice-Chairman.

27. Mr. EUSTATHIADES, Mr. CASTRÉN, Mr. REUTER, Mr. NAGENDRA SINGH and Mr. ELIAS also supported the nomination of Mr. Ago.

Mr. Ago was unanimously elected First Vice-Chairman.

28. Mr. AGO thanked the Commission for his election.

29. The CHAIRMAN called for nominations for the office of Second Vice-Chairman.

30. Mr. USHAKOV proposed Mr. Bartoš.

31. Mr. YASSEEN and Mr. EL-ERIAN supported the proposal.

Mr. Bartoš was unanimously elected Second Vice-Chairman.

32. Mr. BARTOŠ thanked the Commission for his election.

33. The CHAIRMAN called for nominations for the office of Rapporteur.

34. Mr. RUDA proposed Mr. Sette Câmara.

35. Mr. CASTAÑEDA, Mr. NAGENDRA SINGH, Mr. USHAKOV, Mr. AGO, Mr. EL-ERIAN and Mr. BARTOŠ supported the proposal.

Mr. Sette Câmara was unanimously elected Rapporteur.

36. Mr. SETTE CÂMARA thanked the Commission for his election.

Adoption of the Agenda

37. The CHAIRMAN invited the Commission to consider the provisional agenda (A/CN.4/242).

38. Mr. KEARNEY said that there was a great and growing increase in the number of cases involving the kidnapping of diplomats and their murder or injury for political reasons. That was a subject of direct concern to the Commission, which had been foremost in developing diplomatic and consular law. He proposed, therefore, that the Commission place on its agenda, as a matter of high priority, the preparation of a set of draft articles on the protection of diplomats. Despite the crowded condition of the agenda and the need to complete the draft articles on permanent missions and delegations to conferences, he thought it would be possible for the Commission to produce a set of draft articles at the present session if it adopted a suitable method of work.

39. Mr. USHAKOV said he thought Mr. Kearney's proposal could be discussed either under item 7: "Updating of the Commission's long-term programme of work", or under item 11: "Other business". Perhaps the

proposal could be taken up a little later, when members had time to reflect on it. For the moment he would propose that the Commission adopt the provisional agenda.

40. Mr. ROSENNE proposed that the word "Updating" in the title of item 7 of the agenda, be replaced by the word "Review".

It was so agreed.

41. Mr. ELIAS said that, while fully appreciating the views expressed by Mr. Kearney and Mr. Ushakov, he would like to propose the adoption of the provisional agenda as it stood.

42. Mr. EUSTATHIADES said that the Commission should take a decision without delay on the urgency of the question and on how to deal with it. It was clear from the statement made by the outgoing Chairman that the problem of the protection and inviolability of diplomatic agents fell within the scope of the Commission's work.

43. Mr. REUTER said that Mr. Kearney's proposal was obviously important, but its acceptance would compel the Commission to change its methods of work. He suggested that Mr. Kearney be asked to submit a brief note setting out not only the purpose of his proposal, but also the method of work and the timing he suggested. The note might also indicate whether the Commission should simply express a wish, adopt a resolution on general principles or prepare an actual draft of articles. In any event, the Commission must take a decision.

44. Mr. YASSEEN said that the question which had been raised was becoming more and more alarming, but the Commission's methods of work were ill-suited to its urgent character. The Commission's work of codification was necessarily slow, because it was carried out in close co-operation with the General Assembly and with States. There could, therefore, be no question of putting forward draft articles without first submitting the question to the General Assembly and to governments. The problem of the protection and inviolability of diplomatic agents called for reflection; it raised many political issues on which the General Assembly should pronounce before a draft of articles could be formulated.

45. Mr. BEDJAOUÏ said he thought Mr. Kearney's proposal might entail the adoption of a new method of work. The Commission's work of codification was a long-term undertaking which did not always allow it to examine topical questions, however important they might be. In view of its very heavy agenda, the Commission was unlikely to be able to achieve any constructive results in the matter. Moreover, Mr. Kearney's proposal called for the formulation of draft articles, and that was something which could not be done in a hurry.

46. He therefore considered that the Commission should not attempt to formulate and adopt draft articles on that subject at the present session.

47. Mr. AGO said he agreed with Mr. Yasseen and Mr. Bedjaoui that Mr. Kearney's proposal, as submitted, did not quite fit in with the Commission's usual methods of work and that it would be difficult to put it on the

agenda forthwith. The question of the protection and inviolability of diplomatic agents was none the less urgent, and the Commission should make every effort to consider it. He therefore supported Mr. Reuter's suggestion that Mr. Kearney be asked to submit a note. If the provisional agenda were adopted, that would not prevent the Commission from amending it later, and in any case the question raised by Mr. Kearney could always be considered under "Other business".

48. Mr. ROSENNE said he could agree to Mr. Reuter's suggestion.

49. He proposed that the Commission adopt the provisional agenda subject to minor drafting amendments and without prejudice to the order in which the various items would be discussed.

50. The CHAIRMAN suggested that the Commission should adopt the provisional agenda with the drafting amendment suggested, namely, that the word "Up-dating" in item 7 be replaced by the word "Review".

51. Mr. KEARNEY would submit a more detailed proposal in writing concerning the protection of diplomats.

The provisional agenda was adopted as amended.

The meeting rose at 5.40 p.m.

1088th MEETING

Wednesday, 28 April 1971, at 10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 3; A/CN.4/241 and Add.1 and 2)

[Item 1 of the agenda]

1. The CHAIRMAN invited the Special Rapporteur to introduce his sixth report.

2. Mr. EL-ERIAN (Special Rapporteur) said that his sixth report, which was contained in document A/CN.4/241 and the addenda thereto, has been prepared in accordance with the Commission's instructions; it reviewed the 116 articles adopted at the twentieth, twenty-first and twenty-second sessions in the light of the comments of delegations in the Sixth Committee at the

twenty-fifth session of the General Assembly, and of the written observations of governments and international organizations (A/CN.4/221 and Add.1; A/CN.4/238 and Add.1; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 3).

3. The 116 articles were divided into three groups. The first, consisting of articles 1 to 21,¹ contained general provisions and provisions regulating the legal modalities of the institution of permanent missions. The second, consisting of articles 22 to 50,² dealt with the facilities, privileges and immunities of permanent missions to international organizations and with related matters. The third, consisting of articles 51 to 116,³ consisted of two parts, one dealing with permanent observer missions to international organizations and the other with delegations of States to organs of international organizations and to conferences convened by, or under the auspices of, an international organization.

4. His review of articles 1 to 116 (A/CN.4/241 and addenda) was preceded by an introduction and preliminary considerations on the form, scope and title of the draft articles, all matters which had been thoroughly discussed by the Commission at previous sessions and on which decisions had already been taken. The first question the Commission had to decide was whether, now that it had before it the observations of governments and international organizations, it wished to confirm its previous decisions on those matters.

5. An examination of the dates of issue of the various documents would show that the observations had not all been submitted in time, and it was only thanks to the efforts of the Codification Division that it had been possible to place before the Commission at the opening of the present session a substantial part of his sixth report and the bulk of the observations by governments and international organizations.

6. The general philosophy of the draft articles, their basic underlying assumptions, and the approach and methods adopted by the Commission, had received the support of governments and international organizations. Issue had only been taken on the drafting of certain articles and, of course, on the subject of privileges and immunities. That had never been a popular subject with governments and the Commission's past experience with its draft articles on diplomatic intercourse and immunities, on consular relations, and on special missions had shown that governments, at least in the early stages, always opposed any extension of privileges and immunities.

7. One example of the general approval of governments, was the written comment of the United States, which was host in New York to the United Nations and in Washington to a number of other organizations, both universal and regional, that "The United States considers that these twenty-one draft articles have been carefully and

¹ See *Yearbook of the International Law Commission, 1968*, vol. II, pp. 196 *et seq.*

² *Op. cit.*, 1969, vol. II, pp. 207 *et seq.*

³ *Op. cit.*, 1970, vol. II, document A/8010/Rev.1, para. 26.

thoroughly worked out by the International Law Commission and is, in general, in accord with the Commission's proposals" (A/CN.4/221/Add.1, section B.10). The Government of Yugoslavia, in its written comments on articles 1-50, had stated that it regarded them "as an important contribution to the codification and progressive development of rules on representatives of States to international organizations, which are destined to play a special role in the promotion of peaceful international co-operation" (A/CN.4/239, section B.4). The Government of the USSR had stated that "the draft articles on representatives of States to international organizations (articles 1-21) do in general reflect existing practice and do not give rise to any objections of principle" (A/CN.4/221, section B.9).

8. The first of the preliminary questions discussed in his report was the form of the draft articles. On that point, there had been no explicit comment in the Sixth Committee at the twenty-third or twenty-fourth sessions of the General Assembly. However, during the discussion of the third group of articles in the Sixth Committee at the twenty-fifth session, although the general opinion had been that the draft constituted a suitable basis for a future convention, some delegations had expressed a preference for a code and had made the point that, owing to the great variety of international organizations and their differing purposes and functions, a general convention would probably have to be complemented by specific agreements in individual cases.

9. In the written observations of governments, no exception had been taken to the Commission's decision to prepare the draft articles as a basis for a draft convention constituting a self-contained and autonomous unit. The Government of Sweden, however, had expressed its preference for the idea of a code (A/CN.4/221, section B.8).

10. He had had to consider how much weight should be given to the absence of specific comments on the important question of form. He had taken into account the fact that in their observations on earlier drafts of the Commission, governments which were not in favour of a draft convention had said so expressly. Furthermore, in the comments of governments on specific articles of the present draft, there appeared to be an underlying assumption that the draft was intended to serve as the basis for a convention. For those reasons, he had felt entitled to consider the absence of specific comments on the question of form as at least a lack of opposition to, if not an implied endorsement of, the Commission's approach.

11. The International Labour Organisation had raised the question "whether legally, an inter-State agreement"—like the convention that would embody the draft articles—"can impose obligations on a third subject of international law, in this instance international organizations of universal character" (A/CN.4/239, section D.2). The same point had been raised by the International Bank for Reconstruction and Development (A/CN.4/240, section D.4, para. 5).

12. On that point, he had drawn attention to paragraph (2) of the commentary to article 22, which stated

that the question whether international organizations would become parties to the future convention was a separate one to be considered at a later stage. He had also pointed out that the 1946 Convention on the Privileges and Immunities of the United Nations had been opened for accession by States only, although it contained provisions granting rights to, and imposing obligations on, the United Nations itself (A/CN.4/241, para. 16). The position was the same with regard to the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.

13. On the question of the scope of the draft articles, he drew attention to the carefully balanced compromise solution adopted by the Commission and incorporated in article 2. When the Commission came to consider that article, it would find that the compromise had met with the general approval of States and international organizations.

14. The Commission's decision to include draft articles on delegations of States to organs of international organizations and to conferences convened by, or under the auspices of, an international organization, had been generally accepted by governments, though with some hesitation.

15. During the discussions in the Sixth Committee, a number of suggestions had been made for supplementing the draft articles by provisions regulating the status of certain categories of missions, delegations and representatives of entities other than States (A/CN.4/241, para. 27). He would take a position later on those suggestions, which related more to questions connected with the organizations themselves. His first reaction, however, was that the Commission might be wise to confine its draft articles to representatives of States, without attempting to deal with other categories of persons, regarding which no draft articles had been prepared by the Commission and, of course, no government comments had been received.

16. As to the title of the draft, it would be remembered that the title "Draft articles on representatives of States to international organizations" had been adopted before the Commission had decided to deal with the subject of delegations to organs and conferences.⁴ In view of the extension of the draft to cover that subject, he now proposed that the title be amended to read "Draft articles on representatives of States to international organizations and conferences".

17. The title of Part I, "General Provisions", covered articles 1 to 5, which contained general provisions applicable to all the draft articles. Those provisions, however, had been prepared at a time when the draft dealt only with permanent missions and were therefore couched in terms applicable only to missions of member States. Now that the Commission had decided to include provisions on permanent observer missions (Part III) and on delegations to organs and conferences (Part IV), it would be necessary to amend the articles in Part I so as

⁴ *Op. cit.*, 1968, vol. II, p. 195, para. 28.

to extend their scope to missions and delegations of non-member States.

18. After the adoption of the articles in Part I, the Commission had adopted certain general provisions which, although they appeared at present in Part II, were also applicable to Parts III and IV. They included such provisions as those of article 44, on non-discrimination, and article 50, on consultations. It would hardly be appropriate to transfer them to Part I, which contained introductory articles and for which he now proposed the title "Introduction", since they were substantive articles which applied to Parts II, III, and IV and could best be placed at the end of the whole draft. He therefore suggested that they be grouped in a new Part V, to be entitled "General Provisions".

19. He would be glad if the Commission, before examining the draft articles *seriatim*, would examine those preliminary questions and decide whether it wished to confirm its earlier decisions.

20. The CHAIRMAN said that there was no objection to the course proposed by the Special Rapporteur; he therefore invited members to comment on those preliminary questions.

21. Mr. ELIAS said that, on the question of the form of the draft, he thought the Commission should confirm its earlier decision that the draft articles should be prepared with a view to the formulation of a convention.

22. During the discussion in the Sixth Committee, there had been strong support for the idea of reducing the length of the draft by combining provisions susceptible of uniform treatment; the matter was one to which representatives had attached considerable importance. At the previous session the great majority of the Commission had stressed the desirability of shortening the draft by using the device of drafting by reference. Now that the Commission had had the benefit of the views of the Sixth Committee, it should make every effort to reduce the number of articles substantially; a draft of 116 articles was undoubtedly too long.

23. Another preliminary question was whether it was desirable to include separate provisions on the possible effects of exceptional situations such as absence of recognition, absence or severance of diplomatic relations and armed conflict, on the representation of States in international organizations. He hoped the Special Rapporteur would submit draft articles on those matters for the Commission's consideration.

24. With regard to the new title for the draft proposed by the Special Rapporteur (A/CN.4/241, para. 28), it was clear that if the Special Rapporteur's proposals for Parts III and IV were accepted, the title would have to be amended. The final form of the title, however, would require further consideration.

25. He suggested that, once the Commission had taken a decision on those preliminary issues, it should not reopen its discussion on draft articles 1 to 21, apart from considering such rewordings as the Special Rapporteur might propose in the light of government comments.

26. Mr. USHAKOV said it was regrettable that the Commission should have only part of the Special Rapporteur's report before it. At that stage of its work it could not consider isolated parts or articles of the draft separately, as it had when preparing the text. For the second reading it was essential for the Commission to have a general conspectus of the draft and to have before it all the Special Rapporteur's proposals on the matters remaining to be settled.

27. However, not only had part of the Special Rapporteur's report not yet been circulated, but he had made no proposals on many of the matters still pending. For example, he had stated that the Commission had decided to consider, during the second reading, the question of the possible effects on the representation of States in international organizations of exceptional situations, such as absence of recognition, absence or severance of diplomatic relations and armed conflict, but he had made no specific proposals on that question. The draft would not be complete without articles dealing with those situations, and the question should therefore be settled before the Commission started on the second reading.

28. Similarly, the Special Rapporteur proposed that an introductory section, consisting of a few articles applicable to the whole draft, should precede the substantive articles and be followed by a new part containing certain other provisions, which, though of general application, were not introductory, and whose logical place was therefore at the end of the draft. But there again, the Commission had not been given any specific proposal to work on, to say nothing of the fact that it was questionable whether it was possible from the legal standpoint to draft, for both Part I and Part II, provisions applicable to the whole of a draft which contained widely different notions.

29. Before it could think of starting on the second reading, the Commission must complete the work of drafting and see how it could combine certain articles so as to shorten the text; for example, articles 79 and 80 might be consolidated with the introductory articles. To do that, however, the Commission must have before it the whole of the Special Rapporteur's report and his specific proposals on the provisions to be examined, the arrangement of the articles and how to proceed. The Commission had undertaken to complete consideration of the topic of relations between States and international organizations at the present session and to make substantial progress in its work on certain other items; that was why the General Assembly had granted it, against the views of some delegations, a fourteen-week session. It was the more regrettable, therefore, that an exceptional effort had not been made to submit the documentation in time, for that might substantiate the view that the Commission could work faster if everyone really did their best.

30. Mr. EL-ERIAN (Special Rapporteur) said that Mr. Elias had expressed some doubts about the title proposed but had agreed in principle that the title should be changed if the Commission decided to include draft articles on permanent observer missions and delegations to organs and conferences.

31. Both he and Mr. Ushakov had also referred to the possible effects of exceptional situations on permanent missions; he could assure them that he was preparing a provision to regulate that question in the light of the Commission's discussions in 1969 and 1970.

32. Mr. Ushakov had suggested that it might be more useful to deal with those questions which were before the Commission on first reading, before taking up the articles at second reading. He (the Special Rapporteur) would have preferred to present the Commission with a complete set of draft articles, but unfortunately that had not been possible because the observations of governments and international organizations had not been received in time.

33. It was his opinion that the articles on consultations between the sending State, the host State and the Organization, on the professional activities and conduct of members of permanent observer missions and delegations, and on the possible effects of exceptional situations should be included among the general provisions.

34. Mr. KEARNEY said that he shared some of the concern expressed by previous speakers about the difficulty of considering the draft articles without having a complete set before the Commission; there was, indeed, a definite connexion between some of the general articles and those relating to the conduct of permanent observer missions and delegations, in so far as privileges and immunities were concerned. He hoped, therefore, that the Special Rapporteur would be able to submit a complete set of draft articles in the near future; at the same time, however, he did not think that the lack of a complete set of articles would automatically bar the Commission from proceeding to deal with articles 1 to 21.

35. The Commission would undoubtedly be faced with a problem of consolidation when it reached the articles on permanent observer missions. Mr. Ushakov had referred to the possible consolidation of article 79 with an introductory article; that consolidation should be with article 5. He hoped that the Special Rapporteur would give the Commission some idea of his general approach to the consolidation problem, in order to relieve any feelings of uncertainty.

36. As to the possible effects of exceptional situations, he had some doubts about the desirability of attempting to deal with that subject. He did not believe that the absence of diplomatic relations was a problem which could cause serious difficulties in international organizations. If the Commission tried to deal with the problems resulting from a situation of armed conflict, he feared that it might become involved in endless theoretical discussions. International organizations had, in fact, managed to function quite satisfactorily for a long time without any special rules to govern that contingency and should be able to continue to do so in the future on an *ad hoc* basis.

37. With regard to the title of the draft, he had some reservations about the one proposed by the Special Rapporteur, which he considered unduly restrictive, but it was not a matter on which the Commission needed to take an immediate decision.

38. He suggested that the Commission proceed immediately to discuss the existing draft articles, pending the submission of a complete set, which he hoped would be forthcoming before long. He further suggested that the Secretariat be asked to prepare, for easy reference, a single document containing the existing 116 draft articles.

39. Mr. ROSENNE said that the Commission seemed to be in the normal situation attending a second reading. The volume of comments which had been received from governments was enormous and he thanked the Special Rapporteur for having reduced them to some kind of order in his sixth report.

40. With regard to the form of the draft articles, he thought that, in accordance with the Commission's previous practice, they should be designed to take the form of a draft convention, but that was essentially a matter of drafting technique which left open the final recommendation the Commission would make. In that connexion, the Commission would sooner or later have to face the difficult problem posed by Article 105 of the Charter, which in the past it had brushed aside.⁵

41. The basic problem, as expressed in the observations of governments and in the discussions in the Sixth Committee, was whether the privileges and immunities which the Commission would recommend for the permanent missions of member States should set the pattern for the permanent observer missions of non-member States and delegations to international conferences. On the answer to that question would depend the ability of the Commission to reduce the number of articles. However, that issue could not be discussed until the Special Rapporteur had given his views on it, and it was not to be excluded that the final text might take the form of two or more sets of draft articles. On the whole, he thought that questions of the arrangement and possible consolidation of the draft articles, and of titles, should be left to the Special Rapporteur, who could make proposals to the Drafting Committee at a later stage.

42. With regard to the possible effects of exceptional situations, he thought the Commission was committed to dealing with that problem and reporting to the General Assembly; he hoped, therefore, that the Special Rapporteur would submit appropriate proposals, without prejudice to any final decision the Commission might take.

43. He proposed that the Commission should proceed as quickly as possible and on a pragmatic basis, as suggested by Mr. Kearney; that it should take up the draft articles on the permanent missions of member States at second reading; and that it should leave the other questions open until it had the whole of the Special Rapporteur's report before it.

44. Mr. YASSEEN said he agreed with Mr. Ushakov that the Commission could work more easily if it had before it a report on all the questions relating to representatives of States to international organizations. Never-

⁵ Op. cit., 1963, vol. I, 718th meeting; 1964, vol. I, 755th meeting; 1970, vol. I, 1073rd meeting.

theless, the Commission had often worked under difficult conditions, when documents had not been distributed in due time, and it had always managed to make the best of the situation.

45. He agreed with Mr. Ushakov that, although the Commission was preparing to examine the draft at second reading, some questions had never been discussed at first reading. He would suggest that the Commission begin by considering those questions on the basis of the documents submitted by the Special Rapporteur, embody them in a text, and take them up again at second reading, either at the end of its consideration of item 1, or at the end of the session.

46. With regard to the form of the draft, the Commission had always intended to prepare a convention, and it was to that end that it had directed its work. The legal technique of drafting a code was very different from that of drafting a convention, and it would be a serious matter if the Commission had to retrace its steps. In any event, Sweden seemed to be the only country which had advocated the drafting of a code. He had no doubt that in its final form the convention would be flexible enough to permit the development of international law with respect to regional organizations.

47. Many representatives in the Sixth Committee had said that the draft could be shortened. He himself agreed with that view, and would suggest that the method of cross-references be used as much as possible, so as to make the draft more convenient. The Commission should, however, beware of *mutatis mutandis* references, since they were not always sufficiently precise.

48. With regard to exceptional situations, the Commission should examine them carefully and decide whether they called for special articles. He had no fixed views on the effects of hostilities, but he thought that that point, too, deserved consideration.

49. As to the title of the draft, the Commission should leave that over until it had finally settled the arrangement and text of the draft articles, when the question would present no difficulty.

50. Mr. ALCÍVAR said he agreed with Mr. Ushakov that it would have been better if the Commission could have had a complete set of draft articles before it; on the other hand, the lack of a complete set should not prevent it from starting work on the articles which the Special Rapporteur had already submitted.

51. With regard to the form of the draft articles, he did not think that the Commission should depart from its normal practice of preparing draft articles for eventual incorporation in an international convention, which in his opinion was the type of instrument that would have the greatest legal value.

52. He agreed in principle that some provision should be made for the possible effects of exceptional situations, but the question of the specific articles in which that provision would be made should be decided later, as the work progressed.

53. The number of articles dealing with permanent

observer missions might usefully be reduced, since many of them were repetitive.

54. As to the title of the draft, he thought it should consist of two parts, the first referring to the representatives of States to international organizations and the second to the rights of the organizations themselves, their legal personality and their privileges and immunities.

55. Mr. AGO said that although certain governments had been late in sending in their replies, it should not be forgotten that they had had to examine an impressive number of articles, several of which had been hastily prepared. The Commission had committed itself to finishing the second reading of the draft, and it must now face the situation, even though it might not be ideal. If it devoted four weeks to the discussion, as Mr. Elias had proposed, it would have little time to review the articles as a whole. Hence, it must be prepared to allow more time. In any case the Commission must try to gain time, so it should not revert to the question whether it would be advisable to draft a code rather than a convention. The title of the draft could be decided at the final stage.

56. Admittedly, it had been materially impossible to prepare a report on the whole draft before the beginning of the session. But he agreed with Mr. Ushakov that the introductory articles and the general part could only be examined in the light of all the other articles, and he hoped that the Secretariat would soon be able to provide a complete list of the articles proposed, which would enable the Commission to decide whether the draft should have one or more introductory parts.

57. As Mr. Yasseen had observed, it was absolutely necessary to consolidate the articles of the draft. The previous year the Commission had made a necessary analytical study, but it should now avoid repetition, perhaps by resorting to the method of cross-references. To all appearances the provisions on permanent missions in general and on permanent observer missions could be consolidated, whereas the last part of the draft was of a more separate character.

58. Before starting on its consolidation the Commission might, as Mr. Yasseen had suggested, take up the articles it had not yet examined at first reading; it could then proceed to examine the special provisions, starting with article 6, and leave aside the general provisions for the time being. It should get to the heart of the matter without delay.

59. Mr. EL-ERIAN (Special Rapporteur) replying to Mr. Yasseen and Mr. Ago, said that in fact only one article was still pending for first reading and the problem of the possible effects of exceptional situations had already been discussed; he had dealt with it in articles 47 to 50, since it was related to the termination of functions. The Vienna Convention on the Law of Treaties provided that the host State should facilitate the departure of the mission, but did not refer to the problem raised by the outbreak of hostilities; that problem had not been discussed at the Conference on the Law of the Sea either.

60. For the time being, he proposed that the Commission should concentrate on the first twenty-one articles, concerning which he would submit a working paper in the near future.

61. Mr. USHAKOV said he must emphasize that the draft articles did not contain provisions on exceptional situations. He was opposed to deferring consideration of those situations as the Special Rapporteur suggested. Even if it did not finally prove necessary to draft special articles, the Commission should take a position on the question without delay. It was most unlikely that the Special Rapporteur would be able to draft a single article covering all the situations involved. The notion of armed conflict was very complex, since it might apply to three parties: the sending State, the host State and the organization. The question of exceptional situations called for an urgent decision by the Commission.

62. So far as the immediate future was concerned, he supported Mr. Ago's suggestion that the Commission begin by considering article 6 and the following articles.

63. The CHAIRMAN said that the Commission could hope to receive one or more articles on exceptional situations within a few days. Meanwhile, it could take up the draft again, article by article, starting with article 6.

The meeting rose at 1.5 p.m.

1089th MEETING

Thursday, 29 April 1971, at 10.15 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Mr. Yasseen

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 3; A/CN.4/241 and Add.1 and 2; A/CN.4/L.162/Rev.1)

[Item 1 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's sixth report (A/CN.4/241 and addenda).

GENERAL COMMENTS

2. Mr. REUTER said that before the Commission began to consider the draft article by article, he would like to make a few general comments.

3. Mr. El-Erian's report had been prepared under difficult conditions and the Commission should not re-open the question of his methods of work merely because it had not yet received a complete report.

4. Generally speaking, he shared the Special Rapporteur's view regarding the orientation of the draft articles; at the stage of second reading the Commission could not depart from the line that it had followed so far.

5. The observations of States always deserved consideration, even if only to satisfy public opinion. Some States had questioned whether the draft achieved a perfect balance between the rights and duties of host States. There was no denying, for example, that the civil effects of immunities were closely linked with certain questions of insurance. He hoped, therefore, that the Commission would disarm all the criticisms made by States.

6. The reactions of international organizations were even more important than those of States, for while the replies of States were sometimes prompted by rather selfish considerations, those of international organizations should be more disinterested. The observations of the organizations reflected a concern to "defend themselves" against the draft articles; they emphasized the precise legal effects of the convention which the draft articles were intended to form. Several old-established organizations stressed not only their *de jure* practice, but also their *de facto* practice, and seemed to wish to reserve for themselves an area of creative autonomy. That problem was linked with another item of the agenda: the question of treaties concluded by international organizations. It was essential that due account be taken of the observations of the international organizations.

7. Mr. EL-ERIAN (Special Rapporteur) said that at the previous meeting the point had been made that it was important to co-ordinate the Commission's work on relations between States and international organizations with Article 105 of the United Nations Charter. Paragraphs 2 and 3 of that Article were particularly relevant to the Commission's work. Paragraph 3 stated that "The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose". It was in accordance with Article 105 that the General Assembly had in 1946 drawn up the Convention on the Privileges and Immunities of the United Nations,¹ and in 1948 adopted resolution 257 (III) concerning permanent missions to the United Nations. It was clear, therefore, that the Commission's present task came within the strict application of Article 105.

8. The question of the importance of the comments of international organizations had been raised. He had

¹ United Nations, *Treaty Series*, vol. 1, p. 16.

always taken the view that the Commission should work hand in hand with the international organizations, and questionnaires on the present draft articles had been sent to them. All, without exception, had replied, and he had attempted to digest and analyse their replies in his sixth report. He hoped that when the General Assembly came to decide the fate of the draft articles it would see that the international organizations were consulted at the final stage. It was true that there was a wide variety of such organizations, but, as Mr. Reuter had observed, in view of the importance of their practice some attempt should be made to arrive at a synthesis of their views.

9. Mr. ROSENNE said that, as the Special Rapporteur had pointed out, the General Assembly had taken action more than once on the basis of Article 105, paragraph 3, of the Charter, by making recommendations and proposing conventions. His (Mr. Rosenne's) difficulty with that paragraph was that the General Assembly had never given any indication whether it wished the Commission to examine what had been done in the past and to propose further draft recommendations for the General Assembly to adopt. In particular, the General Assembly had never suggested that the Commission should undertake a substantial revision of the 1946 Convention on the Privileges and Immunities of the United Nations.

10. He hoped, therefore, that the Commission might reach agreement on an appropriate paragraph for inclusion in its report, which would show that it was aware of the constitutional problems raised by Article 105.

PART II. *Permanent missions to international organizations*

ARTICLE 6

11. The CHAIRMAN invited the Special Rapporteur to introduce article 6, on the establishment of permanent missions.

12.

Article 6

Establishment of permanent missions

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

13. Mr. EL-ERIAN (Special Rapporteur) said that the comments of governments and the secretariats of international organizations were summed up in paragraphs 107-111 of his sixth report (A/CN.4/241/Add.1). His own observations and proposals were contained in paragraphs 112-116.

14. Mr. CASTRÉN said the Special Rapporteur had done well to prepare the first part of his report in so short a time. He had duly taken account of all the observations on his articles and had successfully rebutted all the unfounded criticism. But although few changes had been made to Part I of the draft articles, the criticisms expressed by certain States of Parts III and IV could be expected to cause real difficulties.

15. The Special Rapporteur had been right in refusing

to change article 6. The proliferation of permanent missions feared by the Swiss Government would not present a danger since the establishment of permanent missions benefited both the international organizations and their member States. Besides, in view of the expense involved, it was unlikely that States would establish permanent missions unless they were necessary.

16. Mr. YASSEEN said that article 6 should not be changed; he shared the Ecuadorian Government's view that articles 2, 4 and 5 made the necessary reservations to the provisions of article 6. The comment by the International Atomic Energy Agency seemed to relate, not to permanent missions as such, but to their composition. That question of detail could be dealt with in another article. There was no reason to fear a proliferation of permanent missions; at present, there were not enough of them.

17. Mr. ROSENNE said that, on the assumption that articles 3, 4 and 5 remained in a satisfactory form, article 6 could be retained, subject to review by the Drafting Committee and to the linguistic observations of the Secretariat. In general, he could accept the reasoning and conclusions of the Special Rapporteur.

18. At first glance, the suggestion made by the Netherlands Government seemed an attractive one, but he feared it might lead to undue rigidity and excessive formalism. He would prefer to leave the article in its present flexible form in order to allow for special situations, such as when an existing diplomatic or consular mission was appointed as a permanent mission to an international organization in the same city.

19. Mr. RUDA said he had been struck by Mr. Reuter's observation on the positions taken by international organizations vis-à-vis the draft articles. The rights granted to those organizations in the draft articles would not present any major legal problems, but such articles as 22 and 33, which imposed obligations, might considerably complicate the Commission's task, as had been pointed out by the ILO (A/CN.4/241, para. 13). Moreover, as Mr. Reuter had suggested, the question how far States could impose obligations on international organizations would seem to come under the heading of treaties between States and such organizations.

20. With regard to article 6, he agreed with the Special Rapporteur that articles 3, 4 and 5, especially article 3, should remove the doubts expressed by the Governments of Ecuador, the Netherlands and Belgium about the obligation of organizations to accept permanent missions from States.

21. He had noted particularly the suggestion of the Swiss Government (A/CN.4/241/Add.1, para. 110) that a second paragraph should be added to provide for the possibility of establishing a single permanent mission to several organizations. Switzerland was an important host country and its views should be given proper weight. As the Special Rapporteur had pointed out, if article 6 was read in conjunction with article 8, the rights of member States to establish a single permanent mission to several organizations would seem to be implied; in his

own opinion, however, there could be no harm in adopting the Swiss suggestion and adding the suggested new paragraph.

22. Mr. USTOR said he understood the views expressed by Mr. Ushakov at the previous meeting,² but hoped he would agree with the general view that the Commission should adopt a constructive approach to its task and do its utmost to present the General Assembly with a complete set of draft articles. With regard to the form of the draft, experience had shown that a draft convention was the form best suited for the codification and progressive development of international law.

23. He also appreciated the point made by Mr. Reuter in connexion with the observations of the ILO. The principle *pacta tertiis nec nocent nec prosunt* was a valid rule of international law, but only if the *tertius* was a State; if it was an international organization, the rule was doubtful. It was certainly doubtful in the extreme case where all the members of an organization were also parties to a convention.

24. In his opinion, the question of co-ordinating Article 105 of the Charter with the draft articles was really dealt with in article 4, on the relationship between the present articles and other existing international agreements. The only question was what the General Assembly might have to say about the relationship between previous agreements and the Commission's draft.

25. He agreed with the Special Rapporteur that the Commission should not, at present, consider the possible consolidation of articles, but leave that to the Drafting Committee. If some common denominator or term could be found for both permanent missions and observer missions, they could probably be dealt with in the same series of articles.

26. Mr. AGO said that there was a close relationship, where permanent missions were concerned, between the provisions concerning member States and those concerning non-member States. After examining each of those sets of provisions separately, the Commission might find some way of combining them. In the case of article 6, the Commission might, for example, stipulate in the first paragraph that member States could establish permanent missions and in the second paragraph that under certain conditions non-member States could establish permanent observer missions.

27. He welcomed the use of the term "permanent mission" in the report, but regretted that the Special Rapporteur had not preferred the term "head of the permanent representative".

28. The observation by the Ecuadorian Government seemed pertinent, but he thought the clause suggested by the Netherlands Government was too restrictive (A/CN.4/241/Add.1, paras. 107-108). To refer only to the "relevant rules of the organization" might give the impression that there were always rules indicating whether permanent missions could be established or not,

whereas in some cases it was merely a question of practice.

29. As the Belgian Government had observed, article 6, as drafted, subjected the host State to an automatic process which involved a danger that permanent missions might proliferate. It was doubtful whether such automaticity should be encouraged; the great diversity of international organizations would justify a more flexible provision. Article 6 might stipulate, for example, that a member State could establish a permanent mission to an organization if it was the practice of that organization to accept such missions.

30. The Swiss Government's comment regarding the establishment of a single permanent mission to several organizations should be considered in the context of article 8, which dealt with that question. Article 6 was concerned with the establishment of a permanent mission to a single organization.

31. Mr. EUSTATHIADES said that the observations of governments evoked some reflections which did not come to mind at first. The Commission had not wished to ignore the rules of organizations, or their practice either. In that connexion, he thought article 3 was the only one which came into consideration. Nevertheless, as the Swiss Government had pointed out, sometimes there were no relevant rules, but only practice. When article 3 came to be re-examined, the reservation regarding practice could be inserted in the text of the article instead of only in the commentary. But even if the Commission later decided to mention practice in article 3, one particular case would not be covered: that of new organizations which had neither rules nor practice. In doubtful cases, like that of new organizations, every State should be able to establish a permanent mission; and article 6 contained just that idea, which, though it might perhaps be *de lege ferenda*, nevertheless marked a trend in favour of allowing States to establish permanent representation.

32. Mr. USHAKOV said he was in favour of keeping article 6 as it stood. In paragraph (5) of its commentary to article 3, the Commission had specified that "The expression 'relevant rules of the organization' used in article 3 is broad enough to include all relevant rules whatever their source: constituent instruments, resolutions of the organization concerned or the practice prevailing in that organization".³ That showed that in the Commission's view the practice of the organization had to be taken into consideration.

33. The fear that permanent missions might proliferate probably derived from the idea that a State could compel an organization to accept its permanent mission. That fear was groundless, for an organization could always react against such a danger, for example, by adopting a resolution. The Commission should explain clearly that international organizations need not fear a proliferation of permanent missions.

34. He did not believe that a single permanent mission

² Paras. 26-29.

³ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 198.

could be accredited to several international organizations. In practice, it sometimes happened that a mission was accredited successively to several organizations, but the Commission should not concern itself with that question.

35. Mr. THIAM said he found it difficult to understand how there could be any fear of a proliferation of permanent missions. States had the right, not the obligation, to establish permanent missions. If they did so, it was because there was a need for them and they were prepared to bear the expense. The establishment of numerous permanent missions could only facilitate mutual understanding between States and international organizations. The question whether an organization was required to accept a permanent mission was less a matter of law than a matter of choice. Most organizations were dependent on States for their funds, and they could only benefit by the establishment of new permanent missions. Apart from certain regional organizations which tended to regard themselves as separate entities, international organizations generally pursued aims which directly benefited their member States. That convergence of interests was an additional reason for encouraging the establishment of permanent missions. He was not in favour of changing or adding to the text of article 6.

36. Mr. SETTE CÂMARA agreed that there were no grounds for fearing a proliferation of permanent missions. Concern could of course be felt at the proliferation of international organizations, but once an organization was established, the governments of its member States needed to appoint representatives and to establish permanent missions. The provisions of article 6 were subject to those of article 3, as had been pointed out by the Government of Ecuador. For those reasons, he fully supported the Special Rapporteur's proposal that no change be made in the text of article 6.

37. Mr. AGO said that Mr. Eustathiades and Mr. Ushakov had rightly pointed out that there was a problem of practice. It was true that, in its commentary to article 3, the Commission had specified the possible sources of relevant rules and indicated that there could be rules established by practice. But there were practices which were not rules and they must also be taken into account.

38. He interpreted article 6 in the same way as Mr. Ushakov, that was to say assuming that the right of every member State to establish a permanent mission to the Organization was subject to the Organization's consent, but he recognized that it could be understood differently. It should therefore be laid down as a principle, in the commentary, that any member State could establish a permanent mission to the Organization, provided that it had ascertained that the Organization had no objection to receiving such missions.

39. Mr. REUTER said he agreed with Mr. Ago that the term "practice" should be used with caution. Certainly the International Court of Justice, which had often used the term in its advisory opinions, gave it a different meaning from the term "rule", and when international organizations had used the term "practice" in

the observations they had submitted before the Vienna Conference on the Law of Treaties, they had clearly attached a broader meaning to it than that of an international rule. It was therefore a general problem which went beyond the scope of the draft articles, and the best course for the time being would be to accept that "practice" had a broader meaning than "rule" and to take that into account.

40. Mr. EL-ERIAN (Special Rapporteur), summing up the discussion, said that there appeared to be general support for his conclusions. In particular, it appeared to be agreed that no saving clause should be added to article 6, the general saving clauses in articles 3 to 5 being sufficient.

41. The case of a single permanent mission being accredited to several organizations, mentioned by the Government of Switzerland, should be considered as belonging to article 8 and not to article 6. He agreed with Mr. Ushakov that, although physically there was one mission, legally there were a number of missions accredited to as many organizations. Article 6 had been drafted after very thorough consideration, both in the Commission and in the Drafting Committee, so it would not be advisable to try to redraft it.

42. With regard to the fears expressed by some governments that the terms of article 6 might be construed as implying a right of a sending State to establish a permanent mission, he proposed to include in the commentary an explanation showing that those fears were unfounded.

43. He suggested that article 6 be referred to the Drafting Committee.

44. Mr. ROSENNE said he wished to place on record that he reserved his position completely regarding the opinion that a single permanent mission accredited to several organizations constituted, legally, a number of permanent missions; that opinion was highly debatable, but it was hardly necessary for the Commission to reach any conclusion on it.

45. He also entered a formal reservation regarding a possible addition to the commentary to meet the concern of some governments that article 6 might be regarded as creating a right for a State member of an organization to establish a permanent mission; it might not be necessary to go quite as far as the Special Rapporteur had indicated.

46. Mr. ALCÍVAR said that the comments by the Government of Ecuador should not be construed as indicating a wish to amend article 6; the Government of Ecuador accepted the text as it stood, but stressed that it was "to be interpreted subject to the general reservations laid down in articles 3, 4 and 5" (A/CN.4/221, section B.5).

47. As to the possibility, mentioned by the Government of Switzerland, of a single permanent mission being accredited by a State to several organizations, it should be pointed out that States had no obligation to adopt such a measure: they had the option to do so if it met their needs. Some States which had permanent missions

accredited to the United Nations Office at Geneva nevertheless appointed special representatives for the meetings of certain organs, such as the Committee on Disarmament. It was a matter for the discretion of the State concerned and could not be the subject of regulation. There was no reason to fear a proliferation of permanent missions, since no State would willingly bear the cost of establishing an unnecessary mission.

48. The rule *pacta tertiis nec nocent nec prosunt*, to which Mr. Ustor had rightly drawn attention, would have to be borne in mind throughout the consideration of the draft.

49. He supported the Special Rapporteur's proposal that the text of article 6 should remain unchanged.

50. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 6 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁴

ARTICLE 7

51. The CHAIRMAN invited the Commission to consider article 7, for which the Special Rapporteur did not propose any change.

52.

Article 7

Functions of a permanent mission

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

- (a) representing the sending State in the Organization;
- (b) keeping the necessary liaison between the sending State and the Organization;
- (c) carrying on negotiations with or in the Organization;
- (d) ascertaining activities and developments in the Organization, and reporting thereon to the Government of the sending State;
- (e) promoting co-operation for the realization of the purposes and principles of the Organization.

53. Mr. EL-ERIAN (Special Rapporteur) said that both in the comments of delegations in the Sixth Committee and in the written observations of governments, certain doubts had been expressed regarding the need to include sub-paragraph (b), on the permanent mission's liaison function. He could not, however, agree to the suggestion that it be deleted, because permanent missions had in fact originated in 1947 as offices for maintaining liaison with the United Nations while the General Assembly was not in session.

54. He had not accepted the drafting suggestions for the rearrangement of the sub-paragraphs, in particular the suggestion that sub-paragraph (e) should be inserted immediately after sub-paragraph (a); he had pointed out that the list of functions in article 7 followed a certain

logical order which did not imply a grading in order of importance (A/CN.4/241/Add.2, para. 128).

55. The International Labour Organisation had objected that article 7 could give the impression that only the permanent mission was competent to have dealings with the ILO, and had drawn attention to its own practice (A/CN.4/241/Add.2, para. 122). He had not, however, considered it necessary to make any change in article 7 to deal with that special situation. Articles 3 to 5 safeguarded the special rules and agreements of international organizations. He did not believe that the terms of article 7 could give the impression that the permanent mission constituted the only channel of communication between the sending State and the Organization. An appropriate reference could be made to the subject in the commentary, and that should satisfy the ILO.

56. Drafting suggestions similar to those made by the United Nations Secretariat (A/CN.4/L.162/Rev.1) had already been considered by the Drafting Committee; he suggested that the Secretariat suggestions be referred to the Drafting Committee for consideration on second reading of the article.

57. Mr. REUTER said that the Special Rapporteur's explanations were, on the whole, convincing. He saw no reason, however, why the Commission should not try to find more flexible wording for sub-paragraphs (a) and (b), which might satisfy the International Labour Organisation and probably other specialized agencies that were in the same position, such as the World Health Organization and the Universal Postal Union. For example, if sub-paragraph (a) read "providing a representation of the sending State" and sub-paragraph (b) "maintaining a liaison between the sending State and the Organization", that would imply that there were other possible forms of representation and liaison. Perhaps Ministries of Foreign Affairs would prefer the present wording, but although control over the so-called technical ministries by the Ministry of Foreign Affairs was a problem that arose in internal constitutional law, it must be recognized that for the practical functioning of international relations it was essential for international organizations to be able to deal with the appropriate technical ministries.

58. He also thought that articles 6 and 7 should perhaps be brought into harmony. According to article 6, the possibility of establishing permanent missions was limited by the performance of certain functions, while in article 7, which enumerated those functions, the words "*inter alia*" had been cautiously included, which implied that there might be others.

59. Mr. USHAKOV said that the problem raised by the International Labour Organisation was not a real problem. The fact that diplomatic missions had the function of negotiating with the host State did not mean that the ministries concerned had no authority to negotiate. The same applied in the case of permanent missions to Organizations. Their functions did not impair the authority of competent government organs.

60. Mr. CASTAÑEDA said that the Drafting Committee should consider very carefully the concordance, in the

⁴ For resumption of the discussion see 1110th meeting, para. 18.

three languages, of the terms "*inter alia*", "*notamment*" and "*principalmente*" in the introductory phrase of the article, and of the term "in", "*auprès de*" and "*en*" in sub-paragraph (a).

61. Mr. AGO said he agreed with Mr. Reuter. It was no accident that some organizations had seen fit to draw the Commission's attention to certain problems of representation: there were not only problems which arose in the sending State concerning the respective competence of different government departments, there were also problems which arose in the Organization. The wording adopted by the Commission must not give the impression that the permanent mission had all the functions of representing the State to the Organization and that it alone was authorized to deal with the Organization. That tendency was becoming all too prevalent, and the Commission must be careful not to embarrass the organizations by appearing to encourage it.

62. Mr. USTOR said he supported the Special Rapporteur's conclusions on article 7, but suggested that the Drafting Committee consider inserting the words "between States" in sub-paragraphs (e) after the word "co-operation", and possibly introducing a reference to friendly relations between States. References to friendly relations were contained in article 3, paragraph 1 (e) of the Vienna Convention on Diplomatic Relations⁵ and in article 5, sub-paragraph (b) of the Vienna Convention on Consular Relations;⁶ the preambles to those Conventions and to the 1969 Convention on Special Missions⁷ also referred to the development of friendly relations and co-operation between States.

63. Mr. ALCÍVAR said that the wording of sub-paragraph (a) raised a question of substance, not merely of drafting. A permanent mission represented the sending State in two ways. In the first place, it represented the sending State in its relations with the Organization, an idea which was expressed in Spanish by the words "*ante la Organización*"; possibly the words "*auprès de l'Organisation*", used in the French version of sub-paragraph (a), had the same meaning. In the second place, the permanent mission represented the sending State within the Organization. That idea was expressed in the Spanish version of sub-paragraph (a) by the words "*en la Organización*". He could not, of course, say conclusively whether the wording used in the English version of sub-paragraph (a), "in the Organization", covered both those meanings. He had observed, however, that the expression "permanent mission to the United Nations" was also currently used.

64. Mr. EUSTATHIADES, referring to the observations of the ILO, which raised an aspect of a more general question, said that the Commission could make it clear in the commentary, first, that article 7 did not enumerate all of the functions that might be performed by a permanent mission, but only the most important

and, secondly, that those functions did not exclude parallel functions exercised by other organs.

65. Mr. CASTRÉN said he agreed with the Special Rapporteur that the text of the article should not be changed. On the other hand, it would be well to insert the classifications suggested by Mr. Eustathiades in the commentary.

66. Mr. EL-ERIAN (Special Rapporteur) said he welcomed Mr. Ustor's suggestion concerning sub-paragraph (e). The Commission had decided in 1968 to adopt the present text, which referred only to the permanent mission's function of promoting co-operation for the realization of the purposes and principles of the Organization. He himself was in favour of including a reference to the promotion of co-operation and friendly relations between States, but he had accepted the present wording because it mentioned the realization of the purposes and principles of the Organization. All universal organizations were intended to promote friendly relations and co-operation between States.

67. With regard to the suggestions made by Mr. Reuter and Mr. Ago on the delicate question of the special procedures in certain technical organizations, he thought it would be difficult to cover the point in the text of article 7. In any case, the provisions of that article did not in any way prejudice the use of channels of communication other than the permanent mission. The position was the same in bilateral diplomatic relations; the fact that a sending State was already represented by a permanent diplomatic mission did not prevent it from sending a special ambassador for a particular purpose.

68. He suggested that the drafting points raised might be left to the Drafting Committee, but pointed out that it had already considered the wording of the various provisions of article 7 at the previous session.

69. Mr. RUDA suggested that the Drafting Committee should consider the suggestion that sub-paragraph (b) be deleted; as pointed out by the United States Government in its comments (A/CN.4/221/Add.1, section B.10), that sub-paragraph was not necessary, since it was already covered by the provisions of sub-paragraphs (a) and (c). In fact it was also covered by sub-paragraph (d). It was significant that the Vienna Convention on Diplomatic Relations did not contain any reference to the liaison function. Paragraph (3) of the Commission's commentary to article 7,⁸ which explained the inclusion of sub-paragraph (b), made it perfectly clear that its provisions duplicated those of the other sub-paragraphs, in particular sub-paragraph (d). The quotation from a book contained in that paragraph of the commentary was particularly revealing in that respect.

70. Mr. ROSENNE said that, when the Commission had adopted article 7 at its twentieth session, the Drafting Committee had pondered very carefully over the use, in the English version of sub-paragraph (a), of the words "in the Organization" rather than "at the Organization"

⁵ United Nations, *Treaty Series*, vol. 500, p. 98.

⁶ *Op. cit.*, vol. 596, p. 268.

⁷ See Annex to General Assembly resolution 2530 (XXIV).

⁸ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 200.

or “to the Organization”,⁹ which raised questions relating to accreditation and other matters dealt with elsewhere in the draft.

71. For those reasons, he would urge that no change be made in the text of article 7, which had been carefully drawn up in 1968.

72. Mr. KEARNEY said he agreed with Mr. Ruda that sub-paragraph (b) was not necessary.

73. Mr. EL-ERIAN (Special Rapporteur) said that, although from a strictly logical point of view sub-paragraph (b) might be subsumed under the other sub-paragraphs of article 7, he thought the function it specified deserved special mention because of the historical origin of the institution of permanent missions.

74. The expression “in the Organization”, which was used in sub-paragraph (a), had been examined very carefully by the Drafting Committee and should therefore be retained.

75. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 7 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁰

The meeting rose at 1 p.m.

⁹ Op. cit., 1968, vol. I, p. 214, para. 78 *et seq.*

¹⁰ For resumption of the discussion see 1110th meeting, para. 33.

1090th MEETING

Friday, 30 April 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 3; A/CN.4/241 and Add.1 and 2; A/CN.4/L.162/Rev.1)

[Item 1 of the agenda]

(continued)

ARTICLES 8 and 9

1. The CHAIRMAN invited the Special Rapporteur to introduce articles 8 and 9.

2.

Article 8

Accreditation to two or more international organizations or assignment to two or more permanent missions

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

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

Article 9

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

1. The permanent representative of a State may be accredited as head of a diplomatic mission or assigned as a member of a diplomatic or special mission of that State to the host State or to another State.

2. A member of the staff of a permanent mission of a State may be accredited as head of a diplomatic mission or assigned as a member of a diplomatic or special mission of that State to the host State or to another State.

3. A member of a permanent mission of a State may be appointed as a member of a consular post of that State in the host State or in another State.

4. The accreditation, assignment or appointment referred to in paragraphs 1, 2 and 3 of this article shall be governed by the rules of international law concerning diplomatic and consular relations.

3. Mr. EL-ERIAN (Special Rapporteur) said that a number of comments, mostly of a drafting character, had been made by governments on article 8, and on articles 8 and 9 taken together. He had therefore thought it advisable to deal with the two articles simultaneously.

4. In the Sixth Committee, there had been some criticism of the use of the term “accreditation” in the titles of articles 8 and 9 and of the term “accredit” in the body of article 8. He proposed to deal with those criticisms, and with the suggestion that those terms be replaced by such words as “appointment” and “appoint”, when the Commission considered articles 12 and 13, dealing with the credentials of the permanent representative and accreditation to organs of the Organization.

5. One government had suggested the deletion of article 8, pointing out that it referred to a case that was not analogous to that dealt with in the corresponding provisions of the Vienna Convention on Diplomatic Relations and the Convention on Special Missions (A/CN.4/221, section B.6). He recognized the validity of that comment, but thought that the Commission should make the draft as complete as possible, following the example of its draft on the law of treaties. It was useful to deal with the situations envisaged in the article, even if they did not involve legal obligations.

6. The United Nations Secretariat had made elaborate drafting suggestions which he had reproduced in full in his sixth report (A/CN.4/241/Add.2 para. 136). His own proposal was to insert the words “or special” after

the words "head of a diplomatic" in paragraphs 1 and 2 of article 9, and to refer the drafting suggestions by the United Nations Secretariat to the Drafting Committee.

7. Mr. USTOR said that the provisions of articles 8 and 9 were connected with those of article 46, which precluded the permanent representative and the members of the diplomatic staff of a permanent mission from practising for personal profit any professional or commercial activity in the host State. Articles 8 and 9 stated the functions with which a member of the permanent mission might be entrusted, apart of course, from his duties in the mission. The whole system was not completely watertight and there might well be some functions which were not covered by articles 8 and 9, but were not prohibited by article 46. He did not believe that any greater precision was necessary in the matter; the drafting points which had been raised should be referred to the Drafting Committee.

8. With regard to substance, there was considerable merit in the view that, even if articles 8 and 9 were not included, the functions therein mentioned might still be carried out because they were not prohibited. Nevertheless, he agreed with the Special Rapporteur that it would be useful to include the two articles in the draft.

9. The functions specified in articles 8 and 9 did not include membership of an observer mission or of a delegation to an organ or conference. The possibility of a member of a permanent mission exercising such functions would appear to go without saying, but it would be preferable to state it expressly.

10. In view of the complex wording of the two articles, which would be made even more complex if that additional possibility were covered, he suggested that the Drafting Committee consider the possibility of combining articles 8 and 9 with the corresponding articles in Part III. Articles 8 and 9 provided a good example in support of the view that it was possible to deal with permanent missions and permanent observer missions together.

11. Mr. ROSENNE, referring to the choice between the term "accreditation" and the term "appointment", said that the whole matter of terminology had not been adequately clarified, either in the context of articles 8 and 9 or in the broader context of existing diplomatic law or of the draft as a whole. He suggested that the Drafting Committee be asked to report on such problems of terminology at the end of the Commission's consideration of the whole draft. He himself had not been fully convinced by the Special Rapporteur's arguments, either in his observations on articles 8 and 9 or in his observations on articles 12 and 13.

12. With regard to the question of the analogy with the corresponding provisions of the Vienna Convention on Diplomatic Relations and of the Convention on Special Missions, he suggested that it would be advisable to adjust paragraph (14) of the commentary to article 8¹ so as to bring out the points so well made by the Special

Rapporteur in his sixth report (A/CN.4/241/Add.2, para. 138).

13. In general, the text of articles 8 and 9 required very careful scrutiny by the Drafting Committee, especially in the light of the constructive suggestions made by the United Nations Secretariat.

14. The idea put forward by Mr. Ustor was attractive, but it was essential, in any attempt to shorten the text of the draft, to avoid consolidating or amalgamating the missions themselves. A consolidation of that kind would involve a major problem of substance which should be avoided at the present stage.

15. Mr. CASTRÉN said that, in general, he agreed with the observations and proposals of the Special Rapporteur; in particular, he agreed that article 8 was not superfluous and should not be deleted, as one government had proposed. He would revert to the observations which related both to articles 8 and 9 and to other articles, when the Commission came to examine those other articles.

16. The text proposed by the United Nations Secretariat for articles 8 and 9 had many advantages and, although longer than the text adopted at first reading by the Commission, it was all the clearer for that. Since it did not entail any substantive change, he was of the opinion that the Drafting Committee should give it most serious consideration.

17. Mr. SETTE CÂMARA said that in general he supported the views of the Special Rapporteur. The arguments of certain governments had not convinced him of the need for any substantial change in the two articles.

18. In particular, the criticisms of the term "accreditation" were groundless. The use of that term with reference to the head of a permanent mission was connected with the formal requirement of credentials; in other contexts the Commission had been careful to use the term "assignment" or "appointment". In any case, he supported the Special Rapporteur's view that that question should be considered in connexion with articles 12 and 13.

19. The problem of multi-accreditation was clearly much more complicated in bilateral diplomacy, in the cases covered by article 5, paragraph 1 of the Vienna Convention on Diplomatic Relations and article 4 of the Convention on Special Missions. For permanent missions, article 10 of the present draft laid down the general principle of the sending State's freedom of appointment. That made multi-accreditation much simpler than in bilateral relations, where the *agrément* of the receiving State was necessary, and where a diplomatic agent could be declared *persona non grata*.

20. He agreed that the drafting suggestions made by the United Nations Secretariat, some of which were very interesting, should be referred to the Drafting Committee, but it should be noted that some of them considerably altered the structure of articles 8 and 9.

21. Mr. USTOR said he must explain that he had had no intention of suggesting that permanent missions and

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

permanent observer missions should be amalgamated or assimilated; the two institutions were quite distinct. He had merely mentioned the possibility of simplifying the drafting of the articles and had pointed out that articles 8 and 9 provided a good example of that possibility.

22. Mr. AGO said that article 8 dealt only with the accreditation of a permanent representative to two or more international organizations or his assignment as a member of two or more permanent missions, but it was also necessary to decide whether or not to mention the possibility of establishing one and the same permanent mission to several organizations.

23. At the previous session, the intention to replace the term "permanent representative" by "head of the permanent mission" had been indicated, and he asked the Special Rapporteur why he had omitted to make that change in the draft articles.

24. Mr. EL-ERIAN (Special Rapporteur) said that he had dealt fully with the question raised by Mr. Ago in his observations on sub-paragraph (e) of article 1, on use of terms (A/CN.4/241/Add.1, para. 68). He had pointed out that the term "head of mission" had been used in the Vienna Convention on Diplomatic Relations because it was necessary to cover both embassies and legations. In the case of permanent missions there was only one category of mission, with respect to which the term "permanent representative" was in general use. In the Convention on Special Missions, the term "head of a special mission" had been used because the term "special representative" did not have an established meaning in practice. The Commission would have an opportunity to discuss the matter when it considered article 1.

25. He agreed with Mr. Ustor that it was desirable to include in articles 8 and 9 a reference to the possibility of the permanent representative or a member of a permanent mission being appointed to a permanent observer mission or to a delegation to an organ or conference. When articles 8 and 9 had been drawn up, however, the Commission had not yet decided whether to include provisions on permanent observer missions and delegations to organs and conferences.

26. As to the suggestion that certain articles could be combined, he urged that the Commission should deal first with the various parts of the draft. At a later stage, it would be possible to combine certain articles that lent themselves to general treatment.

27. The Swiss Government had suggested the inclusion in article 6 of a provision to the effect that a State might establish a single permanent mission to several organizations (A/CN.4/239, section C.II); he himself was in favour of including such a provision in article 8. In fact, he had originally drafted the article in that form,² but the Commission had preferred not to refer to the permanent mission in the abstract, and had split the text into two separate paragraphs, one dealing with the permanent

representative and the other with the members of the permanent mission. He now suggested that article 8 should consist of three paragraphs: the first would make provision for the establishment of a single permanent mission accredited to several organizations; the second and third, corresponding to the present paragraphs 1 and 2, would deal with the multi-accreditation of the permanent representative and of members of the permanent mission respectively.

28. The question of the use of the term "accreditation" could be dealt with when the Commission came to consider article 13. He was aware that the Government of France and some other governments were reluctant to introduce the terminology of diplomatic relations into the law of international organizations, but the term "credentials" had been used in 1948 by the General Assembly, in its resolution 257 (III) on permanent missions to the United Nations, and was well established in the practice of international organizations.

29. Mr. USHAKOV said he thought that, legally speaking, there were as many permanent missions as there were organizations to which a permanent representative was accredited. In fact, a permanent mission to an organization existed only inasmuch as a permanent representative was accredited to the organization. If a single accreditation was sufficient to establish a permanent mission to several organizations at the same time, articles 12 and 13, and even article 14, would be unnecessary.

30. Mr. CASTRÉN said he agreed with Mr. Ushakov. It would be a mistake to introduce a provision on joint permanent missions into the draft articles. Even if the premises, the staff and the permanent representative were the same, accreditation was essential in each case, so that the missions were clearly separate.

31. Mr. CASTAÑEDA said that he could not accept that view. From the strictly legal point of view, it was true that the credentials were made out in the name of the permanent representative, but international practice showed that there were permanent missions accredited, as such, to several organizations. The act of establishing a mission was more a matter of fact than of law, but there could be no doubt that, particularly in Geneva practice, both the organizations and the host State recognized the existence of the mission itself.

32. It would be appropriate for article 8 to reflect that practice, which could be regarded as virtually a rule of customary international law and which was useful because it enabled a member of a permanent mission to act in organs of an international organization for which no special accreditation was necessary.

33. For those reasons, he fully supported the Special Rapporteur's proposal to include in article 8 a paragraph dealing with the multi-accreditation of the mission itself.

34. Mr. RUDA said that, before articles 8 and 9 were referred to the Drafting Committee, he wished to suggest that article 9 be framed in positive terms, as in the text adopted by the Commission at the first reading. The corresponding provisions of the Vienna Convention on

² *Ibid.*, p. 134, article 7.

Diplomatic Relations,³ the Vienna Convention on Consular Relations⁴ and the Convention on Special Missions⁵ were also in positive terms. It would not be advisable to adopt the negative formula suggested by the Secretariat (A/CN.4/L.162/Rev.1) and quoted by the Special Rapporteur.

35. Mr. NAGENDRA SINGH said that the term "accreditation" was correct legally and conformed with diplomatic terminology, but if it gave rise to objections on the part of certain governments, he would be prepared to accept its replacement by a broader term, such as "appointment".

36. Article 8 was not superfluous and should be retained. As to the possibility of combining it with other articles, he feared that some confusion might result. On the other hand, he would have no objection to shifting certain articles to a more suitable place in the draft.

37. He believed that the Special Rapporteur was right in considering the permanent mission as the central pivotal point; there should be no objection to crystallizing the law in accordance with well-established practice.

38. Mr. ROSENNE said it would be useful if the Secretariat could provide the Commission with information on the position at Geneva with regard to multi-accreditation. In the booklet printed by the United Nations Office at Geneva and entitled "*Missions permanentes auprès des Nations Unies à Genève*", he noticed that most missions were described as "*Mission permanente auprès de l'Office des Nations Unies et des autres organisations internationales à Genève*". In a few cases, the concluding words were replaced by "*l'Office des Nations Unies à Genève et des institutions spécialisées en Suisse*". In at least one case, reference was made to "*institutions spécialisées en Europe*". It would be useful for the Commission to know whether, in the second group of cases, there was only one accreditation, and only one notification to the Swiss Government, and whether the permanent mission represented the sending State both at the Geneva Office and agencies and at the Universal Postal Union (UPU) at Bern. In the last case, the permanent mission would appear also to represent the sending State at organizations with headquarters in other countries of Europe.

39. Mr. AGO said he could accept the practical arguments put forward by the Special Rapporteur in support of the use of the term "permanent representative", even though there were permanent representatives who were not heads of permanent missions. And Mr. Rosenne had just pointed out that the term "permanent representative" was always used in titles. That was a mistake, but usage had to be followed.

40. As to whether there should be one or several permanent missions, Mr. Ushakov and Mr. Castrén had maintained that, where there was representation to several organizations, there were several permanent missions,

even if the permanent representative was one and the same person. It could just as well be said that there were as many permanent representatives as organizations to which they were accredited, even if they were one and the same person. Article 8, as drafted, gave the impression that there must be several permanent missions, but that they might have the same head. In reality, however, there was often only one mission, and that was what mattered for the host State. It would therefore be better to specify that any State could establish a single permanent mission to several organizations.

41. Mr. ROSENNE said that the publication he had mentioned listed the permanent missions of three States which were not Members of the United Nations, but were members of specialized agencies; the title used in those cases was "*Observateur permanent auprès de l'Office des Nations Unies et Délégué permanent auprès des autres organisations internationales à Genève*".

42. Mr. BARTOŠ said it was very difficult to decide whether it should be considered that there was one or several permanent missions where the same permanent representative was accredited to several organizations. In fact, although some international organizations would accept a single permanent representative accredited "globally", so to speak, to several of them, there were many others which, for reasons of prestige or convenience, insisted on having a permanent representative accredited to themselves. That applied, for example, to FAO, CERN, the European Economic Communities and the Organization of American States.

43. Hence it would be better not to waste time trying to settle the question, but to provide, mainly in the interests of small States and States which could not afford to have many representatives, that any State might accredit either the same representative, or several representatives, to several organizations, whether the permanent mission was situated in the same place as the headquarters of the organization or not. Practical needs would determine the solution to be adopted. It was to be hoped that the Drafting Committee would find a formula satisfactory to all.

44. Mr. AGO said that, as was clear from what Mr. Bartoš had just said, the consent of the organization was always essential. The right stated in article 8 could be exercised only if the organization made no objection.

45. Mr. EUSTATHIADES said he did not think the discussion was serving any practical purpose, particularly from the standpoint of privileges and immunities. Articles 8 and 9 had been very carefully drafted by the Special Rapporteur and the Commission, and their basic purpose was to state the general rule that accreditation could be to one or to several organizations, in other words that an international organization could not refuse to accept a mission accredited to another organization. Article 12, which provided that the credentials of the permanent representative must be transmitted to the competent organ of the Organization, would make it possible to settle the problems raised by the practice of each organization, especially the possible requirement of separate letters of credence.

³ United Nations, *Treaty Series*, vol. 500, p. 100, article 5.

⁴ *Op. cit.*, vol. 596, p. 276-278, article 17.

⁵ General Assembly resolution 2530 (XXIV), Annex.

46. Mr. ROSENNE said that some of the remarks made during the discussion might be interpreted as implying that an organization had some say in a State's choice of its permanent representative. It should be made clear that nothing in articles 8 and 9 could prejudice the basic provisions of article 10 on the sending State's freedom of choice. The application of articles 8 and 9 was also subject to the general provisions of articles 3, 4 and 5.

47. It would now seem appropriate to refer articles 8 and 9 to the Drafting Committee.

48. Mr. ELIAS said that the discussion would have been shorter if the contents of such articles as 10, 12 and 13 had always been kept in mind. The Commission was engaged in the second reading of the draft articles and there was no need to engage in theoretical discussions. Since there appeared to be no fundamental difference of opinion with regard to the substance of articles 8 and 9, he concurred with the suggestion that they should be referred to the Drafting Committee and that the Commission should pass on to consider other articles.

49. Mr. EL-ERIAN (Special Rapporteur), reverting to the question of the appointment of the same permanent mission to two or more organizations, said that from the legal point of view there were certainly several permanent missions. For example, if the sending State withdrew from one organization but not from the others, the permanent mission ceased to exist as far as that one organization was concerned, but continued for the others.

50. The essential purpose of article 8 was to specify that permanent representatives and members of permanent missions were not subject to the requirement of consent, which was laid down in the corresponding provisions of the Vienna Convention on Diplomatic Relations and the Convention on Special Missions. Consequently, an organization could not refuse to accept a permanent mission on the ground that the mission was already accredited to other organizations. It could, of course, refuse to accept permanent missions altogether, but it could not reject the permanent mission of one member State while accepting those of others; such action would be contrary to the principle of non-discrimination.

51. The CHAIRMAN said that if there were no objection he would take it that the Commission agreed to refer articles 8 and 9 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.**

ARTICLES 10 and 11

52. The CHAIRMAN invited the Special Rapporteur to introduce articles 10 and 11.

53.

Article 10

Appointment of the members of the permanent mission

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

* For resumption of the discussion see 1094th meeting, para. 104.

Article 11

Nationality of the members of the permanent mission

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

54. Mr. EL-ERIAN (Special Rapporteur) said that there had been general agreement in the Sixth Committee and in the observations of governments and of international organizations that there was a fundamental difference between permanent missions to international organizations and traditional diplomatic missions. The latter required the *agrément* of the receiving State, while the former did not.

55. Some governments had proposed that exceptions be provided for in the case of persons who had previously been convicted in the host State of a serious criminal offence or who had previously been declared *persona non grata* by the host State. He had not seen fit, however, to depart from the rule generally accepted by the Commission.

56. The Government of Switzerland had suggested that it should be specified in article 11 that the host State should not be obliged to accept the presence of stateless representatives (A/CN.4/239, section C.II); but he had taken the view that that question was already regulated by a number of international instruments which he would not wish to impair.

57. Mr. YASSEEN said he was in favour of keeping the two articles as they stood.

58. With regard to article 10, he shared the misgivings of the host States, in particular Switzerland, but was not in favour of drawing on bilateral diplomacy for a solution which would not properly meet the requirements of multilateral diplomacy. Although it was true that the host State should have the right to refuse a person who had been convicted of a serious criminal offence, as certain States had proposed, there was no need to include a special provision on that exceptional case. In practice, it was hardly conceivable that a State would appoint a common criminal as a member of one of its permanent missions. The Commission should rely on the good faith of States.

59. Article 11 had not, he noted, been the subject of much criticism. The Swiss Government had raised the question of stateless persons; but as the Special Rapporteur had pointed out, the problems of stateless persons were regulated by a number of international instruments and it was not desirable to introduce into the draft articles on permanent missions a provision dealing with a particular point relating to statelessness.

60. Mr. KEARNEY said that if it were invariably possible to rely on the good sense and discretion of States, as Mr. Yasseen had suggested, then article 10 would not present any difficulties. Unfortunately, the observations of States on that article indicated that there was some doubt as to whether such reliance was always possible.

61. For example, the Government of Japan had stated that: "While the draft articles grant permanent missions privileges and immunities virtually identical with those accorded to permanent diplomatic missions, they do not adequately ensure the protection of the interests of the host State by providing measures comparable to the provisions on *persona non grata* and *agrément* designed to protect the interests of the receiving State in bilateral relations." (A/CN.4/239/Add.2, section B.5, para. 3). Moreover, the Council of Europe Sub-Committee on Privileges and Immunities of International Organizations and persons connected with them had reported on 26 September 1969 that: "The Sub-Committee considered to what extent the host State might have a justifiable interest in the appointment of permanent representatives. It was agreed that, whatever solution might finally be found on this question, it was essential that it should take into account both the interest of the host State to exercise a certain measure of control over persons admitted to take up an official appointment within its territory and the independence of the international organization."

62. He himself did not agree that a host State should be empowered to refuse to grant immunities to permanent representatives, since that would tend to create a kind of second-class citizenship among such representatives. He thought it would be better for the Commission to lay down one or two rules to apply to those cases in which the host State was granted the right to object to an appointment.

63. The comments of governments mentioned by the Special Rapporteur (A/CN.4/241/Add.2, paras. 143-147) seemed to refer to the most important problems, such as those concerning persons with previous convictions and persons who had been declared *persona non grata* by the host State. In those cases, it would seem presumptuous on the part of the sending State to appoint such persons, but that situation had, in fact, arisen in his own country, where persons who had been declared *persona non grata* by his Government for having engaged in espionage had subsequently reappeared on permanent missions to United Nations Headquarters. Consequently, while fully recognizing the theoretical desirability of placing no restrictions at all upon the appointment of members of the permanent mission, he proposed that the Commission provide for such restrictions in at least the two most serious cases to which he had referred.

64. Mr. BARTOŠ said he, too, thought that the two articles under consideration should not be changed.

65. With regard to article 10, he observed that persons had sometimes been convicted in a country and later worked there as members of a permanent mission. A Yugoslav diplomat convicted in France of a criminal offence—using a false passport—had subsequently represented his country at several international conferences and then been appointed ambassador in Paris,

with the *agrément* of the French Government. The attention of the French authorities had later been drawn to the diplomat's conviction, but he had been pardoned because the motives of his crime had been political. That example showed that the concept of a criminal offence should be treated cautiously where diplomatic agents were concerned. Refusal on the ground of a previous conviction should be a matter for the practice of States.

66. In considering article 11, it should be remembered that questions of nationality could raise very delicate problems. There was the case of certain Serbian diplomats who had participated in international conferences while claiming to be stateless. The Austro-Hungarian Empire and Turkey, of which they had been nationals, had persistently refused to allow them to renounce their nationality, and Serbia had entered into treaty obligations with those States not to grant Serbian nationality unless the previous nationality had been lost. The Commission should therefore be careful not to exclude all stateless persons from permanent missions, but only those whose actions constituted a threat to the proper functioning of the organization.

67. Mr. USHAKOV said he shared Mr. Kearney's concern regarding the necessity of protecting the interests of the host State. But the Commission should not waste time on exceptional cases.

68. In bilateral diplomacy there were two principles: the freedom of the sending State to choose the members of its mission and the right of the receiving State to declare someone *persona non grata* or unacceptable. But it was possible to imagine extreme cases, such as refusal by the receiving State of all the persons suggested by the sending State. In multilateral diplomacy, on the other hand, the principle of freedom of choice of the sending State was accompanied by the principle that the host State could not refuse everyone. Once again, it was possible to imagine extreme cases, such as the sending of a common criminal or a person previously declared *persona non grata* or unacceptable. Such cases should not, however, be the subject of specific provisions, but should be settled direct by the States concerned through diplomatic channels. As Mr. Yasseen had said, the Commission should rely on the good faith of States.

69. Mr. SETTE CÂMARA said that there could be no objection to article 10, outside the extreme hypotheses covered by articles 11 and 16, and that in his opinion any departure from the freedom of appointment would be very dangerous. Hence he could not accept the suggestion of certain governments that the host State should have the right to reject persons who had been convicted of a criminal offence or who had been declared *persona non grata* by the host State. As the Special Rapporteur had rightly pointed out, members of permanent missions were not accredited to the host State and did not enter into any relations with it.

70. On article 11 he was in full agreement with the Special Rapporteur; he could not support the suggestion of the Swiss Government that the host State should not be obliged to accept the presence of stateless representatives. He agreed with Mr. Yasseen that that would be

¹ *Privileges and Immunities of International Organizations, Resolution (69) 29 adopted by the Committee of Ministers of the Council of Europe on 26 September 1969 and Explanatory Report, Council of Europe, Strasbourg 1970, para. 154.*

contrary to the spirit of many international instruments which had been drawn up—some by the Commission itself—for the defence of stateless persons.

71. Mr. ALCÍVAR said that he fully approved of the formula proposed by the Special Rapporteur for article 10. In the first place, when a State agreed to act as host to an international organization, that was an act of will by which it acknowledged the absolute independence of the organization. Any amendment giving the host State a right to restrict the appointment of permanent representatives would be very dangerous, since it would put a stop to the independence which the organization had to have in order to function efficiently. Admittedly, the world was not perfect, but it was a world of peaceful coexistence, and it was on that basis that international organizations had been established.

72. He fully supported the well-balanced text which the Special Rapporteur had proposed for article 11.

73. Mr. NAGENDRA SINGH said he understood the embarrassment which might be felt by host States at having to receive representatives who were criminals and *persona non grata* to them, but it would be difficult to provide for every contingency of that kind which might arise. Rather than try to draw up articles to meet specific cases, the Commission should provide for some sort of machinery, such as that proposed by the Swiss Government in its observations on article 50 (A/CN.4/239), section B.II). For that purpose, some reference to article 50 might be included in article 10.

74. Mr. ELIAS said that the anxiety expressed by Mr. Kearney was reflected in the comment of a Government quoted in paragraph 146 of the Special Rapporteur's report; that Government had suggested the addition of a new paragraph to article 10, or of a new article 10 (*bis*), which would provide that "the host State should have the right to refuse its consent... (1) in the case of a person who has previously been convicted in the host State of a serious criminal offence; (2) in the case of a person whom the host State has previously declared *persona non grata*".

75. However, in the case of municipal offences, the host States always had the right of pardoning the offender, and as Mr. Bartoš had pointed out, that right had been exercised in the case of representatives who had at one time been declared *persona non grata* because of such offences. He feared, therefore, that the effect of including the two exceptions suggested would be to deprive the host State of the right to change its mind subsequently with regard to such representatives. Article 10 should be retained in its present form, though the Commission could include a short explanation in the commentary.

76. With regard to article 11, he agreed with the Special Rapporteur that it was undesirable to incorporate the Swiss Government's suggestion concerning stateless persons in the article itself, although it might be mentioned in the commentary.

77. Mr. ROSENNE said that when his Government had expressed the view quoted by the Special Rapporteur in paragraph 146 of his report, nothing could have been

further from its thoughts than the idea of compelling host States not to exercise the right of pardon.

78. He agreed that it was necessary for the draft articles to remain within the framework of established principles, although at times those principles seemed to be contradictory. One of them was to be found in article 4 of the 1961 Vienna Convention on Diplomatic Relations and in article 12 of the 1969 Convention on Special Missions, regarding the right of the host State to refuse its consent without giving any reason. He thought it would be a corollary of that principle that no State ought to regard itself as being entitled to circumvent it by appointing a person who might be caught by the principle to a diplomatic position in the host State under some other juridical institution.

79. In article 10 of the present draft the second of those principles, the principle of the freedom of appointment, was qualified only by reference to articles 11 and 16, although it was now recognized in article 45, paragraph 2, that the sending State could be required to recall a person in circumstances not far removed from those mentioned in paragraph 146 of the Special Rapporteur's report. In his opinion, the draft would be defective if no attempt was made to reconcile those contradictory principles.

80. Perhaps the best solution would be to ask the Drafting Committee to consider the problem in the light of all the observations of governments and the discussions in the Commission. In any case, it would be wrong to assume that the matter could be dealt with in the commentary, for after all, the commentary would disappear in the course of time.

81. He was prepared to accept article 11 as at present drafted.

82. Mr. CASTRÉN said he had no comments to make on article 11.

83. As to article 10, he thought the fact of having declared someone *persona non grata* should not entitle a State to refuse that person a second time, particularly as States were not obliged to give their reasons.

84. The question of persons convicted of a criminal offence was more difficult. Article 45, paragraph 2, protected the host State in case of grave and manifest violation of the criminal law. The host State could fall back on that provision to oppose the appointment of a criminal. Unlike Mr. Rosenne, he thought the Commission could confine itself to dealing with the question in its commentary to article 10 and should leave the text of the article unchanged.

85. Mr. RUDA said he could accept both article 10 and article 11 as drafted by the Special Rapporteur, since it was obvious that the requirements for accreditation in bilateral diplomacy did not apply in the case of permanent missions to international organizations. It might be advisable, however, to make some reference in the commentary to article 10 to the suggestion of the Swiss Government that the host State should be authorized to formulate objections to the presence of a given individual in its territory and that such objections could

be examined by the conciliation commission referred to in its comment on article 50 (A/CN.4/239, section C.II).

86. With regard to article 11, he agreed with the Special Rapporteur that the problems of stateless persons were adequately covered by the first sentence in that article, which read: "The permanent representative and the members of the diplomatic staff of the permanent mission should in principle be of the nationality of the sending State." The words "in principle" surely implied that it was not impossible that persons other than nationals could be appointed.

87. Mr. EUSTATHIADES said he thought there was no need to make express provision for the very unlikely case of a State appointing a person previously convicted of a serious criminal offence. Moreover, if such a case did arise, the host State could invoke article 45, paragraph 2.

88. The case of *persona non grata*, on the other hand, led to a conflict of interests: those of the host State and those of the organization, which wished to safeguard its proper functioning. The opposition of the host State could not be ignored, but neither could that State be given a right of veto. The word "freely" left the host State very little latitude.

89. In order to reduce the problem to its proper dimensions, perhaps only the case of a person already declared *persona non grata* should be considered. In that case, a "question" arose between the States concerned, and consultations between them could be held in accordance with the provisions of article 50. In his view, it would not be necessary for the sending State to communicate the name of the person to the host State; the latter State could take action when that communication was made to the organization and indirectly brought to its attention.

90. He proposed that article 50 should be mentioned in the text of article 10, which would then begin; "Subject to the provisions of articles 11, 16 and 50...". That compromise solution seemed to him to be the minimum that would partly meet the justified fears expressed during the discussion.

91. Mr. EL-ERIAN (Special Rapporteur), summing up the discussion, said that, as in 1968, a majority of the Commission seemed to be attached to the basic principle of the sending State's freedom of choice of its permanent representative, a principle which itself was based on the fundamental difference between bilateral and multilateral diplomacy. There was general agreement, therefore, that articles 10 and 11 should be retained in their present form.

92. Mr. Elias, supported by other speakers, had suggested that some reference should be made in the commentary to the need for certain exceptions in the case of past criminal activities on the part of proposed members of missions. Mr. Ruda had suggested that the commentary should include some mention of article 50. He realized that the commentary was bound to disappear eventually, but it was nevertheless a part of the *acte préparatoire* of the draft convention.

93. There was always a risk of abuse in connexion with basic immunities, but as Mr. Ushakov had said, it was necessary to assume good faith on the part of the sending State and to allow it freedom of choice. Article 45, paragraph 2, relating to the sending State's recall of members of its mission in the event of grave violations of the law, used the word "shall", and that implied an obligation. There were, however, many delicate considerations which might make a member of a diplomatic mission *persona non grata*, but which would not automatically disqualify a member of a permanent mission to an international organization.

94. Mr. KEARNEY said he reserved the right to revert to the problems presented by articles 10 and 11 at the next meeting.

The meeting rose at 1.20 p.m.

1091st MEETING

Monday, 3 May 1971, at 3.10 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 3; A/CN.4/L.162/Rev.1)

[Item 1 of the agenda]

(continued)

ARTICLE 10 (Appointment of the members of the permanent mission) and

ARTICLE 11 (Nationality of the members of the permanent mission) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of articles 10 and 11.

2. Mr. KEARNEY said he was rather perplexed by the proposal that the problems raised in connexion with articles 10 and 11 should be dealt with in the commentary. He seemed to recall that at the Vienna Conference on the

Law of Treaties it had been agreed that if the meaning of a provision was clear in the light of the ordinary meaning of the words as used in their context, the preparatory work would be referred to only if application of the literal meaning of the provision led to an absurd or unreasonable result.¹ He could see nothing ambiguous in the text of article 10; it was plain and clear and imposed no restrictions except in respect of articles 11 and 16. It would seem strange if the Commission relied on the commentary to solve any difficulties in connexion with article 10, for that course would suggest that it thought the article was likely to lead to some absurd or unreasonable result.

3. Any reference in the commentary to the consultation procedure provided for in article 50 would not be fruitful; there could be no reason for any conciliation procedure in connexion with article 10 because, under its provisions, the sending State had complete freedom to appoint the members of the permanent mission.

4. Mr. NAGENDRA SINGH said he would like to amplify the remarks he had made at the previous meeting, when he had proposed that some reference to article 50 be included in article 10 in order to meet the suggestion of the Swiss Government regarding the establishment of a conciliation commission (A/CN.4/239, section C.II). It was his firm belief that the practice of inviting the comments of governments was the main foundation of the work of codification on which the Commission was engaged. Those comments, whether they represented the views of one State or of many, should be welcomed impartially. If they ran counter to the accepted principles of international law, the Commission was entitled to ignore them; otherwise, the comments of even the smallest State should be given serious consideration, since the work of codification was not a legislative process governed by majority rule.

5. In articles 10 and 11, three entities were involved: the sending State, the host State and the international organization. The relationship was essentially between the sending State and the organization, but it was not an exclusively bilateral one; the host State had certain legitimate interests which could not be ignored. Consequently, to cover the three contingencies referred to by the Governments of Israel and Switzerland—the case of a person who had been previously convicted of a serious criminal offence in the host State, the case of a person who had previously been declared *persona non grata* by the host State, and the case of stateless persons—it seemed to him only reasonable to include a reference to article 50 in article 10.

6. He agreed with the Special Rapporteur that it would be calamitous to include any provision which would tend to reduce the privileges and immunities of the members of the permanent missions.

7. Mr. EL-ERIAN (Special Rapporteur) said he agreed

that the basic principle of article 10, namely, the freedom of the sending State to appoint the members of its permanent mission, might give rise to abuses. In the case of a person who had been convicted of a serious criminal offence, however, a remedy already existed under article 45, paragraph 2, which read: "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 mission or secure his departure, as appropriate".

8. The case of persons who had previously been declared *persona non grata* by the host State seldom arose in practice, because governments were naturally concerned to appoint representatives of high quality and character. Moreover, recourse could always be had to the consultation machinery provided for in article 50, to which article 10 was subject, but he feared that to add a specific reference to article 50 in article 10 might create a certain ambiguity, since it might seem to imply that consultations should be held prior to the appointment of the members of the mission.

9. With regard to Mr. Kearney's objection to dealing with problems in the commentary, he would not like to think that the Commission's commentaries served no other purpose than that of *actes préparatoires*. In his opinion, the commentaries should accompany the articles after their adoption and should always be referred to in case of doubt.

10. Mr. EUSTATHIADES said that at the previous meeting he too had proposed that a reference to article 50 be included in article 10. It was true that a situation which was, after all, exceptional should not be treated as a basic problem, but it was a situation that could arise and provision should be made for settling it, in order to protect the interests of the host State beside those of the sending States. A reference to article 50 in article 10 was the most generally acceptable of the solutions proposed.

11. Mr. USHAKOV said that, with regard to the application of the procedure laid down in article 50 to situations which might arise from articles 10 and 11, it should be made clear, at least in the commentary to article 50, which organization the consultations should be held with in cases where a member of the permanent mission was appointed to several organizations.

12. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer articles 10 and 11 to the Drafting Committee for review in the light of the discussion, bearing in mind that the Commission was anxious to safeguard, either by an appropriate formula in the body of the articles or in some other way, both the freedom of the sending State to appoint the members of the permanent mission and the legitimate interests of the host State.

*It was so agreed.*²

¹ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, p. 293, article 32 (United Nations publication, Sales No.: E.70.V.5).

² For resumption of the discussion see 1111th meeting, paras. 28 and 31.

ARTICLES 12 and 13

13. The CHAIRMAN invited the Special Rapporteur to introduce articles 12 and 13.

14.

*Article 12**Credentials of the permanent representative*

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

*Article 13**Accreditation to organs of the Organization*

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

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

15. Mr. EL-ERIAN (Special Rapporteur) said that the only amendment he proposed to article 12 was to replace the words "or by another competent minister" by the words "or by another competent authority".

16. As to article 13, there had been a suggestion in the Sixth Committee of the General Assembly that the word "accreditation" should be replaced by "appointment", but the Commission had decided in favour of the former word. Those were the only basic issues raised by the two articles.

17. Mr. YASSEEN said he saw no objection to replacing the words "competent minister" in article 12 by "competent authority", which was a more general formula, fully in keeping with international practice. He was also in favour of retaining the words "if that is allowed by the practice followed in the Organization", which granted the organization the right to give or withhold its consent.

18. The solutions proposed in article 13 were satisfactory and in accordance with international practice, and the article could be adopted as it stood, subject to any changes of form that the Drafting Committee might consider appropriate.

19. Mr. USTOR said he could accept the substance of article 12 as submitted by the Special Rapporteur. The article provided for four possibilities: the credentials might be issued by the Head of State, by the Head of Government, by the Minister for Foreign Affairs or, where that practice was recognized, by another competent authority. It should be noted that, even if the last possibility were omitted, the results would be the same, since article 3 provided that the rules of the organization should prevail.

20. In the interests of uniformity, the Drafting Committee should review all similar articles which included a specific reference to the rules of the organization. Article 6, for example, concerning the establishment of permanent missions, would be subject to article 3, although no reference to that article was included in it.

21. Mr. NAGENDRA SINGH said he welcomed the replacement of the words "competent minister" by "competent authority" in article 12.

22. He was not sure, however, about the words "the practice followed in the Organization", and he agreed with Mr. Ustor that the Drafting Committee should examine other similar articles in order to ensure uniformity. He wondered whether it might not be better to speak of "the laws of the sending State". He himself would attach more importance to the laws of the sending State than to the practice of the organization, since the aim was to bind the sending State more firmly.

23. With regard to article 13, the Sixth Committee had considered the word "accreditation" incorrect because it was based on the concepts of *agrément* and *persona non grata*, which were not applicable in the case of international organizations, since they were not sovereign States. The title "Accreditation to organs of the Organization" might perhaps be replaced by "Representation in organs of the Organization".

24. It had also been suggested that there was an inconsistency between paragraphs 1 and 2, but he could not agree with that view. The words "Unless a member State provides otherwise", in paragraph 2, actually covered what was stated in paragraph 1, which thus became almost superfluous. The words "in the organs of the Organization", in paragraph 2, might be replaced by "in all the organs of the Organization", but he would not quarrel with the text as it stood.

25. With regard to the observation by the Government of Ecuador (A/CN.4/241/Add.2, para. 165), he agreed with the Special Rapporteur that there was no inconsistency between article 13 and article 7, since the latter was a general provision. He also agreed with the Special Rapporteur in preferring the present text of article 13 to the formulation in paragraph (7) of the commentary.³

26. Mr. AGO said that, for the same reasons as Mr. Yasseen, he thought it would be preferable to replace the words "competent minister" by "competent authority" and to retain the reference to the practice followed in the organization.

27. With regard to article 13, a very clear distinction should be made between permanent representative *to* the organization, which was the correct expression to use, and representatives, whether permanent or not, *in* one or more organs of the organization. Article 13 was intended to provide for the possibility of a permanent representative to the organization being the representative of his State *in* one or more organs, rather than *to* the organs

³ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 206.

of the organization. The Drafting Committee should see that that difference was observed in the French version of paragraph 2, where the words "*auprès de*" were used instead of "*dans*", and in any other article where it might appear.

28. Mr. ROSENNE said he was inclined to think that there was more in articles 12 and 13 than met the eye. In considering article 12, the Drafting Committee should look very closely at the text adopted at first reading, the text suggested by one Government as a drafting amendment, and the text now proposed by the Special Rapporteur (A/CN.4/241/Add.2, paras. 157-161), since in each case the word "competent" was used with a different meaning.

29. The problem of the word "accreditation" should be considered by the Drafting Committee when it had completed its work. Article 13, as it stood, was extremely ambiguous and the Drafting Committee should make an effort to reduce it to clarity and order.

30. Mr. BARTOŠ said it should be specified, either in the body of article 12 or in the commentary, whether the organization could refuse to recognize a permanent representative whose credentials had been issued by the Head of State, the Head of Government or the Minister for Foreign Affairs, if its practice required the credentials of a permanent representative to be issued by some other clearly defined authority.

31. With regard to article 13 and Mr. Ago's comments, it could happen that the permanent representative had to be both representative to the organization and in the organization. That applied, for example, to the Office of the United Nations High Commissioner for Refugees. The Drafting Committee should take care not to exclude one of those two possibilities when amending the text of paragraph 2.

32. Paragraph 1 raised a different problem. There were cases in which the rules of the organization required the representative of a State to be expressly appointed to an organ; that applied, for example, to the United Nations Security Council. In such a case the general specification provided for in paragraph 1 would not be enough. Perhaps the Special Rapporteur and the Drafting Committee would think over that question.

33. Mr. CASTRÉN said that in general he approved article 12, with the change proposed by the Special Rapporteur. It might, however, be advisable to insert the words "of the sending State" after the words "another competent authority", in order to exclude international authorities.

34. On the other hand, given the general reservation in article 3, it was hardly necessary to include the reservation relating to the practice followed in the organization. However, if prudence required it, he would not object to the retention of the words "if that is allowed by the practice followed in the Organization".

35. Paragraph 1 of article 13, the deletion of which had already been discussed at length during the first reading, should be retained.

36. He hoped the Special Rapporteur would take account, in the commentary, of the observations concerning the commentary to articles 12 and 13 made by the Legal Counsel of FAO (A/CN.4/239/Add.1, section D.10).

37. Mr. SETTE CÂMARA said that article 12 dealt with a subject which pertained more to internal law, since it defined the authorities who were competent to issue credentials. In his opinion, it was altogether necessary, since that matter could not be left to States themselves.

38. He could understand the concern of the Government of Yugoslavia about the character of representation, but the needs of technical organizations must not be ignored. The ILO, for example, would be the concern of the Minister of Labour, WHO that of the Minister of Health, UNESCO that of the Minister of Education, and so on. By using the words "or by another competent authority", the Special Rapporteur had given the article added flexibility; however, the power to issue credentials should be confined to authorities of the highest rank and not allowed to fall into the hands of those of second or third rank.

39. With regard to the title of article 13, he could not agree with the Sixth Committee's criticism of the word "accreditation". Surely, if permanent representatives arrived at the organization bearing formal instruments, one must speak of accreditation and not of appointment.

40. In considering the problem of reconciling article 13 with article 7, it should be remembered that article 7 was a general provision, whereas article 13 dealt with a particular hypothesis. In the comments of governments, there was a certain confusion between permanent missions and permanent representatives; only the latter could be accredited to organs of the organization.

41. He considered article 13 satisfactory as it stood.

42. Mr. RAMANGASOAVINA said he was not in favour of replacing the words "competent minister" by "competent authority". It was essential that the permanent representative of a State should be appointed by someone in a high position and there was some danger of opening the door to anarchy on the pretext of respecting the sovereignty of the State. However, by providing that the right of the State to have its representative appointed by an authority other than the Head of State, the Head of Government or the Minister for Foreign Affairs, was subject to "the practice followed in the Organization", the Special Rapporteur had proposed an acceptable compromise.

43. Mr. USHAKOV said that the reference to the Minister for Foreign Affairs in article 12 clearly did not mean the Minister himself, but a member of the Government competent in foreign affairs. The same applied to the reference to "another competent minister". In both cases, the idea was that the credentials of the permanent representative must be issued at least by a member of the Government; it mattered little whether the term "minister" or "authority" was used, but the wording

adopted at first reading was preferable to that proposed by the Special Rapporteur.

44. Mr. ALCÍVAR said it was not clear to him whether the clause "if that is allowed by the practice followed in the Organization" in article 12, applied only to the other "competent authority" or also to the "Head of State", "Head of Government" and "Minister for Foreign Affairs". If the former was the case, the article should be expanded. He also doubted whether the question who was the "competent authority" was clearly regulated by the internal law of all States.

45. With regard to article 13, it should be noted that a permanent representative had a dual function; he represented his State both *to* the organization and *in* the organization. A permanent representative *to* the United Nations, for example, might also represent his State in the Security Council. The order of the paragraphs of article 13 should be reversed, since it was more logical to state the general rule first, and that was the rule in paragraph 2. The rule stated in paragraph 1, which was the exception, should follow.

46. Mr. KEARNEY said that the discussion on article 12 could give rise to some confusion as to its purport. Some of the remarks which had been made appeared to suggest that, in addition to specifying the type of credentials which an organization was obliged to accept, article 12 might also be laying down a rule, binding upon States, on the question who was competent under internal law to sign or issue credentials. In those States in which a treaty, once ratified, became part of internal law and in which the Minister for Foreign Affairs was constitutionally competent to issue credentials, another authority, relying on article 14, might dispute that competence. The Drafting Committee must ensure that the language of article 12 did not lend itself to the interpretation that a national authority could issue credentials in defiance of the competence of the Minister for Foreign Affairs under internal law.

47. Mr. REUTER said he shared the views of previous speakers, particularly those of Mr. Ago, Mr. Alcívar and Mr. Kearney. The Drafting Committee should be guided by the wording used in the Vienna Convention on the Law of Treaties, especially that of article 7, paragraph 2 (c), concerning representatives accredited to an international conference or to an international organization or one of its organs.⁴

48. Mr. EL-ERIAN (Special Rapporteur) said that the purpose of the reference to another competent authority in article 12 was to accommodate the position of technical organizations. For an organization of a political character, the credentials would always be issued by the Head of State, the Head of Government or the Minister for Foreign Affairs. But the draft articles were intended to cover all organizations, and in the practice of some technical organizations, credentials issued by other authorities

were allowed. The provisions of article 12 were purely permissive. They simply meant that, if the practice of the Organization allowed it, credentials could be issued by an authority other than the Head of Government, Head of State or Minister for Foreign Affairs.

49. Mr. Alcívar had asked what the words "if that is allowed by the practice followed in the Organization" applied to. They applied only to the immediately preceding words, "or by another competent authority"; they did not apply to the Head of State, the Head of Government or the Minister for Foreign Affairs, who were in all cases entitled to represent the State, regardless of any practice of the organization.

50. He could accept Mr. Castrén's suggestion that the words "of the sending State" be added after "competent authority". The idea was already implicit in the text, but he had no objection to its being made explicit.

51. He was also prepared to include a passage in the commentary explaining that the provision on the issue of credentials by another competent authority constituted an exception and a departure from the general rule.

52. Mr. Ustor had made the valid point that if the words "if that is allowed by the practice followed in the Organization" were omitted, the matter would still be covered by article 3. Nevertheless, a specific reference to the practice of the organization would be useful in article 12.

53. He noted that there was general agreement to retain article 12 in its present form. The same applied to article 13; there had been no support for the suggestion that it should be replaced by the text appearing in paragraph (7) of the commentary. He suggested that articles 12 and 13 be referred to the Drafting Committee.

54. Mr. USTOR suggested, for the consideration of the Special Rapporteur and the Drafting Committee, the inclusion of a provision between articles 13 and 14 to the effect that nothing precluded the sending State from appointing the permanent representative or a member of the permanent mission as a member of a delegation to an organ or conference. Perhaps that matter could be dealt with simply by means of a paragraph in the commentary to article 13.

55. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer articles 12 and 13 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁵

ARTICLE 14

56. The CHAIRMAN invited the Special Rapporteur to introduce article 14.

⁴ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, p. 290 (United Nations publication, Sales No.: E.70.V.5).

⁵ For resumption of the discussion see 1111th meeting, paras. 41 and 61.

57.

Article 14

*Full powers to represent the State
in the conclusion of treaties*

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

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

58. Mr. EL-ERIAN (Special Rapporteur) said he had not been convinced by the Swiss Government's argument that article 14 should be dropped because the subject of treaties between States and international organizations might eventually be codified (A/CN.4/241/Add.2, para. 172). The provisions of article 14 would serve a useful purpose until an international convention was actually concluded on the subject of treaties between States and international organizations.

59. The point raised by the Government of Belgium (*ibid.*, para. 173) related to treaties concluded under the auspices of organizations, which involved delegations to organs or conferences. That matter belonged in Part IV of the draft.

60. He had accepted the idea put forward by the Government of the Netherlands (*ibid.*, para. 174) and proposed that the title of the article be reworded to read: "Representation of States in the conclusion of treaties with international organizations".

61. He had not accepted the Swedish Government's suggestion that the expression "adopting the text" of a treaty be replaced by the term "negotiating" and the term "treaty" by "agreement" (*ibid.*, para. 175). In accordance with the prevailing opinion in the Commission, he thought that article 14 should conform with the wording of the Vienna Convention on the Law of Treaties.

62. Mr. YASSEEN said he was in full agreement with the Special Rapporteur. Article 14 did not pertain exclusively to the law of treaties, for it was not applicable to any treaty whatsoever, but only to treaties between the sending State and the international organization concerned. The limited scope of the article justified its inclusion in the draft and the Commission should not follow the Belgian Government's suggestion.

63. On the other hand, he was in favour of changing the title of the article as proposed by the Netherlands Government. As to the word "adopting", it had been used in the Convention on the Law of Treaties and could therefore be retained in article 14. Similarly, the term "treaty" had been given a very broad meaning in the Convention, so it should not be replaced by the word "agreement".

64. Mr. ROSENNE said he believed that article 14 could be retained, at any rate in substance. He had

reservations on the change of title and thought it would be preferable either to keep closer to the original title, or to go so far as to adopt the title "Full powers" of article 7 of the Vienna Convention on the Law of Treaties; but that was a matter which could ultimately be left to the Drafting Committee.

65. Article 14 was one of those general articles which should be taken out of Part I and merged, in the present instance at least, with article 88 and—if it survived—with article 58 also, into a single article covering the limited aspects of representation which had been left over from the Vienna Convention on the Law of Treaties.

66. Mr. NAGENDRA SINGH said that the question of the title could be considered by the Drafting Committee, but he thought it was necessary to use language more in keeping with the contents of the article. The provisions of article 14 dealt only with bilateral treaties, and the title would suggest that it covered a much wider field.

67. He agreed with the Special Rapporteur that there was no need to await the codification of the topic of treaties between States and international organizations and that the provisions of article 14 should be included in the draft. He also agreed with the Special Rapporteur's reasons for retaining the present text and not adopting the changes suggested by the Swedish Government.

68. Mr. BARTOŠ asked whether the Commission intended to take account of the possible differences between the general rules of the Vienna Convention on the Law of Treaties and the particular rules of international organizations. Two approaches were possible: it could be held that the Vienna Convention contained unifying rules which took precedence over the rules of organizations; or it could be held that those rules, although general, were not *ius cogens*, and that organizations could have their own rules.

69. Though not opposed to the view of the Special Rapporteur, who had adopted the first approach, he would point out that some organizations required permanent representatives to produce express authority for the purpose of adopting an instrument. That practice could not be ignored and he suggested that the Drafting Committee should add, at the end of the first paragraph of article 14, some such reservation as "unless the rules of the organization concerned provide otherwise". The Commission should take care not to impose a unification whose effect might be contrary to that desired.

70. Mr. CASTRÉN said he supported the change in the title of article 14 proposed by the Netherlands Government. He had some doubts about the usefulness of the article, but would not go so far as to propose its deletion. It was likely, however, that the Convention on the Law of Treaties would enter into force before the adoption of the present articles.

71. He suggested that the drafting of paragraph 2 should be modelled on the corresponding provision of the Convention on the Law of Treaties, namely, article 7, paragraph 1 (b); the last part of the paragraph might then read: "unless it appears from the practice of the organization concerned, or from other circumstances, that the intention of parties was to dispense with full powers".

72. Mr. EL-ERIAN (Special Rapporteur) said he would submit a rewording of the title to the Drafting Committee in the light of the discussion.

73. With regard to the remark by Mr. Castrén, he wished to make it clear that what he (Mr. El-Erian) had been referring to was not the coming into force of the Vienna Convention on the Law of Treaties, but the codification of the topic of treaties between States and international organizations.

74. He noted that no member of the Commission had suggested the deletion of article 14 and that the various points that had been raised could be referred to the Drafting Committee.

75. Mr. EUSTATHIADES, referring to the word "adopting", used in paragraph 1 of article 14, and to the comments to the effect that that term was used, in particular, with reference to multilateral treaties, as in article 9 of the Vienna Convention on the Law of Treaties, observed that it was also used in article 7, paragraph 2 (b) of that Convention with reference to bilateral treaties. Without going so far as to support the Swedish Government's proposal that the word "adopting" be replaced by the word "negotiating", he thought that the later term might be added. It could, of course, be presumed that the person competent to adopt the text of a treaty was *a fortiori* competent to negotiate it, but the negotiation might be entrusted to different persons.

76. Mr. EL-ERIAN (Special Rapporteur) said that article 7, paragraph 2 (b) of the Vienna Convention on the Law of Treaties specified that heads of diplomatic missions were considered as representing their State, without having to produce full powers, "for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited". That provision clearly referred to bilateral treaties and used the expression "adopting the text".

77. He could accept Mr. Castrén's suggestion that a reference to "the practice of the organization concerned" be added in the last phrase of paragraph 2 of article 14.

78. Mr. SETTE CÂMARA said that he wished to give his reasons for supporting the Special Rapporteur's text for article 14, despite certain differences of opinion revealed by the discussions in the Sixth Committee and the observations of governments.

79. Article 7, paragraph 2 (c) of the Vienna Convention on the Law of Treaties dispensed a representative accredited by a State to an international organization from the requirement of producing full powers for the purpose of adopting the text of a treaty in that organization. Article 14, paragraph 1 of the draft dispensed a representative to an international organization from the requirement of producing full powers only for the purpose of adopting the text of a treaty between his State and the international organization to which he was accredited.

80. The provisions of article 14 were thus narrower than those of article 7, paragraph 2 (c), of the Vienna Convention on the Law of Treaties, and the Government of Belgium had suggested that treaties concluded under

the auspices of the organization might also be covered (A/CN.4/239, section B.1.II). He himself favoured the more restrictive provision of article 14 as it stood, because of the need for caution in the matter.

81. He also supported the provisions of article 14, paragraph 2, which required the production of full powers for signing a treaty unless there was evidence of a clear intention of the parties to dispense with full powers.

82. He did not agree with the suggestion that the codification of the subject of treaties between States and international organizations could justify the deletion of article 14.

83. Mr. ROSENNE said he was not in favour of introducing a reference to negotiation into article 14. The 1962 draft on the law of treaties had included a whole article on negotiation,⁵ but in response to the reaction by governments the Commission had decided to delete it. At the time, he had been against the deletion, but he was now convinced of its wisdom.

84. In the present instance, it was not advisable to deal with the question of negotiation in the context of full powers. The subject of negotiations with the organization was dealt with in article 7, sub-paragraph (c), in connexion with the functions of a permanent mission.

85. The final title of the article could not be settled until a decision had been taken on the relationship between article 14 and articles 58 and 88.

86. Mr. YASSEEN said he saw no point in mentioning negotiations. One of the functions of the permanent mission was, precisely, to conduct negotiations. The present wording of article 14 was sufficiently broad to cover them.

87. Mr. AGO said he thought that negotiations should not be mentioned. The Commission had discussed the matter at length before reaching agreement on the wording of article 7, paragraph 2 (b), of the Vienna Convention on the Law of Treaties, and it would seem strange to introduce a concept which did not appear in that Convention. Since adoption was more important than negotiation, the latter was certainly implied. He was in favour of absolute parallelism with the Vienna Convention on that point.

88. With regard to the title proposed by the Netherlands Government (A/CN.4/241/Add.2, para. 174), he suggested that the words "in the conclusion" be replaced by "for the conclusion", thus substituting an idea of finality for a purely temporal idea.

89. Mr. REUTER, referring to Mr. Bartoš's suggestion that the possibility of a contrary practice by the international organization should be reserved, asked whether there should not also be a reservation covering the possibility of a contrary practice by the sending State. The term "competent authority" in article 12 constituted a reference to the constitutional law of States. Like article 12, article 14 was of a residuary nature in relation

⁵ See *Yearbook of the International Law Commission, 1962*, vol. II, p. 38.

to the constitutional law of States and to the practice—not to mention the “constitutional law”—of international organizations.

90. Mr. YASSEEN asked whether Mr. Reuter really thought that the practice of States should prevail. A reservation in favour of international organizations was justified by the fact they consisted of a large number of States. To introduce such a reservation in favour of States would again raise a question which had been discussed at length in connexion with the law of treaties: the question of the relationship between internal law and international law.

91. The CHAIRMAN said that if there were no objection he would take it that the Commission agreed to refer article 14 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.¹

The meeting rose at 6.5 p.m.

¹ For resumption of the discussion see 1111th meeting, para. 66.

1092nd MEETING

Tuesday, 4 May 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Ushakov, 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 and 2; A/CN.4/L.162/Rev.1)

[Item 1 of the agenda]

(continued)

ARTICLES 15 and 16

1. The CHAIRMAN invited the Special Rapporteur to introduce articles 15 and 16, on the composition and size of the permanent mission.

2. *Article 15*

Composition of the permanent mission

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

Article 16

Size of the permanent mission

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

3. Mr. EL-ERIAN (Special Rapporteur) said that, apart from a proposal to delete paragraph (4) of the commentary, the only observation on article 15 had suggested that it should be combined with article 6 to form a second paragraph of that article (A/CN.4/241/Add.2, para. 181). He did not favour that suggestion and preferred to keep article 15 in its present place in order to maintain the necessary co-ordination with the Vienna Convention on Diplomatic Relations and the Convention on Special Missions.

4. A number of observations had been made by governments and secretariats of international organizations on article 16, and were described in his sixth report (*ibid.*, paras. 183 to 186). All the points made had been thoroughly discussed in the Commission when article 16 had been drafted. He therefore proposed that no change be made in the text of that article.

5. Mr. YASSEEN said he had no comments to offer on article 15, which should be retained in its present form.

6. Article 16 stated a reasonable legal rule, which included the objective criteria governing its application; those criteria were the functions of the organization, the needs of the permanent mission and the circumstances and conditions in the host State. And since there were criteria, it was surprising that one international organization should have asked by what criteria it was to be decided what was reasonable and normal.

7. There was no justification for providing, as one government advocated, that the rule in the article was subject to the right of the host State to intervene; every international legal rule must necessarily recognize that right, so that no specific rule on it was required. In the present instance, recourse could be had to the consultations provided for in article 50, or to any other means of settlement of disputes recognized by international law. He found it hard to understand why some critics should see fit to raise, in regard to the application of article 16 only, a general problem which might arise in regard to the application of any other legal rule and whose solution did not belong to the topic being studied by the Commission. In his opinion, article 16 should be referred to the Drafting Committee unchanged.

8. Mr. REUTER said that in fact, if not in the text of the article, the responsibility for deciding what was reasonable and normal was borne by the organization. It intervened in bilateral consultations only if there was disagreement and, although it did not have the final say, its views carried weight. Any suggestion that the application of article 16 should be made subject to article 50 called in question the organization's powers of mediation.

9. The CHAIRMAN suggested that articles 15 and 16

be referred to the Drafting Committee for consideration in the light of discussion.

*It was so agreed.*¹

ARTICLE 17

10. The CHAIRMAN invited the Special Rapporteur to introduce article 17, on notifications.

11.

Article 17

Notifications

1. The sending State shall notify the Organization of:

- (a) the appointment of the members of the permanent mission, their position, title and order of precedence, their arrival and final departure or the termination of their functions with the permanent mission;
- (b) the arrival and final departure of a person belonging to the family of a member of the permanent mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the permanent mission;
- (c) the arrival and final departure of persons employed on the private staff of members of the permanent mission and the fact that they are leaving that employment;
- (d) the engagement and discharge of persons resident in the host State as members of the permanent mission or persons employed on the private staff entitled to privileges and immunities.

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

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

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

12. Mr. EL-ERIAN (Special Rapporteur) said that the drafting points raised in the written observations of governments on article 17 (A/CN.4/241/Add.2, para. 191) could be referred to the Drafting Committee.

13. With regard to the substance, only two comments had been made. The first was by the Government of Switzerland which had suggested that the permanent mission rather than the organization should notify the host State (*ibid.*, para. 189). He had not accepted that suggestion because the rule in article 17 was based on recognition of the direct relationship between the sending State and the organization; notifications should accordingly be made to the host State by the organization.

14. The second comment was by the International Labour Organisation, which had suggested that, in cases of accreditation to several organizations, the notification could be made to only one of them, which would then be responsible for informing the host State and the other organizations (*ibid.*, para. 190). Such a system might work at Geneva, where the United Nations Office had a central position in the United Nations system; since most of the organizations at Geneva were specialized agencies

of the United Nations, the latter could make a single notification to the host State on behalf of all of them. But it was very difficult to generalize that rule, because of the independence of international organizations from one another. He therefore suggested that the matter be left to the practice of the organizations themselves and that no rule on it be introduced into article 17.

15. Mr. ROSENNE said he was in general agreement with the Special Rapporteur, who had confirmed that article 17 was not intended to make any change in the rather special position obtaining at Geneva.

16. He found the text of paragraph 3 much too general; it was not sufficient to require the organization to transmit the notifications "to the host State". Consideration should be given to the advisability of specifying that the normal addressee in the host State was either the Minister for Foreign Affairs, or the organ designated by the host State itself. Such a provision would conform with the approach adopted in article 10 of the Vienna Convention on Diplomatic Relations,² article 24 of the Vienna Convention on Consular Relations³ and article 11 of the Convention on Special Missions.⁴ He was not certain, however, that it was necessary to introduce similar precision into paragraph 4. In fact, he had some doubt about the need to include that paragraph at all, since it simply stated a faculty of the sending State. If it was thought desirable to retain paragraph 4, however, consideration might perhaps be given to the advisability of specifying that the notification, if the sending State chose to make it, should be made to the Minister for Foreign Affairs of the host State, or to the permanent mission of that State at the headquarters of the organization.

17. Mr. NAGENDRA SINGH said he agreed with the Special Rapporteur that the objection made by the International Labour Organisation was not valid. It was not possible to designate a single organization to make the notifications to the host State on behalf of several organizations.

18. The comments by the Government of Switzerland appeared to be directed only at paragraphs 3 and 4 of article 17. He saw no reason why paragraph 4 should not lay down an obligation of the sending State to notify the host State. In its present permissive form, the paragraph was not very useful. Since the members of the permanent mission were entering the territory of a sovereign State, it was normal to require the sending State to notify the host State of their arrival. He therefore suggested that the opening words of paragraph 4, "The sending State may also transmit to the host State. . .", be replaced by some such wording as: "The sending State or its permanent mission shall also transmit to the host State. . .".

19. Mr. KEARNEY said that in its comments on articles 8 and 9 the Government of Switzerland had drawn attention to the difficulties that could arise in cases of multiple accreditation unless the accreditation were

¹ For resumption of the discussion see 1111th meeting, paras. 79 and 82.

² United Nations, *Treaty Series*, vol. 500, p. 102.

³ *Op. cit.*, vol. 596, p. 283.

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

notified to the host State and had suggested that a provision should be introduced into article 17 to require such notification (A/CN.4/239, section C.II). He believed that when that comment had been discussed by the Commission during its consideration of articles 8 and 9,⁵ it had been decided to deal with the matter when the Commission came to examine article 17.

20. In fact, the point made by the Government of Switzerland raised a larger problem, namely, that of determining whether, under the provisions of article 17, paragraph 1 (a), there was an obligation of the sending State to notify changes in the status of its permanent mission or of the members of that mission. In bilateral diplomacy, a diplomatic mission would notify the receiving State of any changes in the titles and positions of the members of the missions. He suggested that the Drafting Committee consider the possibility of slightly amending the language of paragraph 1 (a) in order to ensure that the host State was notified of such cases.

21. Mr. YASSEEN said that article 17 was based on the principle that the organization should be informed of certain facts which the host State should also know. The question was how the information communicated to the organization should be transmitted to the host State. In article 17 the system of indirect notification had been chosen. However, although certain facts concerned the organization just as much as the host State, there were others that more especially concerned the latter: for example, the arrival and departure of members of the family of a member of the permanent mission. Consequently, in the interests of efficiency and convenience, it would be better to provide that the sending State must transmit the necessary notifications to the host State, either through the organization or direct, and to amend paragraph 4 accordingly.

22. Mr. AGO said he entirely agreed with Mr. Yasseen. The essential purpose of article 17 was to ensure that members of the permanent mission and members of their families, and also the service staff, were able to enjoy the privileges and immunities granted by the host State. Those were matters which concerned the host State much more than the organization, and that made it preferable for the host State to be notified direct, quite apart from the fact that its notification through the organization entailed long delays and that, where a permanent mission was accredited to several organizations, as was often the case at Geneva, it would be absurd for each of them to transmit the same information to the host State.

23. Paragraphs 3 and 4 should therefore be deleted and paragraph 1 should begin with the words "The sending State shall notify the Organization and the host State of:".

24. Mr. CASTRÉN said he agreed with Mr. Yasseen and Mr. Ago. Paragraph 4, as it stood, was of no practical value, since it stated a mere faculty and not an obligation. It could therefore be deleted and paragraph 1 amended as Mr. Ago had proposed.

25. Mr. EL-ERIAN (Special Rapporteur) said that he was reluctant to accept the suggestion that paragraphs 3

and 4 should specify that notification should be made to the Minister for Foreign Affairs, as in the corresponding provisions of the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions. Very often, as was the case in New York and at Geneva, the international organization was not in the capital of the host State. In New York, the normal channel of communication was the Permanent Mission of the United States to the United Nations. He therefore suggested that the flexible provisions in the text of paragraphs 3 and 4 be retained, with the reference to transmission to the host State in general terms.

26. The point raised by the Government of Switzerland concerning the need to notify multiple accreditation was a valid one and he agreed that it ought to be covered in paragraph 1 (a).

27. It had been suggested that paragraph 3 should be dropped and its provisions merged with those of paragraph 1, which would then prescribe a simplified procedure, laying down an obligation of the sending State to notify both the organization and the host State. At its twentieth session, in 1968, the Commission had drafted article 17 in terms which made a subtle distinction between notification to the organization and notification to the host State; allowance had thus been made for certain cases in which no relations existed between the sending State and the host State, because of such circumstances as non-recognition, tension and even armed conflict.

28. He therefore suggested that paragraphs 3 and 4 be left as they stood. In particular, the provisions of paragraph 4 should remain flexible; notification of the host State by the sending State should be optional and not form an integral part of the compulsory notification system.

29. Mr. YASSEEN said he quite understood that the Special Rapporteur had wished to take account of exceptional situations, in which it was difficult for the sending State to communicate directly with the host State; for example, when there were no diplomatic relations between them. But international organizations had always found means of solving the practical problems resulting from such situations. He saw no objection to the Commission's taking account of those problems and providing solutions for them, but there was no justification for formulating a general rule on the basis of an exception.

30. Mr. EL-ERIAN (Special Rapporteur) referring to the point raised by Mr. Ago concerning the cumbersome procedure of multiple notifications, said that there was no difficulty at Geneva, where the United Nations Office acted for the other organizations of the United Nations family. He suggested that the Commission should leave the matter to be settled by the organizations in their own practice, rather than attempt to settle it by a provision in the draft.

31. Mr. ALCÍVAR said that the problem did not arise in New York where all notifications were made through the United Nations, which communicated them to the

⁵ See 1090th meeting.

United States Permanent Mission. He was inclined to agree with the Special Rapporteur on the need for flexibility, bearing in mind, in particular, that Geneva and New York, where many of the organizations had their offices, were not capital cities. The best course was to leave it in each case to the organization concerned to transmit the notifications to the host State.

32. He suggested that the Drafting Committee be invited to deal with the problem in the light of the discussion.

33. Mr. AGO said that Geneva was not the only city that was host to several international organizations. Like Mr. Yasseen, he considered that any general rule should be based on the normal situation. The absence of diplomatic relations being the exception, it should be provided that the sending State must transmit the necessary notifications direct to the host State and use the organization as an intermediary only in exceptional cases.

34. Mr. CASTRÉN said that the absence of diplomatic relations did not prevent notification through a third State, even in the case of armed conflict. Even if diplomatic relations had been broken off, members of permanent missions could not avoid having a minimum of relations with the host State. Furthermore, the draft articles contained many provisions on the obligations of the host State in regard to other member States. Hence there was no reason why provision should not be made for direct notification of the host State.

35. Mr. EL-ERIAN (Special Rapporteur) said that it was not really a matter of making a distinction between normal and exceptional situations. The principle underlying all the draft articles, and article 17 in particular, was that a relationship existed between the sending State and the organization. Thus, on the arrival of a permanent representative, he was received by the Chief of Protocol of the organization, not by the Chief of Protocol of the host State. It was on the basis of that principle that the rule was laid down in article 17 that the notification by the sending State must be made to the organization, which transmitted it to the host State.

36. He suggested that the Drafting Committee be asked to examine the question raised by Mr. Ago, Mr. Castrén and Mr. Yasseen.

37. Mr. THIAM said that the Commission was studying the relations between States and international organizations, and more particularly, the status of the representatives of States to those organizations, and practical problems should not be allowed to obscure the fact that the main subject was representation in the organization. It was true, as Mr. Ago had said, that it would be absurd for the host State to receive the same notifications from several organizations, but the same situation would occur if the sending State were obliged to notify the host State in respect of each representation in an organization. That was the kind of difficulty the Commission was likely to come up against if it did not follow the principle that the main question to be regulated was that of the relations between the sending State and the organization, and that the relations between the sending State and the host State were a secondary matter.

38. Mr. USTOR said that the point raised by Mr. Ago, Mr. Castrén and Mr. Yasseen was really a practical one. From the practical point of view it was, of course, useful for the sending State to notify the host State of the arrival of the members of its permanent mission; the persons concerned would then immediately receive the necessary identity cards and enjoy their privileges and immunities. In some cases, that notification could also obviate the need for elaborate correspondence.

39. However, the Commission should refrain from imposing fresh obligations on the member States of organizations. At present, they had no obligation to notify the host State of the arrival of members of their permanent missions; they had the right to do so and it was, of course, useful, but there was no binding obligation to make such a notification. He was therefore inclined to favour the retention of the present text with its subtle distinction between the obligation to notify the organization and the right or option to notify the host State.

40. Mr. ALBONÍCO said that on the whole he shared the views expressed by Mr. Thiam. The whole draft was based on the relationship between the organization and its member States. That was why article 17, paragraph 3, imposed on the organization the obligation to transmit the notifications to the host State, whereas paragraph 4 merely stated a faculty of the sending State; whether the sending State would make a notification to the host State would depend on the circumstances of each case. For those reasons, he agreed that article 17 should be retained as it stood, without prejudice to the possibility of the Drafting Committee improving the text.

41. Mr. BEDJAoui said he thought the draft proposed by the Special Rapporteur was the most satisfactory. The Commission should not delete paragraphs 3 and 4, but refer them to the Drafting Committee with a request to consider only their form.

42. Notification of the host State was not a formal legal obligation for the sending State. Article 17, as drafted, was well balanced. The problem of substance was settled in paragraphs 1 and 2, after which a provision had been added giving the sending State the faculty of settling the practical problems promptly. No one questioned that faculty of the sending State to make the notifications mentioned in paragraphs 1 and 2 direct to the host State in normal cases if it so desired, but that faculty should not be made into a legal obligation.

43. In the case of armed conflict, it was not, as Mr. Castrén had said, a third State that should be the intermediary, but rather the organization.

44. Mr. AGO said he did not dispute that the basic principle was the relations between the sending State and the organization, but the question was what obligations those relations entailed for the host State. In the particular case of article 17, the question was whether the host State should be notified direct or through the organization. For the reasons he had already given, he found paragraph 4 insufficient, in that it only stated a faculty which the sending State would have in any case, not an obligation, as he thought advisable. It might also

be asked whether the organization too should notify the host State, if the sending State exercised that faculty.

45. Furthermore, if the organization and the sending State both notified the host State on different dates, when would the obligations of the host State take effect? For all those reasons, it would be better to delete paragraph 4.

46. Mr. YASSEEN said it was true that the Commission was considering the relations between States and international organizations, but the draft articles contained numerous rules concerning the relations between the sending State and the host State and, especially, the obligations of the host State. No member of the Commission denied that the host State should be informed of the facts referred to in paragraphs 1 and 2 of article 17; indeed it would be illogical that it should not be so informed, since its obligations came into effect only when it received the information. The sending State was not, perhaps, legally obliged to notify the host State, but it must do so if it wished the members of its permanent mission in practice to enjoy, without delay, the privileges and immunities to which they were entitled.

47. He did not see why the Commission should hesitate to provide for direct notification of the host State, since in any case the establishment of a permanent mission generally created direct bilateral relations between the host State and the sending State, and in exceptional situations the practice followed by the organizations had always provided satisfactory palliatives hitherto.

48. Mr. THIAM said it would be advisable to make clear in the text that it was primarily to the organization that the permanent mission was accredited and that the fact that the host State was the receiving country did not give it the right to encroach on certain prerogatives of the organization.

49. Mr. RAMANGASOAVINA said it was for the organization to transmit the notifications to the host State, because it was to the organization that the permanent mission was accredited. That obligation was laid down in paragraph 3.

50. Paragraph 4 therefore seemed unnecessary, especially as, in practice, the host State would often be aware, through its visa-issuing services, of the arrival on its territory of the nationals of the sending State. If no entry visa was required, the host State would, of course, be unaware of their arrival, but if it had friendly relations with the sending State, it would be a simple matter for the latter to send it a copy of the notification to the organization. In other cases, the organization would act.

51. Mr. EUSTATHIADES said it was quite natural that the host State should wish to know, as quickly as possible, what was happening on its territory, if only in order to guarantee the enjoyment of the privileges and immunities granted to the members of permanent missions. It was in that light that the comments of the Swiss Government and the need for the transmissions provided for in article 17 should be understood. There was every reason to believe that the transmission to the host State by the sending State, which was a faculty in the draft articles, would become an obligation of direct

notification in any bilateral agreements concluded under article 5. In any event, if direct notification to the host State remained optional for the sending State in article 17, the organization should at least be required to carry out such notification without delay. He suggested covering that point in the text of the article by adding the words "without delay" in paragraph 3.

52. It would also be well to provide that the notification to the host State under paragraph 2 must be made in advance in order to avoid, as far as possible, any need for the host State to resort to the procedure provided for in article 50.

53. In principle, he was in favour of direct notification of the host State, and his proposals were only made as a compromise.

54. Mr. BEDJAOUÏ said he was not convinced by the last argument put forward by Mr. Ago for the deletion of paragraph 4. Mr. Ago had said that, if the sending State were given the faculty of making direct notification, difficulties might arise, particularly with regard to the date on which privileges and immunities would come into effect. But it was laid down in article 42 that "every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State". Consequently, there was no objection to retaining paragraph 4.

55. Article 17 quite rightly stated that the host State should be notified, but indirectly, because it was with the organization that the sending State had direct relations. But—and that was the purpose of paragraph 4—it could be notified by more direct channels and, hence, more quickly.

56. Mr. REUTER said that bearing in mind the problem of the kidnapping of diplomats and persons assimilated to diplomats, which involved the responsibility of the host State, he wished to propose the following wording: "The sending State or, at its request, the Organization, shall notify the host State." If it was desired to be more specific the words "in order to obtain the benefit of immunities" could be added, but they were not necessary. The proposed wording left the sending State free either to transmit the notifications direct to the host State or to request the organization to do so, or, if it did not maintain diplomatic relations with the host State, to use a third State as an intermediary—though in reality it would be transmitting the notification itself through the person authorized to represent it.

57. Mr. NAGENDRA SINGH suggested that, before leaving article 17, the Commission should ask the Secretariat to ascertain whether, in current State practice, it was necessary for the sending State to notify the host State, or the organization, or both. If the sending State had to notify only the host State, then article 17, in his opinion, was out of line, whereas if it had to notify only the organization, the article was perfectly correct. It would be helpful to the Drafting Committee to have some clarification on that point.

58. Mr. RAMANGASOAVINA said that he wished to clarify his views on article 17. In practice, the sending

State notified appointments to the host State as and when it made them. Such notification took place indirectly through the request for a visa which preceded the arrival of a member of the permanent mission in the host State. The majority of States would probably consider it an infringement of their sovereignty if it were left to the organization to make such notifications instead.

59. It might happen that there was no prior notification by the sending State to the host State, as was the case in relations between the States members of the European Economic Community, where the principle of free movement had been established. In such cases, the question of the enjoyment of privileges and immunities could arise during the transitional period between the time when the member of the permanent mission arrived on the territory of the host State and the time when the host State was duly informed of his appointment. But in practice there would be no difficulty, because the member of the permanent mission would always hold a diplomatic passport or a service passport.

60. In brief, notification by the sending State to the organization, and notification by the organization to the host State, were obligatory; but notification by the sending State to the host State was optional, as stated in paragraph 4. In practice, notification was nearly always made by the sending State to the host State and if not, the persons concerned were protected by their passports.

61. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 17 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.⁶

ARTICLE 18

62. The CHAIRMAN invited the Special Rapporteur to introduce article 18.

63.

Article 18

Chargé d'affaires ad interim

If the post of permanent representative is vacant, or if the permanent representative is unable to perform his functions, a *chargé d'affaires ad interim* shall act as head of the permanent mission. The name of the *chargé d'affaires ad interim* shall be notified to the Organization either by the permanent representative or, in case he is unable to do so, by the sending State.

64. Mr. EL-ERIAN (Special Rapporteur) said that article 18 had not evoked many comments by governments, although one had suggested that the temporary head of a permanent mission should ordinarily be designated as "acting permanent representative", while another had noted that no provision had been made for the accreditation of "*chargés d'affaires ad interim*", although the post of permanent representative was sometimes vacant for a considerable time (A/CN.4/241/Add.2, paras. 196-197). He did not think that practice supported that view.

⁶ For resumption of the discussion see 1112th meeting, para. 2.

65. Mr. NAGENDRA SINGH said he fully endorsed the Special Rapporteur's remarks. Article 18 should be retained as it stood.

66. The CHAIRMAN suggested that article 18 be referred to the Drafting Committee.

It was so agreed.⁷

ARTICLE 19

67. The CHAIRMAN invited the Special Rapporteur to introduce article 19.

68.

Article 19

Precedence

Precedence among permanent representatives shall be determined by the alphabetical order or according to the time and date of the submission of their credentials to the competent organ of the Organization, in accordance with the practice established in the Organization.

69. Mr. EL-ERIAN (Special Rapporteur) said he accepted the suggestion by the United States Government that the alphabetical order rule be adopted and the United Nations Secretariat's drafting suggestion (A/CN.4/241/Add.2, paras. 202 and 204). Referring to the ILO suggestion (*ibid.*, para. 203), he pointed out that at United Nations Headquarters in New York the English alphabetical order was followed, while at Geneva the French alphabetical order was sometimes used. The text he now proposed for article 19 (*ibid.*, para. 206) read:

Article 19

Precedence

Precedence among permanent representatives shall be determined by the alphabetical order, in accordance with the practice established in the Organization.

70. Mr. USHAKOV said that, if the Commission decided not to mention the time and the date of the submission of credentials, the text proposed by the Special Rapporteur should be amended, since the words "in accordance with the practice established in the Organization" were only justified in the former version, in which the Organization was given a choice. He himself would suggest that they be replaced by the words "in accordance with the practice applied in the Organization".

71. Mr. NAGENDRA SINGH said he supported the revised text proposed by the Special Rapporteur. Following alphabetical order was the most salutary and egalitarian practice.

72. Mr. ELIAS said he agreed with Mr. Ushakov that it would be closer to the point of view adopted by the Commission in 1968⁸ to use some such wording as "applied" or "followed" in the organization.

⁷ For resumption of the discussion see 1112th meeting, para. 8.

⁸ See *Yearbook of the International Law Commission, 1968*, vol. I, pp. 153-158 and 242-243.

73. Mr. RAMANGASOAVINA said that both systems contained an element of arbitrariness. The alphabetical order system was certainly the lesser evil, because it was more democratic; on the other hand, it was more rigid than the seniority rule, which produced an order that changed with each new arrival and departure. In order to avoid the rigidity of alphabetical order, he proposed the remedy of drawing lots every year, for it was not simply a matter of position, but of precedence.

74. Mr. BARTOŠ said that the Commission had already discussed the question of precedence many times, and had decided in favour of alphabetical order. Since there were several alphabetical orders, the matter must be left either to general practice or to the practice adopted by each Organization when it drew up its rules of precedence. It would be for the Drafting Committee to find an appropriate formula.

75. Mr. ALCÍVAR asked whether the alphabetical order applied to the names of the permanent representatives or the names of their countries. If it applied to the latter, that should be specified.

76. Mr. SETTE CÂMARA said he was entirely in favour of the new text proposed by the Special Rapporteur, which had the advantage of being simpler and more in keeping with the practice of States. The practice of drawing lots, which had been suggested by Mr. Ramangasoavina, was followed by the General Assembly and might serve as a corrective in the case of article 19.

77. Mr. EL-ERIAN (Special Rapporteur) said that the suggestion made by Mr. Ushakov and supported by Mr. Elias improved the text of article 19 and removed any possible ambiguities.

78. Referring to Mr. Ramangasoavina's proposal, he drew attention to the fact that in the General Assembly both the seating arrangements at each annual session and the order of voting in roll-call votes were determined by drawing lots.

79. In reply to Mr. Alcívar, he said that the alphabetical order applied to the name of the country, not to that of the permanent representative.

80. Mr. CASTRÉN said he agreed with Mr. Alcívar that it would be better to specify that the alphabetical order was that of member States.

81. The CHAIRMAN suggested that article 19 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.⁹

ARTICLE 20

82. The CHAIRMAN invited the Special Rapporteur to introduce article 20.

83.

Article 20

Offices of permanent missions

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

2. The sending State may not establish offices of the permanent mission in the territory of a State other than the host State, except with the prior consent of such a State.

84. Mr. EL-ERIAN (Special Rapporteur) said that two observations had been made on the substance of article 20. The Government of Belgium had considered that article unnecessary and had pointed out that some cases were already covered by articles 8 and 9. He was unable to share that view, since articles 8 and 9 dealt with an entirely different question. The United States Government had observed that paragraph 1 contained a slight ambiguity as a result of the use of the word "localities", but he had replied to that objection in his report (A/CN.4/241/Add.2, para. 211). The drafting suggestions made by one Government (*ibid.*, para. 209) could be referred to the Drafting Committee.

85. Mr. KEARNEY said that his Government's query (*ibid.*, para. 208) had been prompted by the belief that there was a certain ambiguity in paragraph 1 if the possibility of two host States existed, although he did not think that it presented a serious difficulty. The ambiguity might be removed by inserting the words "within the host State" after "localities", as proposed in paragraph 209 (2), of the Special Rapporteur's report.

86. The CHAIRMAN suggested that article 20 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.¹⁰

ARTICLE 21

87. The CHAIRMAN invited the Special Rapporteur to introduce article 21.

88.

Article 21

Use of flag and emblem

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

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

89. Mr. EL-ERIAN (Special Rapporteur) said that two comments by governments on article 21 were contained in paragraphs 214 and 215 of his report, while his replies to those comments were given in paragraphs 216 to 218.

⁹ For resumption of the discussion see 1112th meeting, para. 11.

¹⁰ For resumption of the discussion see 1112th meeting, para. 20.

90. The CHAIRMAN suggested that article 21 be referred to the Drafting Committee.

*It was so agreed.*¹¹

APPOINTMENT OF A DRAFTING COMMITTEE

91. The CHAIRMAN suggested that the Commission appoint a Drafting Committee of twelve members, consisting of the first Vice-Chairman, the General Rapporteur and the following members of the Commission: Mr. Alcívar, Mr. Castrén, Mr. Elias, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Ushakov, Mr. Ustor, and Sir Humphrey Waldock.

It was so agreed.

The meeting rose at 12.40 p.m.

¹¹ For resumption of the discussion see 1112th meeting, para. 27.

1093rd MEETING

Wednesday, 5 May 1971, at 10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Barotoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1-3; A/CN.4/L.162/Rev.1)

[Item 1 of the agenda]

(continued)

ARTICLE 22

1. The CHAIRMAN invited the Special Rapporteur to introduce article 22.

2.

Article 22

General facilities

The host State shall accord to the permanent mission full facilities for the performance of its functions. The Organization shall assist the permanent mission in obtaining those facilities

and shall accord to the mission such facilities as lie within its own competence.

3. Mr. EL-ERIAN (Special Rapporteur) said that there had been a certain scepticism in the Sixth Committee about the inclusion of the second sentence, while the secretariats of two specialized agencies had expressed reservations about the implied obligation of the organization to provide office facilities for the permanent mission (A/CN.4/241/Add.3).

4. During the discussion in the Commission, Mr. Tammes had been the first to raise the question whether it was intended that the organizations themselves should become parties to the future convention.¹ He (the Special Rapporteur) had observed that that question would be decided by the organ entrusted with the formulation of the conventional instrument. He proposed that article 22 be retained in its present form.

5. Mr. KEARNEY said that article 22 raised the question of imposing obligations on the organization and thus the question of the relationship between the organization and the future convention. In his opinion, that problem was of such legal complexity that it went beyond the normal final clauses and should not be left to the future conference.

6. With a view to achieving a proper balance between the host State and the sending State in the matter of obtaining assistance, he would suggest that the second sentence might be amended to read: "The Organization shall assist the host State and the sending State in arranging for those facilities . . .". That, however, was a question which should be considered by the Drafting Committee.

7. Mr. NAGENDRA SINGH suggested that the first sentence be amended to read: "The host State shall accord to the permanent mission the facilities necessary for the performance of its functions". However, he could accept the present wording if the word "necessary" was inserted after the words "full facilities".

8. In the second sentence, he proposed that the word "also" should be inserted after the words "The Organization shall . . .", though that point might also be met by Mr. Kearney's suggested amendment.

9. He could not agree with the view of the Japanese Government, which had proposed that the second sentence should be deleted (A/CN.4/239/Add.2, section B.5), since the practice showed that organizations did assist permanent missions in obtaining facilities.

10. With regard to the observation of UNESCO (A/CN.4/239, section D.3, para. 7), he submitted that when a sending State sent a representative to an organization, the latter would be failing in its duty if it shirked the responsibility of providing assistance to that representative. In his opinion, the comments of UNESCO and WHO were not quite in keeping with the elementary courtesies expected of an international organization.

¹ See *Yearbook of the International Law Commission, 1969*, vol. I, p. 6, para. 8 and p. 17, para. 11 *et seq.*

11. Mr. SETTE CÂMARA said that the two sentences of article 22 dealt with the consequences of the establishment of the organization and the presence in the host State of permanent representatives. Any host State was under an obligation to accord full facilities to the permanent mission, but the organization was also under an obligation to assist the permanent mission in obtaining those facilities. Those obligations emanated from general international law and not from any specific rules in the draft articles.

12. On the question of the participation of international organizations in the future convention, he thought that the Special Rapporteur had disposed of the comments of governments in an able and elegant way and had restored the original text. Those comments were relevant, however, and would have to be dealt with in due course.

13. Mr. EL-ERIAN (Special Rapporteur) said that he could not agree with Mr. Kearney that the Commission itself would have to discuss, at some later stage, the question of the obligations of organizations and their participation in the future convention. He thought that the Commission should try to lay down a general rule and leave the preparation of the actual text to the Sixth Committee.

14. He was prepared to reflect on Mr. Kearney's suggested amendment to the second sentence.

15. Mr. Nagendra Singh had suggested amending the first sentence by introducing the word "necessary" after "facilities". He himself thought that idea was implied in the sentence as it stood, but he would leave the point to the Drafting Committee.

16. Mr. NAGENDRA SINGH said he agreed that the question of the participation of international organizations in the future convention should be left to the Sixth Committee to decide; it had, however, been brought before the Commission, which was at least entitled to recommend that organizations of an international character should be invited to the conference.

17. Mr. REUTER, commenting on Mr. Kearney's proposal, said that the Drafting Committee might indeed attempt to find less provocative and more acceptable wording.

18. As to whether the provisions of an international convention could be binding on international organizations, the Commission should, as the Special Rapporteur had proposed, defer consideration of that question; but it should nevertheless stress the importance of the problem in its report. It might become possible to invoke a convention against an international organization which was not itself a party to it.

19. Mr. ROSENNE said he doubted whether the Commission should make any formal recommendation concerning the participation of international organizations in the conference. Nevertheless, the Commission had invited organizations to submit their observations and it should indicate in some way that it had taken those observations into account; otherwise, if organizations were invited to submit observations in the future, they might be reluctant to do so. In other words, the Commis-

sion should show that it was aware of the problem and remind the General Assembly that precedents did exist.

20. Mr. EL-ERIAN (Special Rapporteur) said that questionnaires had been sent to the specialized agencies and to the International Atomic Energy Agency with a view to obtaining material concerning their practice, and their reactions to the draft articles. Up to the present there had thus been a full partnership between the agencies and the Commission; he was confident that the General Assembly would make sure that the partnership continued, by providing that the international organizations should attend the conference at which the draft articles were put into final form. The organizations which should be invited had already been named when the questionnaires had been addressed to them.

21. He agreed with Mr. Reuter that the question of the obligations of the organization was an important one and should be left to the Sixth Committee. A statement should be included in the commentary which would assure all organizations that the Commission had discussed the problem of their obligations and express the hope that they would participate in the final stage of drafting the convention, while at the same time leaving it to the General Assembly to decide whether they should become parties to the convention.

22. The CHAIRMAN suggested that article 22 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.²

ARTICLE 23

23. The CHAIRMAN invited the Special Rapporteur to introduce article 23.

24.

Article 23

Accommodation of the permanent mission and its members

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

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

25. Mr. EL-ERIAN (Special Rapporteur) said that the use of the word "accommodation" in paragraph 1 had been criticized in the Sixth Committee. With respect to paragraph 2, WHO and ILO had expressed misgivings about the role of the Organization in securing private accommodation (A/CN.4/239, section D.2 and 4). He had not, however, found it necessary to make any changes in the article.

26. Mr. KEARNEY said it was not clear to him whether the words "where necessary", in paragraph 2, were intended to apply to the host State or the organiza-

² For resumption of the discussion see 1112th meeting, para. 29.

tion or both. He thought that they applied to both and therefore proposed that they should be placed at the beginning of the sentence.

27. Mr. AGO said that the French text should be revised to bring it into line with the English version of the article and with the French version of the corresponding provisions of the Vienna Conventions.

28. Mr. SETTE CÂMARA said that the question of the title of the article should be reserved till the final reading, since it was only then that uniformity could be achieved.

29. Three international organizations had sharply criticized the article, and the observations of UNESCO (A/CN.4/239, section D.3) were couched in particularly acid terms. The Special Rapporteur had given an adequate answer to those criticisms by stressing that the organization's obligation under paragraph 2 was "to assist in obtaining", not "to provide" (A/CN.4/241/Add.3, para. 9 under article 23). In its early days the United Nations had given such assistance by reserving premises for permanent missions; that kind of assistance, which was based on the principle of the comity of nations, was still given, though it did not involve an actual obligation to provide accommodation.

30. The Special Rapporteur was right in retaining the article as it stood.

31. Mr. ROSENNE said he agreed very much with what had just been said and believed that the acidity of UNESCO's observations was completely unjustified. However, he would suggest that paragraph (3) of the Commission's commentary³ be reworded along the lines of the reply in the report before the Commission, so as to give no excuse to UNESCO to repeat that acidity in the future.

32. Mr. CASTRÉN said he thought that article 23 could be adopted as it stood.

33. He noted, however, that the Special Rapporteur had not replied specifically to UNESCO's observations and therefore suggested that the Commission should do so in its report.

34. Mr. USTOR said he questioned whether the words "of the permanent mission and its members", in the title of the article, were really necessary. The title might perhaps be shortened, as had been done in article 30 of the Vienna Convention on Consular Relations and in article 23 of the Convention on Special Missions.

35. Mr. EL-ERIAN (Special Rapporteur) said he agreed with that suggestion.

36. The CHAIRMAN suggested that article 23 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁴

³ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 208.

⁴ For resumption of the discussion see 1112th meeting, para. 32.

ARTICLE 24

37. The CHAIRMAN invited the Special Rapporteur to introduce article 24.

38.

Article 24

Assistance by the Organization in respect of privileges and immunities

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

39. Mr. EL-ERIAN (Special Rapporteur) said that some fears had been expressed that the assistance provided by the organization under article 24 might take up too much time, but he thought those fears were exaggerated. Article 24 was based on the legitimate interest of the organization and the fact that the privileges and immunities in question were provided for the performance of the work of the organization itself. He had no changes to propose.

40. Mr. AGO said he thought article 24 should be moved to the end of section 2. The Commission usually dealt with the obligations of the host State before mentioning the assistance that might be provided by the organization.

41. Mr. ELIAS said he agreed with Mr. Ago that article 24 should be a residual provision in the part of the draft articles dealing with privileges and immunities.

42. Mr. REUTER said he thought the drafting of the article was ambiguous, perhaps because of its relationship with article 50. If the terms "assist" and "enjoyment" referred only to material things, the article was in its proper place after article 23. But if those terms referred to legal matters, the organization had a more important role to play, in accordance with article 50. The nature of the assistance should be specified in the commentary to article 24.

43. Mr. ROSENNE said that the point made by Mr. Ago and supported by Mr. Elias was a valid one; however, since article 24 touched upon the substance of article 22 and of article 23, paragraph 2, it could perhaps be kept where it was.

44. Mr. EL-ERIAN (Special Rapporteur) said he agreed with Mr. Ago and Mr. Elias that article 24 should be placed at the end of the articles dealing with facilities, privileges and immunities. On the point made by Mr. Reuter, he thought that article 24 was of positive nature, whereas article 50 was more general in character. The question should be referred to the Drafting Committee.

45. The CHAIRMAN suggested that article 24 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁵

⁵ For resumption of the discussion see 1112th meeting, para. 38.

ARTICLE 25

46. The CHAIRMAN invited the Special Rapporteur to introduce article 25.

47.

Article 25

Inviolability of the premises of the permanent mission

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

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

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

48. Mr. EL-ERIAN (Special Rapporteur) said that article 25 had received general support in the Sixth Committee, subject only to the inclusion of appropriate safeguards to prevent abuses. Some governments had stressed that only in extreme cases, such as fire and other disasters, should an exception be allowed to the principle of inviolability.

49. The Government of Switzerland had proposed (A/CN.4/239, section C.II) the addition to paragraph 3 of a provision like the last sentence of paragraph 4 of article 31 of the Vienna Convention on Consular Relations, which read: "If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State". In his opinion, however, it would be more appropriate to deal with that matter as part of the topic of State responsibility.

50. Apart from the amendment referred to in paragraph 17 of his report (A/CN.4/241/Add.3, under article 25), replacing the words "property thereon" in paragraph 3 by the words "property attaching to those premises", he thought that article 25 should be retained in its present form.

51. Mr. ALCÍVAR said he had reservations about the third sentence of paragraph 1. The same sentence had been adopted by the Sixth Committee in article 25 of the Convention on Special Missions,⁶ as the result of a compromise proposed by the delegation of Argentina.⁷ The argument advanced at that time in favour of the sentence had been that special missions, being temporary in character, were generally accommodated in hotels and that it was therefore necessary to safeguard other persons in the same premises. The situation with regard to

permanent missions, however, was quite different, and no such provision had been included in the Vienna Convention on Diplomatic Relations. In his opinion, the inclusion of that sentence in article 25 of the present draft was very dangerous and might at some time be used to justify a violation of the premises of a permanent mission.

52. Mr. USHAKOV said he endorsed the general remarks made in the Sixth Committee, which had been reproduced by the Special Rapporteur in his report (A/CN.4/241/Add.3, para. 6 under article 25). Those remarks were in line with the position he had taken at the first reading. He was, therefore, in favour of a provision based on the corresponding articles of the Vienna Convention on Diplomatic Relations.⁸

53. Mr. BARTOŠ said he wished to make it clear he was not responsible for the adoption of the Argentine amendment referred to by Mr. Alcívar. In the Sixth Committee, his role had been that of expert consultant and personally he was convinced that the best solution was that adopted in the draft articles on diplomatic intercourse and immunities submitted by the International Law Commission.⁹ He had made every effort to defend that point of view, but had not been supported by the majority of the Sixth Committee.

54. Mr. AGO said he hoped the Commission would delete the third sentence of paragraph 1, and thus align the paragraph with the corresponding provision of the Vienna Convention on Diplomatic Relations. There was no need to make any distinction, on that point, between a permanent mission to an international organization and a permanent mission to a State.

55. Furthermore, the sentence was ambiguous; if it referred only to cases of *force majeure*, there was no more reason to include it in the future convention than in the Convention on Diplomatic Relations, since it was self-evident. Indeed, it might be asked why those cases had been provided for in one convention and not in the other. Nor was the wording of the sentence satisfactory. It gave the impression that even if the permanent representative refused his consent, his refusal could be ignored.

56. Mr. USTOR said he wished to state for the record that he too had misgivings about the third sentence of paragraph 1. He fully agreed with the reasons given by Mr. Ago.

57. Mr. ALBÓNICO said he shared the reservations expressed by Mr. Alcívar. The inclusion of the sentence in question in article 25, paragraph 1 of the Convention on Special Missions had been justified by the temporary character of special missions, but its inclusion in the draft on permanent missions was quite inappropriate and should be opposed.

58. Mr. RAMANGASOAVINA said he did not share what appeared to be the majority view with regard to

⁶ General Assembly resolution 2530 (XXIV), Annex.

⁷ See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 85, document A/7375, paras. 188-195.

⁸ See United Nations, *Treaty Series*, vol. 500, p. 106-108, article 22.

⁹ See *Yearbook of the International Law Commission, 1958*, vol. II, p. 95, article 20.

the third sentence of paragraph 1. The first two sentences stated a general principle which was then modified by exceptions. The Commission should not follow slavishly the Vienna Convention on Diplomatic Relations, which conferred extensive privileges because it applied particularly to ambassadors in their capacity as representatives of Heads of State. The same privileges should not be granted in the same way in the case of permanent missions, which were often technical services attached to international organizations. They should enjoy only those privileges that were necessary for the performance of their functions. As to the need for consent, it should be noted that the permanent representative himself often took the initiative of requesting assistance from the host State.

59. He hoped the Commission would retain the third sentence, subject to possible drafting changes. The word "endangers", for example, might be broadly interpreted to justify interference in the affairs of the permanent mission.

60. Mr. CASTRÉN said he too thought that the article proposed by the Special Rapporteur could be adopted without any change of substance. The absolute principle stated in the Vienna Convention on Diplomatic Relations had already been watered down in the Convention on Consular Relations,¹⁰ following the decision taken in the Sixth Committee. Moreover, several governments considered that the Commission was inclined to grant too many privileges to permanent missions. Those considerations justified the retention of article 25 in its present form.

61. Mr. ALBÓNICO said that in the event of grave danger, there were two possible situations: either the head of the permanent mission would be present and would give his consent, or he would not be present and his consent would be assumed. It would be extremely dangerous, however, if the local authorities were to assume his consent in cases other than fire or some equally serious disaster, since such an assumption might lead to arbitrary measures, particularly if relations between the host State and the sending State happened to be strained.

62. Mr. AGO said that the question being considered, although of relatively minor importance, had evoked expressions of opinion on a fundamental problem: that of the representative character of the permanent mission. In the draft articles, the permanent mission was considered as the representative of a State, a subject of international law, to an organization, also a subject of international law. But if the permanent mission was to be considered as merely a technical service, the draft articles would have to be viewed from a completely different standpoint. The first approach, which was his own, did not justify any derogation from the principles formulated with respect to diplomatic missions or any borrowing from the Vienna Convention on Consular Relations, at least so far as inviolability of the premises was concerned.

63. Mr. ALCÍVAR said he agreed with Mr. Ago that the question was one of principle and that the provision should be deleted.

64. Mr. ELIAS proposed that the idea embodied in the third sentence of paragraph 1 should be retained, subject to the Drafting Committee's being able to improve the wording in order to make it more generally acceptable.

65. There was considerable merit in the view that permanent missions should be equated with diplomatic missions rather than with consulates. But the Commission had discussed all the issues at its twenty-first session, before arriving at the decision to include the sentence in question. The main purpose of that sentence was to cover cases in which the permanent representative was not immediately available during an emergency. It was only logical to make provision for such a contingency, and the failure to do so in the Vienna Convention on Diplomatic Relations had been entirely due to inadvertence.

66. The discussions in the Sixth Committee and the written comments of governments showed that there was a slight majority of governments in favour of retaining the idea contained in the third sentence of paragraph 1.

67. Mr. KEARNEY said that the sentence in question embodied a practical solution to a very difficult problem. It also reflected the difference between a classical diplomatic mission and a permanent mission to an international organization. That difference had constituted the major influence in the adoption of the sentence.

68. An embassy or legation was usually housed in a separate building in the capital city of the receiving State. The same was not normally true of permanent missions—certainly not in New York or Geneva. As a general rule, a permanent mission occupied only one office or apartment in a large building containing a great many other offices or apartments occupied by other people. In the event of a fire or other emergency, the authorities in the host State had to take action to put out the fire or to evacuate the people from the building. Such action had to be taken promptly in order to save lives and to protect the property of people who had nothing to do with the permanent mission. The case was clearly one in which the different physical situation justified the adoption of a principle different from that embodied in the Convention on Diplomatic Relations.

69. As Mr. Alcívar had pointed out, the wording of the third sentence of paragraph 1 had its origin in an amendment adopted by the Sixth Committee, as a compromise solution for the concluding sentence of paragraph 1 of article 25 of the 1969 Convention on Special Missions. It betrayed the usual defects of compromise solutions and a good deal of dissatisfaction had been expressed as to both its meaning and its effect. At least three States which were hosts to international organizations had criticized its ambiguity and suggested that it be replaced by language similar to that of the concluding sentence of article 31, paragraph 2, of the Vienna Convention on Consular Relations. He suggested that the Drafting Committee take those remarks into account.

¹⁰ United Nations, *Treaty Series*, vol. 596, p. 288, article 31.

70. Mr. REUTER said that the Commission should decide whether it was considering a question of drafting or of substance. If it was accepted that the last sentence of paragraph 1 was redundant because there was a general legal theory—for example, *force majeure*—which justified derogation from the basic principle, it followed that such derogation was also justified under the Vienna Convention on Diplomatic Relations, although the reservation was not expressly stated, so that the Commission was merely considering the advisability of mentioning it expressly in the draft articles. On the other hand, if it was not accepted that a reservation existed implicitly by virtue of a general legal theory, the Commission was discussing a question of substance.

71. Personally, he thought it was a question of advisability, and since it had already been decided to include an express mention in two previous Conventions—the Convention on Consular Relations and the Convention on Special Missions—that trend should be continued, even though the wording might need improvement. The essential point, however, was to know whether all the members of the Commission were agreed on the substance.

72. Mr. USHAKOV, referring to the change which the Special Rapporteur had proposed to paragraph 3 for the reasons set out in paragraph 17 of his report (A/CN.4/241/Add.3, under article 25) said he thought it would be better to keep to the earlier wording, which was in line with the corresponding provision of the Vienna Convention on Diplomatic Relations.

73. Mr. EUSTATHIADES said that the principle of the inviolability of premises and the exceptions to which it might be subject were based primarily on good faith. If that was lacking, no provision would be safe from abuse. Consequently, if malice was excluded, there was nothing against making express mention of an exception in the article.

74. It would be interesting to know whether the commentary to the corresponding article of the Vienna Convention on Diplomatic Relations¹¹ had mentioned exceptional cases, in particular cases of *force majeure*. The Commission would then be able to see whether it was departing from the Vienna Convention in regard to substance.

75. His reply to those who said that diplomatic missions and permanent missions could not be given different treatment was that it was absurd to repeat what might have been a mistake in an earlier set of rules, merely for the sake of maintaining parallel texts.

76. Admittedly, the text on permanent missions should be closer to that of the Convention on Diplomatic Relations than to that of the Convention on Consular Relations or the Convention on Special Missions. But, apart from the question of parallelism of texts, even assuming that the exception in the case of *force majeure* was not implicit in the Convention on Diplomatic Relations, could

it be said that the premises of a permanent mission could be left to burn because it had been accepted that the premises of a diplomatic mission could be left to burn? If that was the question of substance, the Commission should deal with it in the draft articles by making clear provision for an exception in the case of *force majeure*. Since it was agreed that a permanent mission could be assimilated to a diplomatic mission in so far as inviolability of premises was concerned, the Commission would then be doing useful work by clarifying the position in regard to diplomatic missions at the same time.

77. He was therefore in favour of retaining the last sentence of article 25, paragraph 1. For it would be absurd if, in order to avoid the appearance of placing diplomatic, consular, special and permanent missions on the same footing, the Commission allowed the possibility of derogating from the principle of inviolability of the premises to be clouded by doubt in the case of some of those missions.

78. With regard to the drafting, the present wording was not entirely satisfactory. What was meant was that officials of the host State would endeavour, in all cases, to obtain the consent of the permanent representative, which could only be assumed in the event of a disaster. Perhaps the last half of the sentence, beginning with the words “and only”, could be dropped. The Drafting Committee should consider, in that connexion, whether it would not be better to reproduce the text of the corresponding provision in the Convention on Consular Relations, irrespective of the substance, assuming that the problem of substance was settled.

79. Mr. THIAM said that the question was whether the principle of inviolability of the premises, once proclaimed, should admit of any exceptions. In the discussion on article 17,¹² it had been argued that the rights of the host State could not be left out of account: it was even less admissible to disregard them in the present case. Article 25, as at present drafted, protected the interests both of the host State and of the permanent mission by taking into consideration not only public safety, but also the possibility of demonstrations, riots and such like. It would therefore be well to state that although the principle of inviolability was the basic principle, there could be exceptions. If members were agreed on the substance, it should not be difficult to express it in the text by improved wording.

80. Mr. ROSENNE said that there had been a long discussion at the twenty-first session, in 1969, before the Commission adopted article 25 unanimously. His own view was that the article should remain as it stood, but that the commentary¹³ should be made more concentrated and more specific; paragraph (6) in particular, needed to be substantially recast.

81. It was hardly fruitful to speculate on what the language of article 22 of the Vienna Convention on Diplomatic Relations would have been if it had been

¹¹ See *Yearbook of the International Law Commission, 1958*, vol. II, p. 95, article 20.

¹² See previous meeting, para. 10 *et seq.*

¹³ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 209.

adopted ten years later. He believed, however, that the third sentence of paragraph 1 might well reflect the law as it now stood. In the last twenty years, there had been a very great change in the character of office accommodation in the major cities, including the office accommodation of permanent missions, and rules that had been appropriate for diplomatic missions in the nineteenth century were not necessarily applicable to permanent missions at the present time.

82. He fully agreed with Mr. Ago that article 25 should certainly not be modelled on article 31 of the Vienna Convention on Consular Relations. In fact, however, the text now proposed for the third sentence of paragraph 1 was not modelled on the corresponding provisions either of the Convention on Consular Relations or of the Convention on Special Missions. Both article 31, paragraph 2, of the Convention on Consular Relations and article 25, paragraph 1, of the Convention on Special Missions specifically mentioned the possibility of obtaining the consent of the head of the mission of the sending State. The present text contained no such reference, nor should any be included. Consequently, the reference to the Convention on Special Missions in paragraph (6) of the commentary should be deleted.

83. He agreed that the Drafting Committee should carefully review the drafting of article 25, especially that of the third sentence of paragraph 1. With regard to the previous sentence, it had crossed his mind that members of the fire brigade were frequently officers of the local authority and not "agents of the host State".

84. The Special Rapporteur's proposal concerning paragraph 3 was intended to be essentially of a drafting character, but it required closer examination. In some legal systems in which the English language was used, the words "attaching to those premises" could have a technical meaning which was not intended in the proposal.

85. Mr. NAGENDRA SINGH said that, on grounds of logic and precedent, he agreed that a permanent mission should be equated with a diplomatic mission. If, however, the third sentence of paragraph 1 were deleted, the resulting absolute inviolability of the premises could have absurd results. In the event of a fire, the premises might be allowed to burn while the fire brigade looked on, simply because the permanent representative could not be found. Such a result would give rise to responsibility of the host State; the permanent mission and the sending State would have a claim against the host State for having failed to protect the premises.

86. Even if the Commission were to adopt the approach of the Vienna Convention on Diplomatic Relations, the exception relating to fire or disaster should still remain. Unfortunately, the question of fire or disaster had not come to the fore till after the adoption of the Vienna Convention on Diplomatic Relations.

87. He was not impressed by arguments based on the possibility of acts in bad faith. Such acts would always be possible, whatever text was adopted.

88. Mr. YASSEEN said that the change proposed by the Special Rapporteur raised more problems than it

solved, and it would be better to keep to the text of the corresponding provision in the Vienna Convention on Diplomatic Relations, which was easier to apply.

89. Mr. AGO said that members seemed to be generally agreed on the substance and now had to find the best way of expressing what they thought. The essential point was to establish that a permanent mission to an organization and a diplomatic mission to a State were on the same level and should receive the same treatment. If the Commission believed that the exception to the principle of inviolability of the premises in cases of *force majeure*, which was also applicable to diplomatic missions, was self-evident, it should not state that exception explicitly in the draft articles, any more than it had in the Vienna Convention on Diplomatic Relations. If, on the other hand, the Commission now thought that the situation had evolved since the adoption of the Convention on Diplomatic Relations, it was right that it should supplement the relevant provision of the draft articles, provided that it clearly explained in the commentary that it was stating in writing a principle which had always existed and was not making a distinction between diplomatic missions and permanent missions.

90. Mr. CASTRÉN proposed that, in order to prevent any abusive interpretation of the text which would allow the host State to enter the premises of the mission even if the permanent representative had expressly opposed such entry, the words "to obtain the express consent of the permanent representative", at the end of paragraph 1, be replaced by the words "to obtain the opinion of the permanent representative" or "to consult the permanent representative on the matter".

91. Mr. RAMANGASOAVINA said that the Commission should decide whether it wished to keep to the implicit general rule or whether it wished to stipulate in the draft it was permissible to derogate from the principle of inviolability of the premises in cases of *force majeure*. In his opinion, that stipulation, as expressed in paragraph 1, ought to be included. Some members feared that it would lead to abuse, but every precaution had been taken, particularly in paragraph 3. Moreover, paragraph 2, which laid down the obligation of the host State not only to protect the permanent mission, but also to prevent intrusions and so on, already provided for a case in which agents of the host State should enter the premises of the mission even without the consent of the permanent representative. Hence it was not superfluous to include a supplementary clarification in order to prevent too strict an interpretation of the principle of inviolability.

92. Mr. EL-ERIAN (Special Rapporteur) said that the discussion at the twenty-first session had revealed a division among members of the Commission on the third sentence of paragraph 1.¹⁴ The proposal made by Mr. Elias might perhaps help the Drafting Committee to reach general agreement and thus avoid the Commission's having to decide the question by a vote.

¹⁴ Op. cit., 1969, vol. I, p. 213 *et seq.*

93. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 25 to the Drafting Committee, together with the proposal by Mr. Elias regarding the third sentence of paragraph 1. With regard to paragraph 3, the Drafting Committee would be requested to take special account of the comments of members.

*It was so agreed.*¹⁵

The meeting rose at 12.55 p.m.

¹⁵ For resumption of the discussion see 1112th meeting, para. 42.

1094th MEETING

Thursday, 6 May 1971, at 10.5 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Barotoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 3; A/CN.4/L.162/Rev.1)

[Item 1 of the agenda]

(continued)

ARTICLE 26

1. The CHAIRMAN invited the Special Rapporteur to introduce article 26.

2.

Article 26

Exemption of the premises of the permanent mission from taxation

1. The sending State, the permanent representative or another member of the permanent mission acting on behalf of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the permanent mission, whether owned or leased, other than such as represent payment for specific services rendered.

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

3. Mr. EL-ERIAN (Special Rapporteur) said that the comments of governments and secretariats of interna-

tional organizations on article 26 were summarized in his sixth report (A/CN.4/241/Add.3) and followed by his replies to those comments.

4. Bearing in mind the provisions of article 36, especially sub-paragraph (a), he did not believe that article 26 could be interpreted as covering indirect taxes. With regard to the problem of the ownership of shares in housing corporations, he interpreted the provisions of the article as covering such ownership. For those reasons, he did not recommend any changes in the text.

5. Mr. CASTRÉN said he accepted article 26 as adopted by the Commission at first reading. He was grateful to the Special Rapporteur for the reassuring explanation he had given in his report (para. 15 under article 26) in reply to the question raised by the Finnish Government concerning difficulties in interpretation (A/CN.4/238/Add.1, section B.5).

6. Mr. KEARNEY said the United States Government had suggested revising article 26 by drawing on the language of article 32, paragraph 1, of the Vienna Convention on Consular Relations,¹ so that the opening words would read: "The premises of the permanent mission . . . shall be exempt . . ." (A/CN.4/238/Add.2, section B.8).

7. It was highly desirable to ensure that taxes were not levied direct on the premises of the mission; it was not sufficient merely to exempt the person who leased the premises or who held the title to the property. In the United States, at least, it was possible for the revenue authorities to place a tax lien direct on the premises. Cases of that kind had occurred in the state of New York and in the state of Connecticut. In that type of case, the mission was, of course, exempt from paying the taxes, but if it decided to sell the premises in order to buy accommodation elsewhere, the title to the property sold would not be cleared for the purchaser unless he paid the tax arrears. The purchaser would make allowance for such payment in his offer, so that the value of the property would be reduced by the amount of the tax arrears.

8. He therefore suggested that consideration be given to the suggested change of language.

9. Mr. SETTE CÂMARA said that tax exemption was a very important part of privileges and immunities, both in bilateral diplomacy and for permanent missions. The provisions of article 26 were based on those of article 23 of the Vienna Convention on Diplomatic Relations,² but the comments of governments were not sufficiently clear to solve some of the problems that arose. For example, the question of indirect taxes was not fully covered by the provisions of article 36, sub-paragraph (a), because those provisions referred to indirect taxes "normally incorporated in the price of goods or services", so that they would not cover indirect taxes which were charged separately.

10. As to the problem of ownership of shares in a

¹ United Nations, *Treaty Series*, vol. 596, p. 288.

² *Op. cit.*, vol. 500, p. 108.

housing corporation, he saw no reason to exclude such ownership from the exemption in article 26.

11. With regard to rented premises, it might be desirable to extend the system applied at Vienna, where the International Atomic Energy Agency had secured an agreement that no taxes should be levied on the premises of permanent missions whether owned or rented by the sending State. On that point the government comments were not of much assistance, while the practice in New York and at Geneva hardly justified the hope that equality between owned and rented premises would be ensured.

12. Mr. USTOR said he had no objection to the substance of paragraph 1, but he thought the Drafting Committee should consider the United States suggestion referred to by Mr. Kearney, which would bring the text closer to the language of article 32 of the Vienna Convention on Consular Relations. Since that suggestion had been made in order to overcome difficulties encountered in the United States, which was a host State, it should be given special attention. He himself had an open mind on the subject.

13. He had doubts about the expression "acting on behalf of the mission", which was also used in the corresponding provision of article 24 of the Convention on Special Missions.³ In many legal systems a diplomatic mission or a permanent mission was not recognized as a legal entity and had no legal corporate existence distinct from the sending State. He therefore suggested that the Drafting Committee consider replacing that formula by the words "acting on behalf of the sending State", on the lines of article 32 of the Vienna Convention on Consular Relations.

14. With regard to paragraph 2, ever since the adoption of the 1961 Vienna Convention on Diplomatic Relations, he had protested against the inequality of treatment as between rented and owned premises. A number of governments had drawn attention to that injustice in their comments, as indicated by the Special Rapporteur in his report. The simplest way of dealing with that problem would be to delete paragraph 2, but so far there had never been a majority in the Commission in favour of that course. If the position was still the same, he would propose that a passage be included in the commentary drawing attention to the matter and suggesting to governments that it was desirable to avoid discrimination as between owned and leased premises and to put an end to the present inequality of treatment.

15. Mr. EL-ERIAN (Special Rapporteur) proposed that article 26 be referred to the Drafting Committee with instructions to give careful consideration to the United States suggestion and to the inclusion of a passage in the commentary drawing attention to the present inequality of treatment as between owned and rented premises.

It was so agreed.⁴

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

⁴ For resumption of the discussion see 1113th meeting, para. 2.

ARTICLE 27

16. The CHAIRMAN invited the Special Rapporteur to introduce article 27.

17.

Article 27

Inviolability of archives and documents

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

18. Mr. EL-ERIAN (Special Rapporteur) said that only one government had commented on article 27, stressing the significance it attached to that provision (A/CN.4/238, section B.1).

19. He suggested that the text be retained as it stood.

20. Mr. USTOR said he had no objection to the substance of the article, but he would suggest, for the consideration of the Drafting Committee that, in article 1 on the use of terms, a paragraph be included on the lines of article 1, paragraph 1 (k) of the Vienna Convention on Consular Relations.⁵ Since the definition of "archives" would then cover all papers, documents, correspondence, etc., article 27 could be amended to refer to the "archives" of the permanent mission, instead of the "archives and documents", as at present.

21. The CHAIRMAN suggested that article 27 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.⁶

ARTICLE 27 bis

22. The CHAIRMAN invited the Special Rapporteur to introduce the new article 27 bis.

23.

Article 27 bis

Entry into the host State

1. The host State shall ensure entry into its territory and freedom of transit to and from the premises of the Organization to members of the permanent mission and members of their families forming part of their respective households.

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

24. Mr. EL-ERIAN (Special Rapporteur) said that, at the twenty-first session, he had expressed the view that there was no need to include in the draft articles a special provision on freedom of entry for members of the permanent mission, because that matter was already covered by article 22, on general facilities.⁷ His views on the subject had not changed, but he had nevertheless prepared a text on freedom of entry to serve as a basis for discussion which might assist the Commission in its second reading of the draft articles.

⁵ United Nations, *Treaty Series*, vol. 596, p. 264.

⁶ For resumption of the discussion see 1113th meeting, para. 9.

⁷ See previous meeting, para. 2.

25. The United Nations Secretariat had submitted elaborate observations (A/CN.4/239, section D.1) on the right of entry into and sojourn in the territory of the host State. He had not attempted to paraphrase or summarize those observations, but had reproduced them in full in his report (A/CN.4/241/Add.3); they concluded with a suggested draft for a new article 27 *bis*, which read:

26.

Article 27 bis

Entry into and sojourn in the host State

1. The host State shall take all necessary measures to facilitate the entry into and sojourn in its territory of any person appointed, in accordance with article 10, by a State member of the Organization as a member of that State's permanent mission and of any member of the family forming part of the household of such member of permanent mission.

2. The host State shall ensure to all persons referred to in paragraph 1 of this article the freedom of transit to and from the Organization and shall afford them any necessary protection in transit.

3. Visas, where required for any person referred to in paragraph 1 of this article, shall be granted free of charge and as promptly as possible.

4. Laws or regulations of the host State tending to restrict the entry or sojourn of aliens shall not apply to any person referred to in paragraph 1 of this article.

27. The secretariat of the International Atomic Energy Agency had also favoured the inclusion of a new article on the right of entry (A/CN.4/239, section D.9).

28. At its twenty-first session, the Commission had considered the matter in connexion with article 48, on facilities for departure, but had postponed taking a decision until the second reading, as recorded in paragraph (2), of the commentary to article 48.⁸ It was in view of that decision and of the elaborate observations by the United Nations Secretariat, that he had considered it his duty to prepare a text for a new article 27 *bis*, although it did not reflect his own views.

29. Mr. MOVCHAN (Secretary to the Commission) said that the Secretariat had followed the Commission's discussions attentively and, in submitting its suggestion for article 27 *bis*, had had especially in mind paragraph (2) of the Commission's commentary to article 48, according to which the Commission had decided to consider "the possibility of including in the draft, as a counterpart to article 48, a general provision on the obligation of the host State to allow members of permanent missions to enter its territory to take up their posts".

30. The Secretariat had based its suggestion, first, on practice: it had had some experience of the difficulties that arose, which indicated that it would be advisable to include in the draft a new provision on the right of entry and sojourn. It had based its suggestion, secondly, on the provisions of the 1946 Convention on the Privileges and Immunities of the United Nations,⁹ the 1947

Convention on the Privileges and Immunities of the Specialized Agencies,¹⁰ headquarters agreements and other relevant international instruments.

31. In the Secretariat's view, the right of entry into the territory of the host State and the right of sojourn there were indispensable for the independent and effective exercise of the functions of the members of permanent missions in connexion with the organization to which they were accredited or appointed. That right was also a prerequisite for the enjoyment of all other privileges and immunities in the host State, such as the freedom of movement provided for in article 28.

32. It was for those reasons that, in the opinion of the Secretariat, the suggested new article might compromise the following provisions: first, that the host State should facilitate the entry into its territory and the sojourn therein of all members of permanent missions and members of their families forming part of their households; second, that the host State should ensure freedom of transit to and from the organization to those persons; third, that visas, where required, should be granted as promptly as possible—a point of practical importance because delay in granting visas could cause considerable inconvenience; and fourth, that any laws or regulations of the host State which tended to restrict the entry or sojourn of aliens should not apply to the persons mentioned.

33. The United Nations Secretariat felt sure that the Commission would give due consideration to its suggestion.

34. Mr. YASSEEN said that, although at first sight article 27 *bis* seemed to be superfluous, in order to avoid any accidental or deliberate misinterpretation of the rules laid down in the draft articles, there was no harm in stating an essential right which, though self-evident, was nevertheless not always respected, for political reasons.

35. The obligations of the host State with respect to the entry, sojourn and movement of members of the permanent mission and their families should therefore be clearly stated. It might perhaps be going too far to provide, as in paragraph 3 of the text proposed by the United Nations Secretariat, that visas should be granted free of charge. Possibly it could be laid down that the State should not make a heavy charge for visas, but that that was an unnecessary detail and would be rather inelegant. Paragraph 4, on the other hand, was very useful and should be included in the draft in some form or other.

36. In paragraph 2 of the text proposed by the Special Rapporteur, it would be better to replace the words "referred to" by the word "mentioned".

37. Mr. USHAKOV said that, for the reasons very well expressed by the United Nations Secretariat (A/CN.4/239, section D.1), he considered that the draft articles should include a general provision on the obligation of the host State to allow members of permanent missions to enter

⁸ Op. cit., 1969, vol. II, p. 221.

⁹ United Nations, *Treaty Series*, vol. 1, p. 16.

¹⁰ Op. cit., vol. 33, p. 262.

its territory to take up their posts. In the case of permanent missions to international organizations, the principle of reciprocity could not apply between the sending State and the host State, as it did between the sending State and the receiving State in bilateral relations. It was therefore necessary to lay down the principle of the obligation of the host State to permit the entry of members of the permanent mission into its territory.

38. In the text proposed by the United Nations Secretariat, only paragraph 1 contained essential provisions, but it might perhaps be better to divide it into two parts, one dealing with entry into, and the other with sojourn in, the territory of the host State.

39. The other three paragraphs were superfluous for the following reasons. In paragraph 2, it was not "transit" that was being provided for—that meant crossing the territory of a third State—but "movement"; and freedom of movement was already covered by article 28. In paragraph 3, the granting of visas referred to was only one of the ways of applying the general principle of the obligation of the host State to ensure entry into its territory; and visa formalities were covered by the obligation of the host State, stated in paragraph 1, to take all necessary measures to facilitate entry into its territory. Moreover, where a visa was not required, the host State would have to employ other means to fulfil that obligation. As to paragraph 4, it went without saying that members of the permanent mission who enjoyed privileges and immunities were *ipso facto* exempt from the restrictions referred to in that paragraph, so there was no need to mention them.

40. He therefore suggested that, taking as a basis the text proposed by the Special Rapporteur, paragraph 1 of article 27 *bis* be reworded to read:

"The host State shall permit the entry into its territory of members of the permanent mission and members of their families forming part of their respective households, and shall take all necessary measures to facilitate the sojourn of these persons in its territory".

41. Paragraph 2, relating to visas, could be retained if necessary.

42. Mr. CASTRÉN said it was true that the provisions of article 22, on general facilities, could be interpreted very broadly to cover what was envisaged in the new article, but since the question dealt with in the new article was of such importance, it was better to have express provisions in order to avoid any wrong interpretation. Moreover, several organizations, some governments and the United Nations Secretariat recognized the usefulness of the new article. For those reasons, he supported the inclusion in the draft of a provision on the lines of article 27 *bis*.

43. So far as the working was concerned, the text proposed by the Special Rapporteur, which was more succinct than the Secretariat text, was to be preferred, but no doubt the two could be combined, as Mr. Ushakov had suggested.

44. However, he did not think there was any need to mention sojourn, in view of article 28, on freedom of movement in the territory of the host State, or to refer to article 10, as the Secretariat did in its suggested text. It was also unnecessary to mention transit, but if the Commission wished to retain a provision on that subject, it would be better to replace the word "transit" by the word "access", in order to avoid any overlapping with article 43. The reference to visas should also be deleted, for the reasons given by Mr. Ushakov and because visas were in any case issued free of charge to diplomats.

45. Paragraph 4 of the Secretariat text was superfluous, for the reasons given by Mr. Ushakov and the Special Rapporteur.

46. Mr. RAMANGASOAVINA said he was in favour of including article 27 *bis*, either as a separate article, or as a paragraph in article 28.

47. The text proposed by the Special Rapporteur had the advantage of being shorter and more precise than the Secretariat text, but like Mr. Ushakov he thought it was not "freedom of transit" that was required, but "freedom of movement", so that members of the permanent mission could travel to the place where the mission was situated and return to their countries when they left their posts. On the other hand, there was some value in making express provision for facilitating visa formalities.

48. The text proposed by the Secretariat also had certain merits and he would favour an article worded on the lines of the first two paragraphs of that text, on the understanding that the provision that the host State should take "all necessary measures" to facilitate entry into its territory was broad enough to cover the issuing of visas, delay, and so on, and that words "freedom of transit" in paragraph 2 would be replaced by the words "freedom of movement". The Drafting Committee could perhaps consider the possibility of combining the Secretariat text with the text proposed by the Special Rapporteur.

49. Mr. BARTOŠ said that in general he agreed with the views expressed by Mr. Ushakov, but he would like to clarify a few points, mainly for the benefit of the Drafting Committee.

50. There was no need to mention transit in the new article, not only for the reasons given by Mr. Ushakov, but also because freedom of transit was already dealt with in article 43. The Drafting Committee should bear that in mind.

51. On the other hand, the provision relating to the prompt issue of visas was important and should be retained. It would be a pity to leave any doubt on that subject just for the sake of being brief and concise.

52. It was also useful to impose on the host State the obligation to facilitate the sojourn of members of the mission and to exempt them from any restrictions applicable to foreigners in that regard; disputes on that subject had already arisen between a sending State and

a host State. The text proposed by the Special Rapporteur should be expanded to cover the point.

53. It was true that article 28 guaranteed members of permanent missions freedom of movement in the territory of the host State, but care should be taken to ensure that that provision also enabled the permanent representative or any other member of the permanent mission to keep in contact with the diplomatic mission or consulate of the sending State in the host State, as was often necessary for practical reasons. If that possibility was not covered by article 28, it should be mentioned in article 27 *bis*; if it was already covered, it should still be mentioned, but more concisely.

54. Mr. ALBÓNICO said that the right stated in article 27 *bis* would exist even without that new provision. The right of entry into and sojourn in the host State was in fact covered by article 22, on general facilities.

55. Nevertheless, it was perhaps desirable to specify that right, so as to avoid erroneous interpretations. For that purpose, he much preferred the text drafted by the Special Rapporteur, which was clearer and more precise than the text suggested by the United Nations Secretariat. That applied particularly to paragraph 1.

56. Paragraph 2 of the Secretariat text was unnecessary; its provisions were already covered by article 28 on freedom of movement. Paragraph 2 of the Special Rapporteur's text was similar to paragraph 3 of the Secretariat text, except that it did not mention visas being granted free of charge—a point to which further consideration might be given.

57. As to paragraph 4 of the Secretariat text, the exemption of members of diplomatic missions from the laws and regulations relating to aliens was a part of customary international law.

58. For those reasons, he supported the text drafted by the Special Rapporteur, but suggested that it be placed immediately after article 22, on general facilities. The right of entry was the first of all the facilities to be granted by the host State and was a prerequisite for the enjoyment of all the other privileges and immunities.

59. Mr. ELIAS said that the text submitted by the Special Rapporteur provided a sound basis for an article which was not only useful but necessary.

60. The text prepared by the Secretariat did not constitute an actual proposal; it was submitted as a "draft text which indicates the substance which such article might cover". It was simply intended to draw attention to the points that ought to be covered and the principles that ought to be included in the new article 27 *bis*.

61. The Special Rapporteur had been right in reducing the length of the proposed article. It was unnecessary to include a provision on freedom of access to the organization, a matter which was already covered by the provisions of article 28 on freedom of movement. A specific provision was necessary, however, on the granting of visas as promptly as possible; the Drafting Committee could consider whether it should be specified that visas should be granted free of charge.

62. With regard to paragraph 4 of the Secretariat text, he thought that article 27 *bis* should not contain any reference to the laws and regulations of the host State relating to the entry or sojourn of aliens. In some countries that matter was regulated in the constitution and not merely in the organic law. In Nigeria, for example, the constitution guaranteed all citizens freedom to enter and leave the country, but no similar right was guaranteed to aliens. It would therefore be preferable not to try to regulate the matter in article 27 *bis*, but to leave it to each country to ensure that the generally acknowledged exception in favour of diplomats was also applied to members of permanent missions.

63. With regard to the subject-matter of paragraph 1 of the Secretariat text, it was necessary to have regard to the provisions of article 10. In the event of the sending State appointing to a permanent mission a person who had been previously declared *persona non grata* by the host State, the question would no doubt have to be settled by means of mutual consultations under article 50. For paragraph 1, he preferred the text submitted by the Special Rapporteur, subject to the deletion of the words "and freedom of transit to and from the premises of the Organization". Paragraph 2, he suggested, should be slightly recast so as to state that visas had to be granted free of charge and as promptly as possible.

64. He was not in favour of including paragraph 4 of the Secretariat text, because the provision it contained could be regarded as implied.

65. Mr. SETTE CÂMARA said that the right of the members of a permanent mission to enter the host State and sojourn there was inherent and could be inferred from other articles of the draft, even without article 27 *bis*. Convincing arguments had, however, been put forward by the United Nations Secretariat in favour of the inclusion of such a new article as a counterpart to article 48, on facilities for departure. In addition, cases of refusal of permission to enter the host State had been mentioned.

66. He did not believe that the question of freedom of access to the organization was fully covered by the provisions of article 28, on freedom of movement. Those provisions were made specifically subject to the host State's "laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security". The purpose of paragraph 2 of the Secretariat's article 27 *bis* was to cover such extreme hypotheses as the scheduling as a prohibited area of the district in which the premises of the organization were situated. When dealing with that provision, the Drafting Committee should bear in mind the various criticisms of the expression "freedom of transit" and consider replacing it by a more suitable expression, such as "freedom of movement to and from the premises of the organization".

67. The Special Rapporteur's text had the merit of being couched in terms of the obligations of a host State, rather than the rights of the sending State.

68. Article 27 *bis* was necessary, but he supported the suggestion that it be placed immediately after article 22.

69. Mr. USTOR said that the simple draft for article 27 *bis* submitted by the Special Rapporteur was preferable to the longer text submitted by the Secretariat.

70. He agreed with Mr. Ushakov that the expression "transit" was not, perhaps, a happy one, but thought that the idea it embodied should be reflected in the text. The essential point was that the members of a permanent mission should be permitted to enter the territory of the host State, leave the territory and re-enter it as often as they wished. Perhaps the Drafting Committee should give special attention to the problem of re-entry, since it involved the question of visas.

71. He did not think that visas could be included among the exceptions to exemption provided for in article 36 (e); the host State would have to waive visa charges on the principle that it could not ask the members of a permanent mission to pay charges for the operation of its own administrative machinery. As a precaution, therefore, it might be well to include the rather inelegant expression "shall be granted free of charge".

72. Mr. EUSTATHIADES said that the guarantee provided in article 27 *bis* could be regarded as being contained in other provisions of the draft or as a matter to be covered by headquarters agreements, as it had been so far. Nevertheless, since the Commission was preparing a detailed draft, it was natural that it should devote a special provision to that guarantee, especially as the United Nations Secretariat had mentioned cases in which representatives of a State had been refused entry into the host State.

73. The Special Rapporteur had been right to cut down the Secretariat's draft article, but some aspects dealt with by the Secretariat, particularly in paragraph 4 of its draft, deserved to be mentioned in the commentary.

74. He agreed with Mr. Ushakov that the word "transit" applied to passage through a third State and should be replaced by the word "movement". Article 28 dealt with a different situation from that dealt with in article 27 *bis*, which concerned entry into the host State, not freedom of movement in the territory of that State.

75. However, article 28 contained a reservation which might, in extreme cases, apply to article 27 *bis*. For although it was improbable that a member of a permanent mission or a member of his family would enter the host State through a zone "entry into which is prohibited or regulated for reasons of national security", it was possible that he might cross such a zone in exercising his "freedom of transit". He therefore suggested that the words "subject to the reservation contained in article 28" be added at the beginning of article 27 *bis*.

76. Mr. EL-ERIAN (Special Rapporteur) said that there appeared to be general support in the Commission for article 27 *bis*, despite the fact that the question of entry was already covered by article 22, on general facilities. Owing to the importance of the question, the Commission obviously considered that it should be dealt with in a separate, explicit provision.

77. He agreed with most of the suggestions that had been made. As Mr. Ushakov and others had pointed

out, the expression "transit" was ambiguous and confusing, since it applied to a third State and not to the host State. Mr. Albónico had suggested that article 27 *bis* should follow immediately after article 22, because it was only an elaboration of that article. Mr. Ustor had suggested that it should be expressly stated that visas should be granted "free of charge". Those suggestions constituted a good basis for further discussion in the Drafting Committee.

78. Mr. MOVCHAN (Secretary to the Commission) said that the Secretariat appreciated the Commission's reaction to its views on the right of entry and sojourn, which it had not intended to present as an actual draft text. The question of charges for visas was one on which the fiscal authorities of each country would have their own opinion. In principle, however, the Secretariat considered the provisions concerning visas most important and wished to draw the Commission's attention to the very specific provisions on that subject in article 43.

79. The CHAIRMAN suggested that article 27 *bis* be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹¹

ARTICLE 28

80. The CHAIRMAN invited the Special Rapporteur to introduce article 28.

81.

Article 28

Freedom of movement

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

82. Mr. EL-ERIAN (Special Rapporteur) said that the difficulties encountered in drafting that article in 1969 had been reflected in the discussions in the Sixth Committee and in the observations of governments. The view had been expressed in the Sixth Committee that "article 28 should be restricted to movement of members of the mission that was necessary in the performance of the functions of the mission, and that there was no need to extend it to their families". The Government of Switzerland had made the interesting observation that the facilities accorded to members of permanent missions were not really justified by their functions. It had also been suggested that article 28 should be brought more closely into line with article 26 of the Vienna Convention on Diplomatic Relations.¹²

83. He himself did not think that any changes were necessary.

¹¹ For resumption of the discussion see 1113th meeting, para. 13.

¹² United Nations, *Treaty Series*, vol. 500, p. 108.

84. Mr. YASSEEN said that freedom of movement was not justified by the requirements of the function, but was rather a question of human rights. In other words, the aim was not so much to ensure the performance of the mission's functions as to guarantee normal living conditions to members of the mission and their families. The requirements of the function would appear to justify only movements between the residence, the mission and the organization, whereas humanitarian considerations called for general freedom of movement. The interests of the host State were amply protected by the reservation contained in the opening clause.

85. He was in favour of keeping article 28 as it stood. The reason why it was more liberal than the corresponding provision of the Vienna Convention on Diplomatic Relations was that the principle of reciprocity could not operate as it did in bilateral diplomacy.

86. Mr. CASTAÑEDA said that, like Mr. Yasseen, he supported the Special Rapporteur's very clear formulation of an important principle. It was not a question of the importance of the functions of members of the mission; if a State offered to act as host to an international organization, it must ensure that the members of permanent missions had satisfactory working conditions. Such conditions would not exist if restrictions were placed on their freedom of movement. Certain limitations could be imposed in the interests of national security, but they should not be carried any farther than that. Freedom of movement should also extend to the families of the members of permanent missions.

87. Mr. ALCÍVAR said that he, too, fully approved of the draft article proposed by the Special Rapporteur. As Mr. Castañeda had pointed out, when a State agreed to act as host to an international organization, it must accept any disadvantages that might be involved. It could not restrict the freedom of movement of members of permanent missions and their families, except in so far as that was justified by reasons of national security.

88. Mr. KEARNEY said it was interesting to note that most of the governments which had expressed doubts about article 28 had based their position on the functional theory. Four of them were governments of host States and it might be that their expressions of concern were motivated not so much by any desire to restrict the freedom of movement of members of permanent missions, as by a desire to establish a reasonable balance between the rights and obligations of the host State.

89. Article 28, in fact, claimed the same degree of freedom, or even more freedom, than was provided for in the Vienna Convention on Diplomatic Relations, while at the same time denying the host State some of the safeguards provided by the Vienna Convention on the basis of functional necessity. For example, a member of a permanent mission was accredited to the organization, not to the host State, so that the latter did not have the right of *agrément* or the right to declare the member *persona non grata*.

90. He himself was in favour of freedom of movement

and considered it undesirable to restrict the movements of families; but if permanent missions were to be granted certain rights, the Commission should also take into account the legitimate concern of the host State about the possible abuse of those rights. If the draft articles were to be acceptable to host States, that problem would have to be considered when the Commission came to articles 45 and 50.

91. Mr. THIAM said he agreed with Mr. Yasseen. He wondered what disadvantages a host State could see in freedom of movement being enjoyed not only by members of permanent missions, but also by their families. From the humanitarian point of view, it was obvious that such freedom should be extended to members of families. States wishing to act as hosts to international organizations should not limit the facilities they granted to the requirements of the function alone.

92. He approved of both the form and the substance of the Special Rapporteur's draft article.

93. Mr. REUTER said he had no comments to make on the form of article 28. The discussion had shown that the article could be justified in three different ways. First, because, for a variety of reasons, the members of the permanent mission and their families enjoyed freedom of movement as provided in the article. Secondly, because they enjoyed freedom of movement as it was generally understood in the host State, in other words, subject to possible restrictions, in which case they would be treated in the same way as nationals of the State. Thirdly, because freedom of movement was understood in accordance with the general principles of human rights. It would be interesting to know the Commission's view.

94. Mr. USHAKOV, referring to Mr. Kearney's remarks about abuse of rights, said it was a notion which had often been invoked in regard to the sending State, but which should also be examined in regard to the host State. He hoped concrete proposals could be submitted because, in his view, the matter did not lend itself to detailed regulation.

95. Mr. ELIAS said it seemed to him that no member was really questioning the Special Rapporteur's draft article and that Mr. Kearney's comments were merely suggestions for consideration by the Drafting Committee. The Commission was not likely to make much progress if it insisted on having written texts before disposing of an article, which, on the whole, was not controversial. It might have to be reconsidered in connexion with later articles, but for the time being, he proposed that it be referred to the Drafting Committee.

96. Mr. AGO said he approved of the article proposed by the Special Rapporteur.

97. He was surprised that some governments had made reservations; he believed that they originated from the Commission's commentary to the corresponding article of the Vienna Convention on Diplomatic Relations—

article 26, formerly article 24—which included the following passage: “One of the necessary facilities for the performance of the mission’s functions is that its members should enjoy freedom of movement and travel. Without such freedom, the mission would not be able to perform adequately its function of obtaining information . . .”¹³ Since permanent missions to international organizations did not exercise similar functions, particularly the function of obtaining information, some governments had considered that it was not necessary to grant very extensive freedom of movement to members of permanent missions, still less to members of their families, because the latter did not enjoy freedom of movement under the Convention on Diplomatic Relations.

98. The Commission should make it clear in the commentary that freedom of movement was not only a faculty necessary for the performance of certain functions, but also a basic right of everyone—a freedom which should, in principle, be enjoyed by every member of a permanent mission to an international organization, as well as by every member of a diplomatic mission.

99. Mr. SETTE CÂMARA said that the comments of governments had included some criticisms of the liberal approach adopted in article 28, which went beyond the provisions of article 26 of the Vienna Convention on Diplomatic Relations by including families, and discarded the restrictive terminology of article 27 of the Convention on Special Missions.¹⁴ However, the only possible restriction—that made in the interests of national security—was duly taken into account. He therefore supported article 28 as it stood.

100. Mr. BARTOŠ said that the Commission had always considered freedom of movement as covering no more than the movement needed to perform diplomatic or consular functions. But there was another freedom, which was a part of human rights, and the one did not exclude the other. In the conventions with which the Commission was concerned, it was important to emphasize the freedom which members of the mission should enjoy in the performance of their functions.

101. The CHAIRMAN, speaking as a member of the Commission, said that he had no amendments to propose to the text of article 28. The Commission should examine carefully, in its commentary to the article, the extent to which freedom of movement was linked with the requirements of the function and the extent to which it was part of human rights. There were various obstacles to the free exercise of freedom of movement throughout the world. By expressly granting that freedom, article 28 thus conferred a certain privilege. The precise nature of that freedom, as expressed in article 28, should be clearly defined.

¹³ See *Yearbook of the International Law Commission, 1958*, vol. II, p. 96.

¹⁴ General Assembly resolution 2530 (XXIV), Annex.

102. Mr. EL-ERIAN (Special Rapporteur) said that no actual changes to article 28 had been proposed during the discussion. Mr. Kearney had pointed out that it did involve certain problems of remedies and abuse of rights, which should be discussed in connexion with articles 45 and 50. Mr. Reuter and Mr. Ago had also made certain suggestions concerning the commentary which he would be glad to take into consideration.

103. The CHAIRMAN suggested that article 28 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁵

ARTICLE 8 (Accreditation to two or more international organizations or assignment to two or more permanent missions) and

ARTICLE 9 (Accreditation, assignment or appointment of a member of a permanent mission to other functions) (*resumed from the 1090th meeting*)

104. The CHAIRMAN said that, at an earlier meeting, Mr. Rosenne had asked if the Secretariat could provide the Commission with information on the position at Geneva with regard to multi-accreditation.¹⁶ The Secretary was now in a position to give that information.

105. Mr. MOVCHAN (Secretary to the Commission) said that credentials were submitted by the permanent representative to the Director-General in his capacity as representative of the Secretary-General. The titles reproduced in the Blue Book¹⁷ were those given in the credentials themselves. When a permanent representative was appointed as representative to the United Nations and to the specialized agencies at Geneva or in Switzerland, the specialized agencies were informed in writing of the appointment by the United Nations Office at Geneva. When the credentials indicated that the permanent representative was appointed as representative to other international organizations at Geneva or in Switzerland, only the specialized agencies were informed by the United Nations Office. It was the view of the Geneva Office that the Blue Book was issued purely for information.

106. Mr. ROSENNE thanked the Secretary for having provided information which would enable the Commission to consider a difficult point on the basis of actual practice as well as theory.¹⁸

The meeting rose at 1.5 p.m.

¹⁵ For resumption of the discussion see next meeting.

¹⁶ See 1090th meeting, para. 38.

¹⁷ Entitled: *Missions permanentes auprès des Nations Unies à Genève*.

¹⁸ For resumption of the discussion see 1111th meeting, paras. 1 and 16.

1095th MEETING

Friday, 7 May 1971, at 10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bar-toš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1-3; A/CN.4/L.162/Rev.1)

[Item 1 of the agenda]

(continued)

ARTICLE 28 (Freedom of movement) (resumed from the previous meeting)

1. The CHAIRMAN said that before the Commission continued consideration of the Special Rapporteur's sixth report (A/CN.4/241/Add.3), Mr. Kearney wished to reply to a suggestion made by Mr. Ushakov in connexion with article 28.¹

2. Mr. KEARNEY said that at the previous meeting Mr. Ushakov had suggested that if he (Mr. Kearney) was concerned about the problem of abuse of the rights and privileges proposed under the draft articles, he should submit a text or propose a definite solution.

3. He agreed that that was desirable. Indeed he thought that a major part of the solution to that problem had already been suggested in the observations of the United Nations Secretariat on article 45, on respect for the laws and regulations of the host State (A/CN.4/239, section D.1.II) and he would propose at the appropriate time that article 45 be amended to include the pertinent clause of the United Nations Headquarters agreement relating to the abuse of privileges of residence.²

4. A related problem was that of the settlement of disputes between the sending State, the host State and the organization, and in that connexion several governments had suggested that article 50 should be strengthened. He would also submit a proposal to that effect at the appropriate time.³

ARTICLE 29

5. The CHAIRMAN invited the Special Rapporteur to introduce article 29.

¹ See previous meeting, para. 94.

² Section 13 (b); United Nations, *Treaty Series*, vol. 11, p. 22.

³ For resumption of the discussion see 1113th meeting, para. 20.

6.

Article 29

Freedom of communication

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

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

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

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

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

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

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

7. Mr. EL-ERIAN (Special Rapporteur) said that the observations of governments, of the secretariat of the International Atomic Energy Agency and of the United Nations Secretariat were summarized in his report (A/CN.4/241/Add.3). One government favoured the inclusion of a provision on the lines of article 28, paragraph 3 of the Convention on Special Missions,⁴ but he did not think there was a true analogy. He proposed that the article be retained in its present form.

8. The CHAIRMAN suggested that article 29 be referred to the Drafting Committee.

*It was so agreed.*⁵

ARTICLES 30 and 31

9. The CHAIRMAN invited the Special Rapporteur to introduce articles 30 and 31 together.

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

⁵ For resumption of the discussion see 1113th meeting, para. 22.

10.

*Article 30**Personal inviolability*

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

*Article 31**Inviolability of residence and property*

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

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

11. Mr. EL-ERIAN (Special Rapporteur) said that he had found no justification for making any changes either in article 30 or in article 31.

12. The CHAIRMAN suggested that articles 30 and 31 be referred to the Drafting Committee.

*It was so agreed.**

ARTICLES 32, 33 and 34

13. The CHAIRMAN invited the Special Rapporteur to introduce articles 32, 33 and 34 together.

14.

*Article 32**Immunity from jurisdiction*

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

- (a) a real action relating to private immovable property situated in the territory of the host State unless the person in question holds it on behalf of the sending State for the purposes of the permanent mission;
- (b) an action relating to succession in which the person in question is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
- (c) an action relating to any professional or commercial activity exercised by the person in question in the host State outside his official functions;
- (d) an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person in question.

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

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

of the permanent mission except in cases coming under subparagraphs (a), (b) [and] (c) [and (d)] of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

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

*Article 33**Waiver of immunity*

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

2. Waiver must always be express.

3. The initiation of proceedings by the permanent representative, by a member of the diplomatic staff of the permanent mission or by a person enjoying immunity from jurisdiction under article 40 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

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

*Article 34**Settlement of civil claims*

The sending State shall waive the immunity of any of the persons mentioned in paragraph 1 of article 33 in respect of civil claims in the host State when this can be done without impeding the performance of the functions of the permanent mission. If the sending State does not waive immunity, it shall use its best endeavours to bring about a just settlement of such claims.

15. Mr. EL-ERIAN (Special Rapporteur) said that the most controversial provision had been article 32, paragraph 1 (d), which had therefore been left between square brackets. During the debate in the Sixth Committee, a number of representatives had supported that provision as a means of protecting the victims of motor accidents, and others had considered that the exception it provided for should extend to accidents caused by a vehicle used in the performance of official functions. Still others had considered that provisions should be adopted requiring representatives to international organizations to be insured against liability for accidents caused by vehicles they used.

16. In some of the written comments of governments, exception had been taken to the expression "outside the official functions of the person in question". He himself had concluded, however, that it would be appropriate to include the provision contained in paragraph 1 (d).

17. Mr. TAMMES said that the views of governments on article 32, paragraph 1 (d) seemed to be just as divided as those of the Commission had been at its twenty-first session.⁷

* For resumption of the discussion see 1113th meeting, paras. 27 and 31.

⁷ See *Yearbook of the International Law Commission, 1969*, vol. I, p. 138 *et seq.*

18. Among the governments in favour of including that provision was Switzerland, one of the host States to whose views particular attention had been paid during the discussion. Another important host State, the United States of America, preferred a formulation such as that of article 43, paragraph 2 (b) of the Vienna Convention on Consular Relations,⁸ which provided that immunity would not apply in respect of a civil action "by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft".

19. Some other governments less directly interested had taken the same view—not only the Netherlands, but also the United Kingdom, Japan, Finland and Sweden—while at the 1961 Vienna Conference a number of governments had advocated the inclusion of a provision such as article 32, paragraph 1 (d), in the Vienna Convention on Diplomatic Relations.

20. Many of the smaller countries now thought that the problems caused by immunities could be much greater for the host State of a permanent mission than for the receiving State of a diplomatic mission. He had been particularly struck by the Swedish Government's comment on article 32 that "There is undoubtedly a growing tendency, based on public opinion, to limit the immunity in the case of traffic accidents" and that "an element of progressive development" should be incorporated in article 32 (A/CN.4/238/Add.1, section B.7). He had seen the same reaction by public opinion in his own country where, in a case involving a Netherlands diplomat who had been involved in a road accident outside his official functions, the general view expressed had been that the rules governing diplomatic immunity in such cases were completely obsolete.

21. It was true that paragraph 1 (d) might give rise to the problem of determining whether a vehicle was used "outside the official functions", but a similar problem might arise in connexion with article 34 as to whether or not the sending State could waive immunity in respect of a civil claim without impeding the performance of the functions of the permanent mission.

22. The different views had been analysed by the Special Rapporteur. He himself was in favour of including a provision on the lines of article 32 paragraph 1 (d).

23. Mr. ROSENNE said that his Government, in its comments on article 76 (A/CN.4/240, section B.3) had suggested that permanent observer missions and their members should be required to carry third party insurance policies to cover damage or injury that might arise from the use of vehicles by them in the receiving State. That comment also applied to articles 45 and 112, and was offered as a contribution to the solution of the problem dealt with in articles 32, paragraph 1 (d), and 100, paragraph 2 (d) (alternative A).

24. The importance of public opinion on the question of immunity should not be exaggerated, since it was mainly an emotional reaction; the important thing was

that there should be some satisfactory solution to the problem of damages after an accident. He was not enamoured of article 32, paragraph 1 (d), but he would keep an open mind until the Drafting Committee had taken a closer look at it. He did not think, however, that the authorities of the host State, including the courts, which frequently sat with a lay jury, should be in a position to decide whether a vehicle had or had not been used outside the official functions of the person concerned.

25. Mr. USHAKOV said that paragraph 1 (d) of article 32 had no more place in the draft articles than in the Vienna Convention on Diplomatic Relations. In practice, questions of damages arising out of accidents caused by diplomatic agents, whether in the performance of or outside their official functions, were settled through the diplomatic channel. The same practice should be followed in the case of permanent missions.

26. Mr. ALBÓNICO said that paragraph 1 of article 32 should include a reference to commercial as well as to civil and administrative jurisdiction, because there were often special courts to deal with commercial cases.

27. In sub-paragraph (a), he proposed that in the Spanish version the word "*radicados*" be replaced by the word "*situados*". Sub-paragraph (b) called for no comment. He had doubts about the inclusion of sub-paragraph (c), since professional or commercial activity on the part of a member of a permanent mission would be quite improper and contrary to the provisions of article 46. He was in favour of retaining sub-paragraph (d) for the reasons given by the governments of the Netherlands, Japan and Sweden (A/CN.4/238, section B.3 and 7; A/CN.4/239/Add.2, section B.5).

28. He had no comment to make on paragraph 2. With regard to paragraph 3, he proposed that in the Spanish version the words "*medida de ejecución*" be replaced by the words "*medida coercitiva*".

29. As to paragraph 4, he considered that the sending State would still retain jurisdiction over the members of its permanent mission, even in the absence of that exception.

30. Mr. KEARNEY said that the suggestion that the Commission adopt the formula used in article 43, paragraph 2 (b) of the Vienna Convention on Consular Relations had the advantage that it would eliminate any dispute about whether the vehicle had been used outside official functions. The difficulty was that many governments would consider that to eliminate the functional test was going too far. The question whether a vehicle had been used outside official functions was a type of question that was decided under internal law with a fair degree of regularity and in accordance with well-established rules.

31. He would not say, as Mr. Rosenne had suggested, that the emotional factor of public opinion was irrelevant, since it was a fact that in cities where there were permanent missions there was considerable dissatisfaction with the driving of motor vehicles bearing diplomatic

⁸ United Nations, *Treaty Series*, vol. 596, p. 298.

plates. As Mr. Tammes had pointed out, that dissatisfaction did influence the attitude of governments, since it was their own citizens who were most concerned.

32. He did not think that the problem could be solved completely by resorting to compulsory insurance, since insurance coverage was subject to continual inflation and insurance companies were apt to delay the settlement of claims or to force the claimant into expensive litigation. As a compromise solution, therefore, he was prepared to support article 32, paragraph 1 (d).

33. Mr. USTOR said he did not consider the solution proposed in article 32, paragraph 1 (d) either desirable or satisfactory, because its effect would be to subject many members of permanent missions to the jurisdiction of local courts. Nor did it offer a satisfactory solution from the point of view of the person who sustained damage or injury, since it might lead to prolonged litigation. Moreover, the diplomat in question might be transferred to another country, in which case a judgement against him could no longer be enforced.

34. The best solution in his opinion, was the system of compulsory insurance, which in his own country was operated as a State enterprise. That system, as Mr. Kearney had pointed out, did not provide a complete solution, but if the rules governing it were properly drawn up, it was the best possible solution in the circumstances and he hoped that some reference would be made to it in the commentary. For those reasons, he could not support article 32, paragraph 1 (d).

35. Mr. ROSENNE said that he endorsed Mr. Ustor's remarks about the difficulty of enforcing civil judgements when a diplomatic representative was transferred or recalled to his own country. A very pertinent example of that was to be found in the decisions of the Jerusalem District Court of 10 March and 13 July 1953 in the case of *Heirs of Shababo v. Heilen and others*.⁹

36. He had not meant to say that the reaction of public opinion should be ignored altogether, but much of the dissatisfaction of the citizens of New York and Geneva was based on the incorrect popular assumption that immunity meant impunity. It would surely be in the service of the progressive development of international law if the Commission could disabuse the public of that mistaken idea. It was important to minimize as far as possible any interference with, or unnecessary embarrassment to, the members of permanent missions, in order not to impair the institutional basis of diplomatic relations.

37. Mr. REUTER said he agreed with Mr. Ustor that the only correct solution, imperfect though it might be, was to establish a system of compulsory insurance. But it was not enough to express pious hopes, for the present situation was frankly scandalous. A financial privilege which had to be paid for by the victims of that type of accident was inadmissible.

38. In some countries, the court which tried the case

and the law applied were different according to whether the accident occurred in the performance of official functions or not. Although several countries had put an end to such distinctions, the situation was far from satisfactory at the international level, so that paragraph 1 (d) had its drawbacks in the absence of an international tribunal to interpret it. There was, however, some jurisprudence of the Court of Justice of the European Community on the official character of the functions of international officials.

39. Since no text had been submitted to the Commission stipulating that such immunity from jurisdiction could be made subject to compulsory insurance cover, he would support paragraph 1 (d) in the hope that it would induce States to take adequate measures.

40. Mr. CASTRÉN said he had no comments to make on articles 33 and 34. With regard to article 32, paragraph 1 (d), which the Commission had already debated at length, he repeated that he found that provision useful and reasonable. The obligation to take out insurance could be evaded in certain cases by using provisional registration plates and counting on less rigorous inspection of diplomatic vehicles.

41. Mr. ALCÍVAR said the solution proposed by Mr. Ustor, though not perfect, seemed at any rate to be the most acceptable. Where compulsory insurance was operated as a State enterprise, as in Mr. Ustor's country, the insurer could not avoid the payment of claims, but unfortunately that was not the case in all countries. So in view of the lack of uniformity in insurance matters, he hoped the Commission might find some formula which would reconcile the two solutions proposed.

42. Mr. BARTOŠ said he agreed with Mr. Ustor and Mr. Reuter. There were, however, a number of considerations which militated against the establishment of an effective system of compulsory insurance on a general international basis. First, the question arose whether the sending State should be required to give its *exequatur* to foreign judgements pronounced against its missions or representatives in each case, even if there was provision for compulsory insurance, and to consider in each case whether a question of private law of the host State or a question of public or private international law was involved. Secondly, some insurance companies, defending their own interests, sometimes managed to evade their obligation to pay the sum due under the insurance policy. Thirdly, not all companies were willing to participate in that type of "compulsory" insurance and it would be difficult to compel them to do so. Furthermore, the amount of the insurance could be restricted in some countries, either by a maximum amount payable, or by a franchise, or by obstacles to the transfer of foreign exchange.

43. If the Commission wished to provide for a system of compulsory insurance, it should bear those points in mind and try to draw up genuinely effective rules. Up to the present, most governments had adopted varied attitudes to the question. Some systematically defended their nationals even when they were in the wrong, while others compelled them always to meet their obligations.

⁹ Sir H. Lauterpacht, ed., *International Law Reports*, 1953 (London, Butterworth and Co., Ltd., 1957), pp. 391 and 400.

But in all cases the need to take out insurance would provide a uniform solution and would induce many drivers to be more careful.

44. Mr. AGO said that it was becoming more and more difficult to uphold immunity from civil and administrative jurisdiction in cases of that kind, for public opinion and the courts had become alarmed at the injustices to which such immunity could lead. He hoped the Drafting Committee would stipulate that, if the person concerned had not taken out an insurance policy guaranteeing automatic and full compensation, his immunity from jurisdiction would, exceptionally, be forfeit.

45. Mr. ELIAS proposed that the Commission should retain article 32, paragraph 1 (*d*) in its present form until the Drafting Committee had considered it.

46. Mr. Ustor had suggested what might seem an ideal solution, but in view of the differences in legal systems throughout the world, he had some doubts about it. In the United Kingdom, for example, and in Commonwealth law generally, there was the practice of the third-party procedure. In the case of *Dickinson v. Del Solar*,¹⁰ a Bolivian ambassador had seriously injured a British subject, who had brought a civil action not only against the ambassador, but also against the latter's insurance company. The ambassador had wished to waive his diplomatic immunity, but the insurance company, in defending the case against itself, had invoked that immunity; it had thus been the insurance company which had become the real litigant. Insurance companies, after all, were better known for their readiness to receive premiums than for their willingness to settle claims.

47. The Commission should therefore retain article 32, paragraph 1 (*d*), and include a strong recommendation in its commentary that the General Assembly should consider, as part of the progressive development of international law, some better solution for the future.

48. Mr. RAMANGASOAVINA said that, although immunity from criminal jurisdiction was generally considered to be justified, immunity from civil jurisdiction provoked strong reactions from public opinion. The ideal solution would be to impose compulsory insurance, but that solution depended on the law of States, which was far from uniform on the subject; and the practice of insurance companies also varied. Moreover, even if insurance were made compulsory, it would be difficult to keep a check on all the vehicles which would be subject to the system. For although it was easy to check vehicles at the frontier, it was not so easy once they were inside the country.

49. He agreed that paragraph 1 (*d*) be retained, but he hoped that the Drafting Committee would so word it as to provide better guarantees for the victims of accidents.

50. Mr. YASSEEN said that, in his view, the Commission could not go farther than it had in paragraph 1 (*d*) of article 32. In reality, the problems which the Commission was trying to solve were hardly likely to arise,

because most international organizations had their headquarters in European countries where the insurance in question was compulsory. Consequently, the discussion only concerned cases in which the relevant law was repealed or international organizations were established in countries where third party insurance for motor vehicles was not required. To cover the latter case, the Commission could simply point out that it would be advisable for any country which became host to an international organization to make such insurance compulsory.

51. Mr. USTOR said that the substance of article 34 was taken from resolution II adopted on 14 April 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities.¹¹

52. In its draft on special missions the Commission had included, as article 42,¹² a provision similar to article 34 of the present draft. After considerable discussion in the Sixth Committee, however, the General Assembly had adopted the same solution for special missions as the 1961 Conference had adopted for diplomatic missions: no article on the settlement of civil claims had been included in the Convention on Special Missions, and the General Assembly had adopted resolution 2531 (XXIV), which was similar to resolution II of the 1961 Conference.

53. In the present instance, he was inclined to favour the same approach, in order to keep the draft on permanent missions in harmony with the 1961 Vienna Convention on Diplomatic Relations and the 1969 Convention on Special Missions.

54. Mr. BARTOŠ said he was in favour of a solution which would protect, in an equitable manner, both the interests of the permanent mission and those of the victims of accidents caused by vehicles of the mission. It was necessary to prevent the abuses which could sometimes arise, either as the result of immunity from jurisdiction or as the result of false claims by unscrupulous victims, who very often demanded excessive compensation in the belief that the government of the sending State or the mission's insurance company would pay the whole amount claimed in order to avoid a public scandal. Hence, a rule should be drafted guaranteeing that victims would be compensated by the insurance company under the terms of a compulsory insurance, and that the amount of the compensation would really correspond to the damage actually caused.

55. Mr. YASSEEN said that as the Vienna Conference on Diplomatic Intercourse and Immunities and the General Assembly, when examining the draft articles on special missions, had both preferred to deal with the settlement of civil claims in a recommendation, he did not see why the Commission should not follow the same course with the present draft articles.

56. Mr. ROSENNE said that it was not the Commis-

¹⁰ [1930] 1 KB 376.

¹¹ United Nations, *Treaty Series*, vol. 500, pp. 218-220.

¹² See *Yearbook of the International Law Commission, 1967*, vol. II, p. 365.

sion's function to draft resolutions for the General Assembly. If it was thought that the point of substance under discussion deserved a draft article, either as codification of existing law or as progressive development, article 34 should be retained; it would then be for the General Assembly to take a decision.

57. Mr. EL-ERIAN (Special Rapporteur) said that the discussion on articles 32, 33 and 34 had revealed the same division of opinion among members of the Commission as at the twenty-first session in 1969.

58. A number of interesting suggestions had been made concerning both the text of article 32 and its commentary. They all required careful consideration and he would not comment on them individually.

59. There had been no comments on article 33 and he would take it that the Commission agreed with his conclusions on that article.

60. Article 34 had given rise to discussion, as in 1969, of the question whether it should be retained or replaced by a resolution.¹³ He himself adhered to the view expressed in his sixth report and believed that article 34 should be retained in order to balance article 32, on immunity from jurisdiction.

61. The useful drafting suggestions that had been made should be referred to the Drafting Committee.

62. Mr. YASSEEN said he did not think that article 34 reflected positive international law. The Commission's work was not confined to formulating draft articles; it could also propose other solutions. Moreover, the draft articles were not final, and there was no reason why the conference of plenipotentiaries which would adopt the resultant convention should not decide, on the Commission's recommendation, to express the provisions of article 34 in a resolution.

63. Mr. KEARNEY said that the inclusion of a provision on the settlement of civil claims could be amply justified on general grounds of humanity, as had been pointed out during the discussion on article 28, on freedom of movement. He believed that a clause which, like article 34, attempted to promote the settlement of civil claims was in accord with all legal systems.

64. Mr. BARTOŠ, referring to the question of the extent of the Commission's competence in regard to codification of the rules of international law, said that there were two opinions: one held that the Commission must remain within the limits of existing law, the other that it should go farther, in order to find new solutions which would adapt international law to the needs of modern society and the international community. If the Commission went beyond the existing rules, it must at least respect present trends toward the establishment of greater justice in international relations. If it confined itself to codifying existing rules, it would have no alternative but to perpetuate injustices, since international society was imperfect. His own view was that in dealing with the

subject under consideration it should try to make good the present gaps in international law.

65. One might approve or disapprove of the text proposed by the Special Rapporteur, but it must be admitted that he had tried to strike a fair balance between the existing contradictory trends. The only question was whether the present text would safeguard the sovereignty of States. It was clear from the discussions on the corresponding provisions in the Conventions on Diplomatic Relations, Consular Relations and Special Missions, and also from the writings and discussions on the present question, that immunity should be maintained except in cases where the interests of the State did not conflict with the legitimate interests of individuals.

66. Mr. EL-ERIAN (Special Rapporteur) said that the previous speaker had rightly stressed the need to take the demands of international life into consideration. He did not wish to take a position at present on the question whether the provision in article 34 constituted codification of existing law; but the Commission's task was not confined to codification: it included the progressive development of international law. Members of the Commission were jurists and, as such, social scientists; in formulating drafts of international legislation, they should bear in mind that there was widespread resentment at the abuses of immunity.

67. Mr. RAMANGASOAVINA said that he too believed that the Commission's task was to formulate rules in keeping with the facts of international life. In view of the real danger presented by the increasing number and higher performance of motor vehicles, it should draft a provision that would make it possible to avoid the abuses which might result from immunity from jurisdiction, and would be the counterpart of the special protection given to the means of transport of the permanent mission under article 25, paragraph 3.

68. To achieve that aim, it was necessary to go farther than the Special Rapporteur had done in the text he had proposed for article 34. Perhaps it could be stated in article 45 that the laws and regulations of the host State which the permanent mission was required to respect included those on compulsory insurance. That would be an innovation; but the progressive development of international law was part of the Commission's work.

69. Mr. YASSEEN said that it was States which were directly responsible for the progressive development of international law. Moreover, it was clear from the Commission's Statutes that in that respect more than in any other it was subordinate to the General Assembly. It was the General Assembly that had proposed in 1969 that the corresponding provisions of the Convention on Special Missions should be made into a resolution. There was no reason to take a different course in the case of the present draft articles.

70. The arguments he had advanced at the previous meeting concerning freedom of movement had not been based on purely humanitarian considerations, as Mr. Kearney had said, but on positive international law, since freedom of movement was a fundamental human right.

¹³ Op. cit., 1969, vol. I, p. 29, para. 18 *et seq.*

71. Mr. AGO said that he had no hard and fast opinion on article 34; but it was not so easy to transform into an article what in the case of two previous Conventions had become a recommendation. In the Vienna Convention on Diplomatic Relations¹⁴ and the Convention on Special Missions,¹⁵ States had given the option of waiving immunity, but, if the present provision on civil claims was included as an article, the option would become an obligation.

72. Some said that that was an example of the progressive development of international law; but it was wrong and dangerous to believe that the law developed every time there was a departure from the law in force. Article 34 provided that the sending State "shall waive the immunity" when that could be done without impeding the performance of the functions of the permanent mission. But it would be very easy to say that proceedings taken against a member of a permanent mission did not impede the performance of the functions of the mission; and that would be the end of immunity from civil and administrative jurisdiction. It was, of course, desirable to find a formula which would prevent abuses, but he himself could not subscribe to a solution which would, in practice, mean the end to immunity from jurisdiction.

73. Mr. ALCÍVAR said he was in favour of deleting article 34, because a provision on similar lines had already been rejected by the General Assembly in connexion with the 1969 Convention on Special Missions.

74. It would be very dangerous for the independence of States to try to convert the option to waive immunity into an international obligation.

75. Mr. ALBÓNICO said that the first sentence of article 34 did not state an obligation, but introduced the second sentence, the only one in the article which did state an international obligation, namely, the obligation of the sending State to "use its best endeavours to bring about a just settlement" of civil claims. That particular obligation was one which every State should be prepared to accept.

76. The CHAIRMAN suggested that articles 32 and 33 should be referred to the Drafting Committee for consideration in the light of the discussion; the Commission would continue its consideration of article 34 at the next meeting.

*It was so agreed.*¹⁶

Seventh session of the Seminar on International Law

77. The CHAIRMAN invited Mr. Raton, senior legal officer in charge of the Seminar on International Law, to address the Commission.

78. Mr. RATON (Secretariat) said he wished first to thank the members of the Commission, and particularly Mr. Elias, who, when speaking in the Sixth Committee of the General Assembly, had stressed the value of the Seminar on International Law and so convincingly described the organizational problems it involved. He also thanked the members of the Commission who had agreed to lecture to the participants in the seventh session of the Seminar. The Legal Adviser of the International Labour Organisation would also be speaking at the session, the participants in which had for some years been showing an increasing interest in the work of the ILO.

79. In 1971, Switzerland had joined the other States financing fellowships,¹⁷ while the Federal Republic of Germany had increased the amount of the fellowships it was offering from \$1,000 to \$1,500. In accordance with the wish expressed by the Sixth Committee, two young diplomats, from El Salvador and the Sudan, who had participated in the work of the Sixth Committee at the General Assembly's twenty-fifth session, had been invited to attend the seminar. It was also to meet a wish of the Sixth Committee, that Spanish was henceforth to be a working language of the seminar.

80. Mr. YASSEEN thanked Mr. Raton and said that it was to his initiative that the international community owed the Seminar on International Law, which was a link between the International Law Commission and the world at large. That link would be further strengthened by the participation of young jurists who represented their countries in the Sixth Committee of the General Assembly — a development which would also make for closer contact between the Sixth Committee and the International Law Commission.

81. Mr. ROSENNE said he wished to express to Mr. Raton and his colleagues his appreciation of the able manner in which they had organized the annual Seminar and the continual improvements they had introduced.

82. He noted with interest that the legal adviser of the ILO was to take part in the seventh session of the Seminar and suggested that, in planning the eighth session, consideration should be given to the possibility of including lectures by representatives of other Geneva organizations, especially the various economic organizations and even the Conference of the Committee on Disarmament, which was also centred on Geneva. The Seminar was by now sufficiently well established not to be limited to subjects under consideration by the International Law Commission; it could well cover a wider range of United Nations activities.

83. Mr. ALCÍVAR said that Mr. Raton was to be congratulated on the excellent organization of the Seminar and its continued success. The Sixth Committee of the General Assembly attached increasing importance to the Seminar.

84. Fellowships had been granted on a number of occasions to junior officials of the Ministry of Foreign Affairs of his country to enable them to attend the

¹⁴ United Nations, *Treaty Series*, vol. 500, p. 112, article 32.

¹⁵ See General Assembly resolution 2530 (XXIV), Annex, article 41.

¹⁶ For resumption of the discussion on articles 32 and 33 see 1113th meeting, paras. 35 and 68.

¹⁷ Denmark, Federal Republic of Germany, Finland, Israel, Netherlands, Norway and Sweden.

Seminar; that experience had been of great benefit to them in the discharge of their duties on their return to Ecuador.

85. He welcomed the action taken to give effect to Mr. Yasseen's suggestion that young jurists participating in the work of the Sixth Committee should be invited to the Seminar.

86. Mr. ELIAS said he associated himself with the tributes paid to Mr. Raton. He requested that the Commission set aside part of a forthcoming meeting for consideration of the suggestions made in the Sixth Committee regarding the Seminar and certain related problems.

87. Mr. EUSTATHIADES endorsed Mr. Elias's remarks. He warmly congratulated Mr. Raton on his increasingly successful organization of the Seminar which, side by side with the Commission, was giving such valuable assistance to young lawyers from different countries.

88. The CHAIRMAN, speaking on behalf of the Commission, thanked Mr. Raton and expressed his best wishes for the success of the seventh session of the Seminar on International Law.

The meeting rose at 1.10 p.m.

1096th MEETING

Monday, 10 May 1971, at 3.5 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add 1-6; A/CN.4/241 and Add.1 to 3; A/CN.4/L.162/Rev.1)

[Item 1 of the agenda]

(continued)

ARTICLE 34 (Settlement of civil claims) (*resumed from the previous meeting*)

1. The CHAIRMAN invited the Commission to resume consideration of article 34.

2. Mr. USHAKOV said there was a contradiction between the two sentences of the article. The first

sentence stated an obligation, while the second implied that the State could evade it.

3. Moreover, the article provided that the sending State must comply with the obligation "when this can be done without impeding the performance of the functions of the permanent mission". If the sending State was entitled to decide whether the performance of the functions was impeded, the host State or the organization might contest its decision, and there would have to be consultations in accordance with article 50. He hoped the Drafting Committee would be able to obviate that danger by judicious re-drafting of article 34. If that was not possible, it would be better to drop the provision, which did not appear either in the Vienna Convention on Diplomatic Relations or in the Convention on Special Missions.

4. Mr. SETTE CÂMARA said that Mr. Ago had put his finger on the spot when he had pointed out that article 34 purported to establish an obligation for the sending State to waive diplomatic immunity in the case of civil claims, even though that obligation was subject to the condition of non-impediment of the performance of the functions of the permanent mission.

5. Waiver of immunity was a serious act of sovereignty. In a well known case,¹ Lord Phillimore had affirmed that waiver was a privilege which diplomats could not use unless under the direction of their sovereigns. Waivers given without government consent had been invalidated by the courts.² The only known case of implicit waiver was the initiation of proceedings by the diplomat himself.

6. Only the sending State could decide whether it was appropriate and necessary to waive immunity in each particular case, according to the circumstances. He could not see how the Commission could depart from the 1961 Vienna Convention on Diplomatic Relations and transform a mere recommendation³ into a rule of law from which obligations would derive.

7. He therefore reserved his position on the article and suggested that, if necessary, a recommendation similar to that adopted at Vienna be inserted in the commentary, where it belonged.

8. Mr. TAMMES said that he felt some apprehension regarding article 34 and was inclined to take an intermediate position between those who thought that the article added nothing to resolution II of the 1961 Vienna Conference and those who thought that it constituted an important step in the right direction.

9. The first sentence of article 34 did in fact represent a step forward in that it used the word "shall" instead of "should", the word used in the Vienna resolution. Moreover, the first sentence did not contain the subjective criterion embodied in section 14 of the 1946 Convention on the Privileges and Immunities of the United Nations in the form of an express reference to "the

¹ *Mussmann v. Engelke* [1928] 1 K.B. 90.

² *In re Suarez* [1917] 2 Ch. 131.

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

opinion of the Member” on the question whether immunity could be “waived without prejudice to the purpose for which the immunity is accorded”.⁴ In the absence of that subjective criterion, the provisions of the present article 34 were capable of being objectively and functionally interpreted by means of an impartial procedure.

10. The second sentence of article 34, on the other hand, was hardly capable of being impartially applied. It contained a built-in element of national interest. It suggested that it would be for the sending State to determine unilaterally what constituted its “best endeavours” to bring about a just settlement of civil claims. A variety of factors could be taken into account by the sending State in determining its position and the question was not open to impartial evaluation. Hence the legal obligation stated in the second sentence could not be made practically effective. The provision could only serve as a reminder of a moral duty and he was not certain that that was a sufficient reason for retaining it.

11. Mr. EUSTATHIADES said he agreed with Mr. Ushakov. There was at least some awkwardness, if not a contradiction, in the wording of article 34, but it could be remedied by reversing the order of the two sentences. Thus, after article 33 had stated that immunity might be waived, article 34 would provide, first, that if the sending State did not waive immunity, it must use its best endeavours to bring about a just settlement of the claim, and then would come the provision relating to the particular case covered by article 33, paragraph 1.

12. Mr. REUTER said that Mr. Ushakov’s comments were very pertinent. It was impossible to take a final decision on article 34 before considering article 50. The sending State had, in any case, an obligation to use its best endeavours to bring about a just settlement of the claim; but the difficulties involved in the settlement of disputes were well known, and where the sending State refused to waive immunity it should perhaps be required to give reasons for its refusal.

13. Mr. CASTRÉN said he still supported the principle stated in article 34 and approved of the wording; he did not find it at all ambiguous. The primary obligation to waive immunity was followed by a secondary obligation which came into play where the first was not fulfilled. The terms used clearly showed that the article established obligations and did not merely make recommendations.

14. The clause “when this can be done without impeding the performance of the functions of the permanent mission” had been used in the recommendation annexed to the Vienna Convention on Diplomatic Relations, and similar formulations were to be found elsewhere in the draft articles—in article 40, paragraph 4, for example—as well as in the two Vienna Conventions. In his opinion, it was for the sending State to take a decision in the first instance; article 50 could only come into play as a secondary resort.

15. Though he maintained his support for the proposed

article, he recognized that the Drafting Committee could improve the wording.

16. Mr. RAMANGASOAVINA said he endorsed Mr. Castrén’s remarks. There was a logical order in the provisions of articles 33 and 34. Article 33 provided that immunity might be waived voluntarily. Article 34 stated that it had to be waived in respect of civil claims, if the sending State thought that that could be done without impeding the performance of the functions of the permanent mission. However, if the sending State did not waive immunity, even though the performance of the functions of the permanent mission would not be impeded thereby, it was obliged to use its best endeavours to bring about a just settlement of the claim. Lastly, if the sending State did not waive immunity and did not use its best endeavours to bring about a just settlement, and if a dispute arose in consequence, article 50 would apply.

17. He was in favour of draft article 34, not only because it stressed the need to find a solution, but also because it established a form of co-operation between the sending State and the host State in the event of difficulties in the application of article 33.

18. Mr. BARTOŠ observed that the Commission had already discussed the problem under consideration many times. It was not difficult to find theoretical solutions for it and to state fixed rules; but it must not be forgotten that in practice States were disinclined to waive an immunity deriving from their sovereignty. In many cases, too, that attitude had enabled them to draw a veil over certain matters.

19. In the present circumstances, it was to be expected that some States would accept the rules stated in article 34, while others would reject them. It was easy to imagine the diplomatic difficulties that would arise when all those States were represented by permanent missions to international organizations.

20. Although he supported the proposed article in theory, he wondered whether the solution it provided was sufficiently clear-cut. He feared that it might raise serious application problems, and he doubted whether the Commission could assume responsibility for the serious consequences which the proposed article was bound to have in practice. The Drafting Committee should consider the matter exhaustively before proposing a final solution.

21. Mr. AGO said he wished to emphasize once again the difference between a recommendation and an obligation laid down in an article. It must not be thought that if the Commission merely included the text of a recommendation in an article the situation would remain unchanged. The recommendation annexed to the Vienna Convention on Diplomatic Relations was based on the idea of abuse of rights. It stated, in substance, that the sending State enjoyed immunity from jurisdiction; it merely recommended that the sending State should waive immunity when that could be done without impeding the performance of the functions of the mission, and that when immunity was not waived, the sending State should try to bring about a just settlement. Changing that recommendation into an obligation changed the

⁴ Op. cit., vol. 1, p. 22.

option of waiving immunity into an obligatory act; in other words, States would only enjoy immunity from jurisdiction in cases where the exercise of jurisdiction would impede the performance of the functions of the permanent mission.

22. In its present form, article 34 was an innovation, and he wondered whether it might not be a regressive rather than a progressive development of international law.

23. As Mr. Ushakov had pointed out, the tripartite procedure provided for in article 50 could not be of much help, owing to the difficulty of establishing when there was an impediment to the performance of the functions of the permanent mission. Host States would probably tend to allow criteria for determining that question to be established in their jurisprudence; and the tendency would probably be restrictive.

24. Consequently, before requesting the Drafting Committee to review the text of article 34, it was important to know whether the Commission wished to draft an article or a recommendation.

25. Mr. YASSEEN said he too believed that that substantive question should be settled first.

26. With regard to the drafting, he noted a certain incompatibility between the two sentences of article 34. Did the second sentence establish an alternative obligation, or did it impose a sanction on the State which did not waive immunity? Since those points were not clear, he suggested that the Commission should be guided by the attitude taken by the Vienna Conference of 1961 when adopting the Convention on Diplomatic Relations and more recently, in 1969, by the General Assembly when adopting the Convention on Special Missions,⁵ and accordingly decide in favour of a resolution on the subject.

27. Mr. BARTOŠ said that in his previous statement he had not considered the possibility of dealing with the question in a recommendation. He fully agreed with the views expressed by Mr. Ago and Mr. Yasseen.

28. Mr. ELIAS said that although the problem had been discussed at great length by the Commission at its twenty-first session in 1969, the division of opinion in the present discussion was still so sharp that the Commission must deal with it before it could refer article 34 to the Drafting Committee. It was for the Commission to decide whether it wished to retain article 34 in the form of a draft article.

29. The idea of turning the article into a recommendation did not appeal to him. That form was appropriate for a resolution adopted by a conference, but the position of the Commission was different. The General Assembly expected guidance from the Commission in the form of draft articles. If the Commission found that article 34 gave rise to undue difficulty, it could place the text in square brackets.

Mr. Ago, First Vice-Chairman, took the Chair.

30. Mr. EL-ERIAN (Special Rapporteur) said that there was a division of opinion on whether article 34 should be converted into a recommendation or adopted as a draft article stating legal obligations. An intermediate position had been taken by some members who had said that they might be prepared to accept article 34 if the wording was amended to remove ambiguities.

31. There was also a division of opinion on the procedure to be followed. One suggestion was that the Commission should decide between a resolution and a draft article; another was that the Drafting Committee might assist the Commission to take that decision by reviewing the text; finally, it had then suggested that the text be placed in square brackets or transferred to the commentary.

32. He suggested that the article be referred to the Drafting Committee, which could help the Commission to take a decision by reviewing the wording of the article.

33. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 34 to the Drafting Committee for review in the light of the discussion.

It was so agreed.⁶

ARTICLE 35

34. The CHAIRMAN invited the Special Rapporteur to introduce article 35.

35.

Article 35

Exemption from social security legislation

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

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

- (a) that such employed persons are not nationals of or permanently resident in the host State; and
- (b) that they are covered by the social security provisions which may be in force in the sending State or a third State.

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

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

⁵ See General Assembly resolution 2531 (XXIV).

⁶ For resumption of the discussion see 1113th meeting, para. 71.

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

36. Mr. EL-ERIAN (Special Rapporteur) said that the comments of governments on article 35 were summarized in paragraphs 1 to 9 of the section of his sixth report dealing with that article and his replies in paragraphs 10 to 17 (A/CN.4/241/Add.3). In reply to the comment by the secretariat of the International Atomic Energy Agency (IAEA) regarding the exemption from social security legislation of the employer of the permanent representative and the diplomatic staff, he had pointed out that the employer in that case was the sending State, which enjoyed immunity under general international law, so that there was no need to make any specific reference to such immunity in the context of the provisions of article 35.

37. In the light of the government comments relating to paragraph (3) of the commentary⁷ he proposed that paragraph 5 of article 35 be dropped as being unnecessary in view of the provisions of articles 4 and 5.

38. The CHAIRMAN invited the Commission to comment on article 35 paragraph by paragraph.

Mr. Tsuruoka resumed the chair.

Paragraph 1

39. Mr. USTOR said he fully agreed with the Special Rapporteur's reply to the point raised by the IAEA secretariat.

40. He wished to raise a question concerning paragraph 1, though he did so with some diffidence, because article 35 was based on the precedents of the corresponding provisions of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on Special Missions.

41. The social security legislation of some host countries imposed on both employers and employees the obligation to make certain contributions to a fund or State agency. Paragraph 1 exempted the permanent representative and the members of the diplomatic staff of the permanent mission from that obligation and the exemption clearly applied also to the sending State, which was the employer. It could happen, however, that the sending State employed as a member of the technical and administrative staff of the mission a person who was a national of, or a permanent resident in, the host State and was therefore obliged to participate in the social security system of that State and make the appropriate contributions. The question then arose whether the mission also had an obligation to contribute under the social security legislation of the host State. The practice in many countries, including his own, was that in such cases the mission voluntarily undertook to pay the employer's contributions.

42. He had read carefully the provisions both of article 35, paragraph 1 and of article 41, on nationals of the host State and persons permanently resident in the host State, but found that the case was not covered. He therefore suggested that a provision be included in article 35 specifying that, whenever the sending State employed in its permanent mission a person who was subject to the social security legislation of the host State because he was a national of or permanently resident in that State, the sending State should pay the employer's social security contribution.

43. Mr. USHAKOV asked why, in the text now proposed by the Special Rapporteur in his report (A/CN.4/241/Add.3, paragraph 17 under article 35) the words "which may be" had been deleted from the phrase "which may be in force in the host State" in paragraph 1. Those words were included in article 33, paragraph 1, of the Convention on Diplomatic Relations⁸ and in article 48, paragraph 1, of the Convention on Consular Relations.⁹ The point was not of any great importance, but it should be explained in the commentary.

44. Mr. ROSENNE said that the point raised by Mr. Ustor might well be covered by the structure of the whole draft and by the provisions of article 41, especially in the revised form proposed by the Special Rapporteur in his report.

45. Mr. EL-ERIAN (Special Rapporteur) said that he would give careful consideration to the important question raised by Mr. Ustor, which should be the subject of at least a recommendation.

46. He had agreed to drop the words "which may be" before "in force in the host State" in response to a drafting suggestion by the United Nations Secretariat (A/CN.4/L.162/Rev.1). However, in view of the comments made during the discussion, he would recommend that the Drafting Committee revert to the previous text.

Paragraphs 2 to 5

47. The CHAIRMAN, noting that there were no comments on paragraphs 2, 3 or 4, invited the Commission to comment on paragraph 5.

48. Mr. CASTRÉN said he thought that the paragraph should be deleted, for the reasons given by the Special Rapporteur.

49. Mr. KEARNEY said he agreed to the proposal to delete paragraph 5.

50. Mr. USTOR said he also agreed to that proposal.

51. Incidentally, the wording of article 5 would need to be revised, since the reference to "the representatives of States" would no longer be sufficient.

52. Mr. SETTE CÂMARA said that the Special Rapporteur had been right in accepting the government suggestions that paragraph 5 be deleted; the paragraph was unnecessary because it dealt with matters already covered by articles 4 and 5.

⁷ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 214.

⁸ United Nations, *Treaty Series*, vol. 500, p. 112

⁹ *Op. cit.*, vol. 596, p. 300.

53. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 35 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁰

ARTICLE 36

54. The CHAIRMAN invited the Special Rapporteur to introduce article 36.

55.

Article 36

Exemption from dues and taxes

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

- (a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
- (b) dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the permanent mission;
- (c) estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 42;
- (d) dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State;
- (e) charges levied for specific services rendered;
- (f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 26.

56. Mr. EL-ERIAN (Special Rapporteur) said that the comments on article 36 were all of a drafting character; he had replied to them in his observations in his report (A/CN.4/241/Add.3). His conclusion was that article 36 should be retained in its present form.

57. Mr. KEARNEY said that he supported the suggestion made by one government that sub-paragraph (d), which was taken from the corresponding sub-paragraph of article 34 of the 1961 Vienna Convention on Diplomatic Relations, should be replaced by the more satisfactory language of sub-paragraph (d) of article 49 of the 1963 Vienna Convention on Consular Relations (A/CN.4/238/Add.1, section B.4).

58. The difference was that the 1963 text eliminated an ambiguity. The 1961 text, which was reproduced in sub-paragraph (d) of the present article 36, could be read as covering only taxes on income and capital taxes on investments "made in commercial undertakings" in the host State. In fact, there were other kinds of capital gains, such as gains on real estate, which could attract taxation. He therefore disagreed with the Special Rapporteur and urged that the 1963 text be adopted as being considerably clearer than the 1961 text which was now proposed.

¹⁰ For resumption of the discussion see 1114th meeting, para. 8.

59. Mr. SETTE CÂMARA said that the Special Rapporteur's replies to the comments suggesting amendments to the wording of article 35 were all in favour of retaining the text as it stood. Those suggestions, mostly of a drafting character, would entail departures from the text of the Vienna Convention on Diplomatic Relations, which should be respected.

60. Immunity from taxation was a key subject in section 2 of Part II of the draft and parallelism with the Vienna Convention on Diplomatic Relations was important in that connexion, in which controversies and disputes between the host State and diplomatic and permanent missions were likely to be frequent. There was no advantage in adopting different language to cover identical situations. On the contrary, differences in formulation would promote doubts concerning interpretation and favour the occurrence of loopholes in the texts of the various conventions.

61. He therefore supported the Special Rapporteur's suggestion that the previous text be retained, subject to any editorial improvements that might be proposed by the Drafting Committee.

62. Mr. ALCÍVAR said he would like to know whether the exception in sub-paragraph (a) covered a municipal sales tax of the kind levied in New York City. Members of permanent missions in New York were issued with a card by the Mayor, to ensure that they obtained exemption from that tax. He was anxious to avoid any possible confusion.

63. Mr. USTOR suggested that the Drafting Committee consider whether the title of article 36, or the opening paragraph of the article, ought to specify that the dues and taxes in question were those levied by the host State.

64. Mr. ROSENNE said that the point was valid in principle, but care should be taken in the Drafting, because the host State could also have a permanent mission.

65. The CHAIRMAN suggested that article 36 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹¹

ARTICLE 37

66. The CHAIRMAN invited the Commission to consider article 37.

67.

Article 37

Exemption from personal services

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

¹¹ For resumption of the discussion see 1114th meeting, para. 15.

68. The CHAIRMAN said that no government or international organization had made any comment on article 37; the Special Rapporteur had no observations to make either. He therefore suggested that article 37 be referred to the Drafting Committee.

*It was so agreed.*¹²

69. The CHAIRMAN invited the Special Rapporteur to introduce article 38.

70.

Article 38

Exemption from customs duties and inspection

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

- (a) articles for the official use of the permanent mission;
- (b) articles for the personal use of the permanent representative or a member of the diplomatic staff of the permanent mission or members of his family forming part of his household, including articles intended for his establishment.

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

71. Mr. EL-ERIAN (Special Rapporteur) said he proposed that the present text of article 38 be retained, subject only to the drafting changes referred to in paragraphs 5 and 7 of his observations (A/CN.4/241/Add.3), namely, the deletion of the words "or members of his family forming part of his household", in paragraph 1 (b) and the replacement of the word "Such", at the beginning of the last sentence of paragraph 2, by the words "In such cases".

72. Mr. SETTE CÂMARA said that the Special Rapporteur was justified in deleting the reference to "members of his family", because the members of the family were covered by article 40, paragraph 1.

73. The amendment to paragraph 2 suggested by the Secretariat improved the text and reconciled article 38 with article 35 of the Convention on Special Missions.¹³

74. Mr. ROSENNE said he wished to suggest to the Secretariat that they follow, in the presentation of the Commission's articles, the decision of the Vienna Conference on the Law of Treaties to the effect that sub-paragraphs of an article which did not form a grammatically complete sentence should, for grammatical reasons, commence with a small letter. That applied, for instance, to sub-paragraphs (a) and (b) of article 38 and would apply generally in other articles.

¹² For resumption of the discussion see 1114th meeting, para. 20.

¹³ See General Assembly resolution 2530 (XXIV), Annex.

75. Mr. EL-ERIAN (Special Rapporteur) said he would accept that suggestion.*

76. The CHAIRMAN suggested that article 38 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁴

ARTICLE 39

77. The CHAIRMAN invited the Special Rapporteur to introduce article 39.

78.

Article 39

Exemption from laws concerning acquisition of nationality

Members of the permanent mission not being nationals of the host State, and members of their families forming part of their household, shall not, solely by the operation of the law of the host State, acquire the nationality of that State.

79. Mr. EL-ERIAN (Special Rapporteur) said that article 39 had given rise to some controversy in the Sixth Committee where a number of representatives had agreed that "the subject-matter of article 39 should be dealt with in the draft articles themselves and not be relegated to an optional protocol". Others had considered, however, that "the article required further refinement and had expressed doubts as to whether it was compatible with legislation which allowed persons to avoid the application of nationality laws by an act of personal will (option or repudiation)".¹⁵

80. He drew attention to the comments of governments, particularly the Government of Switzerland (A/CN.4/239, section C.II), and the editorial suggestions of the Secretariat (A/CN.4/L.162/Rev.1). He agreed with the latter suggestions, but thought that otherwise the article should remain unchanged.

81. Mr. KEARNEY said that the method of dealing with the problem of acquisition of nationality by an optional protocol¹⁶ had been adopted at the United Nations Conference on Diplomatic Intercourse and Immunities because several countries had had constitutional difficulties which made it seem inadvisable to deal with the matter in the Convention itself. He could understand the difficulty where the mere fact of birth within the territory of a State automatically conferred nationality, but almost all States now recognized an exception for children of diplomats. Article 39, however, seemed to go rather further than that and to imply that it would also be applicable to members of the administrative and technical staff of the mission. Some mention of the problem should be made in the commentary.

82. Mr. SETTE CÂMARA said that the question was whether the indisputable principle laid down in article 39

* This suggestion has been adopted throughout the present volume of the *Yearbook*.

¹⁴ For resumption of the discussion see 1114th meeting, para. 22.

¹⁵ See *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, paragraph 49.

¹⁶ United Nations, *Treaty Series*, vol. 500, p. 224.

should be included in the convention itself or in an optional protocol. In his opinion, the Special Rapporteur had rightly decided in favour of the former approach, in accordance with the directive given in paragraph (3) of the Commission's commentary.¹⁷

83. Mr. ROSENNE said that there seemed to be general support for the course taken by the Special Rapporteur. But since article 39 dealt with the kind of situation in which the concept of reservations might be invoked, he suggested that the Drafting Committee recommend a sentence or two for inclusion in the commentary which would hint that a reservation on the ground of constitutional difficulties would not necessarily be incompatible with the objects and purposes of the draft articles.

84. Mr. ALBÓNICO said he was in favour of retaining article 39 in its present form; in his opinion, however, the words "members of the permanent mission" should apply only to the permanent representative and the members of the staff of the permanent mission, as defined in article 1, sub-paragraphs (f) and (g).

85. Mr. CASTRÉN said he did not think it was necessary to specify in article 39, as Mr. Albónico had requested, that the provision did not apply to all categories of the staff of the mission, since that question was settled in article 40.

86. He was in favour of retaining article 39 as part of the draft. In the commentary it had adopted at its twenty-first session, the Commission had clearly explained the reasons why it considered that in the case of permanent missions exemption from the operation of the local laws of nationality should be made a matter of express provision and not relegated to an optional protocol.

87. Mr. KEARNEY said he was not sure whether Mr. Castrén had meant to imply that article 40 eliminated the broad language of article 39. He did not think that that would be a correct interpretation of article 40, which related to articles 30 to 38 and did not cover article 39.

88. Mr. ALBÓNICO said he supported Mr. Kearney's view.

89. Mr. CASTRÉN said that there might be differences of opinion about the interpretation of articles 39 and 40, but it was certain that article 39 stated an exception, and thus a privilege, whereas article 40 stated the privileges and immunities of persons other than the permanent representative and members of the diplomatic staff. Consequently, those other persons were not entitled to the privilege stated in article 39.

90. Mr. RAMANGASOAVINA said he had difficulty in understanding the effect of article 39. It stated that members of the permanent mission not being nationals of the host State would not, solely by the operation of the law of the host State, acquire the nationality of that State. But laws on nationality varied from country

to country. Most States made the grant of nationality dependent on residence or birth in their territory. Others conferred it on persons whose family came from the country. Consequently, the phrase "solely by the operation of the law of the host State" applied to the acquisition of nationality both by *jus soli* and by *jus sanguinis*. Hence it might be wondered how persons on whom the laws of their State of origin conferred nationality by virtue of family ties could acquire that nationality if, although originating from the said country, they had not been resident in it for a long time, but returned to it through employment in the permanent mission of a foreign country. They would not even be able to obtain that nationality by applying for naturalization, like ordinary aliens. Thus it was clear that article 39 might have very far-reaching implications unless further particulars were included.

91. Mr. BARTOŠ said that the main purpose of article 39 was to state the now generally accepted rule that children born of parents on diplomatic service in a foreign country did not *ipso facto* acquire the nationality of that country solely by the operation of its laws.

92. In addition, it was intended to exempt certain categories of persons from *ex lege* naturalization in countries where residence for a certain number of years was a sufficient qualification for acquiring the nationality of the country. It was clear, therefore, that article 39 did not exclude the acquisition of nationality by petition.

93. Nevertheless, the Drafting Committee might perhaps be able to find a more explicit formula to express the idea that birth or residence were not sufficient to confer the nationality of the host State.

94. Mr. USTOR said that he, like Mr. Kearney, did not think that the Commission should try to construe article 39 in the way suggested by Mr. Castrén. The Drafting Committee might, however, consider reversing the order of articles 39 and 40.

95. In view of the misgivings voiced by Mr. Kearney and by the Swiss Government, it would be useful to know exactly what the legal situation was with respect to the acquisition of nationality in the two main host countries, the United States of America and Switzerland, before the Commission began drafting.

96. Mr. EL-ERIAN (Special Rapporteur) said that it was not the Commission's task to decide whether the principle embodied in article 39 should be included in the convention itself or in an optional protocol. After all, at the Vienna Conference on Diplomatic Intercourse and Immunities, the Commission had submitted that same principle in the form of a draft article, but the Conference had decided that it should be expressed in an optional protocol.

97. He agreed with Mr. Castrén and Mr. Ustor that the Drafting Committee should reflect on the possibility of transposing articles 39 and 40.

98. He did not, however, think that the Commission should go into the question of interpreting article 39 in its commentary. If a government made reservations

¹⁷ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 216.

to the article, that in itself would be an interpretation to which reference could be made.

99. Mr. KEARNEY said that at a later meeting he would try to explain exactly what was provided for on the subject of nationality in the laws of his country.

100. The CHAIRMAN suggested that article 39 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.¹⁸

ARTICLE 40

101. The CHAIRMAN invited the Special Rapporteur to introduce article 40.

102.

Article 40

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

1. The members of the family of the permanent representative forming part of his household and the members of the family of a member of the diplomatic staff of the permanent mission forming part of his household shall, if they are not nationals of the host State, enjoy the privileges and immunities specified in articles 30 to 38.

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

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

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

103. Mr. EL-ERIAN (Special Rapporteur) said that the view had been expressed in the Sixth Committee that it was desirable to state that the privileges and immunities granted must be used for the sole purpose of assisting the persons enjoying them "in the performance of their duties". His reply had been based on the assumption that that comment referred exclusively to the members of the administrative and technical staff, the service staff and the private staff dealt with in paragraphs 2, 3 and 4

of article 40, and did not concern the members of the family dealt with in paragraphs 1 and 2.

104. His reply to the criticism of one government that the phrase "or permanently resident in the host State" was not included in paragraph 1, was that he would consider the inclusion of that phrase an unwarrantable departure from the Vienna Convention on Diplomatic Relations.

105. He proposed that article 40 be retained in its present form, subject to the drafting change at the end of paragraph 3 suggested by the Secretariat, namely, that the word "contained" be replaced by the words "provided for" (A/CN.4/L.162/Rev.1).

106. Mr. KEARNEY said he would like to draw the Commission's attention to the United States Government's observations on article 40, which read: "The United States believes the privileges and immunities accorded members of the mission should only be accorded to the class of people defined in section 16 of the Convention on Privileges and Immunities of the United Nations. We think it excessive to accord 'the administrative and technical staff...together with members of their families forming part of their respective household' all the same privileges and immunities. Nor is this necessary for the effective functioning of the mission. If immunities are to be granted, they should only relate to members of the administrative and technical staff, not to members of their families, and immunities granted should only be in respect of acts performed in the course of their official duties" (A/CN.4/238/Add.2, section B.8).

107. He thought it would be hard to defend the view that the personal inviolability of the children of technical or administrative staff or the inviolability of the residence of a clerk was essential for the proper functioning of a permanent mission. It might therefore be questioned whether the application of articles 30, 31 and 36 was really necessary.

108. Mr. USHAKOV said that, taken as a whole, article 40 was indispensable. It was clear that all the privileges and immunities listed there should be granted to the persons to whom the article related, in the interests of the efficient functioning and the prestige of the permanent mission, which was analogous to a diplomatic mission because it represented the State to the organization, that was to say, to another subject of international law. The basic principle of article 40 was thus the same in the case of diplomatic missions and of permanent missions to international organizations.

109. However, there was no justification for referring *en bloc*, as in paragraphs 1 and 2, to articles 30 to 38 and 30 to 37, for articles 33 and 34 were not concerned with the privileges and immunities of members of the permanent mission, but with the right of the sending State to waive those privileges and immunities.

110. Moreover, since there was already a reference to article 40 in paragraph 3 of article 33, it was unnecessary to refer back to article 33 in article 40. That mistake had been made in the three preceding Conventions, but

¹⁸ For resumption of the discussion see 1098th meeting, para. 101.

there was no reason to repeat it. He therefore asked that the Drafting Committee should consider whether it would be possible to delete the reference to articles 33 and 34 in paragraphs 1 and 2 of article 40.

111. Mr. EL-ERIAN (Special Rapporteur) replying to Mr. Kearney, said that the Convention on the Privileges and Immunities of the United Nations¹⁹ had been drafted with the representatives of States in mind and that in 1946 the institution of permanent missions to international organizations had not yet been developed. The Commission had already explained in its commentary²⁰ that it could not depart from the Vienna Convention on Diplomatic Relations with respect to the privileges and immunities of administrative and technical staff, because they had status analogous to that of diplomatic agents.

112. He thought Mr. Ushakov's observation could usefully be taken into consideration by the Drafting Committee with a view to improving the text of article 40.

113. In its commentary to article 40 the Commission had drawn attention to the fact that, while not including any mention of the privileges and immunities of certain members of the permanent mission, it had proceeded on the basic assumption that practice in regard to them would be in conformity with the rules of inter-State diplomacy. He emphasized that no international organization had taken exception to that assumption.

114. The CHAIRMAN suggested that article 40 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*²¹

The meeting rose at 6 p.m.

¹⁹ United Nations, *Treaty Series*, vol. 1, p. 16.

²⁰ See *Yearbook of the International Law Commission*, 1969, vol. II, p. 216.

²¹ For resumption of the discussion see 1114th meeting, para. 26.

1097th MEETING

Tuesday, 11 May 1971, at 10.5 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Barotoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tames, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1-3; A/CN.4/L.162/Rev.1; A/CN.4/L.166)

[Item 1 of the agenda]

(continued)

ARTICLE 41

1. The CHAIRMAN invited the Special Rapporteur to introduce article 41.

2.

Article 41

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

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

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

3. Mr. EL-ERIAN (Special Rapporteur) said that during the debate in the Sixth Committee of the General Assembly it had been pointed out that paragraph 1 of article 41 contained a drafting mistake which had appeared in the French version of the 1961 Vienna Convention on Diplomatic Relations, but had been corrected in the 1963 Vienna Convention on Consular Relations. In their written comments, two Governments had made similar observations concerning the English version of paragraph 1. He had considered those comments justified and had accordingly changed the English text by moving the word "only" to a position immediately following the words "shall enjoy", so that the last part of the sentence would read "... shall enjoy only immunity from jurisdiction, and inviolability in respect of official acts performed in the exercise of their functions" (A/CN.4/241/Add.3).

4. He had not, however, been convinced by the editorial suggestions of the United Nations Secretariat (A/CN.4/L.162/Rev.1).

5. Mr. SETTE CÂMARA said it was clear that permanent representatives and members of the diplomatic staff who were nationals of the host State or permanently resident therein were entitled to immunities only in respect of official acts performed in the exercise of their functions. That limitation was a wise one, since otherwise they would be given a privileged status in relation to other nationals of the host State, thus violating the principle that all citizens are equal before the law.

6. In paragraph 2 it was left to the host State to determine the extent to which other members of the staff

of the permanent mission and persons on the private staff who were nationals of or permanently resident in the host State would enjoy privileges and immunities, although the host State was called upon to restrict its jurisdiction in such a manner as not to interfere unduly with the performance of their functions.

7. In his opinion, the Special Rapporteur had had good reasons for disregarding the other suggestions for changes; the present text, which corresponded to that of article 38 of the Vienna Convention on Diplomatic Relations,¹ should be referred to the Drafting Committee.

8. Mr. KEARNEY referring to the drafting problem in paragraph 1—the position of the word “only”—said he agreed that the previous formulation had caused difficulties, but the Special Rapporteur’s proposed new wording still contained an element of ambiguity, since it raised the question whether the reference to official acts modified only “inviolability” or whether it modified both “immunity from jurisdiction” and “inviolability”. It was difficult to work out a clause that did not contain some element of ambiguity as long as the word “only” was used, but the new text might be clarified if the words “enjoy only” were replaced by “shall be limited to” and the comma after “jurisdiction” deleted.

9. The CHAIRMAN suggested that article 41 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*²

ARTICLE 42

10. The CHAIRMAN invited the Special Rapporteur to introduce article 42.

11.

Article 42

Duration of privileges and immunities

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

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

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

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

acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the host State was due solely to the presence there of the deceased as a member of the permanent mission or as a member of the family of a member of the permanent mission.

12. Mr. EL-ERIAN (Special Rapporteur) referring to paragraph 1, said that one government had expressed the opinion that the corresponding article in the Vienna Convention on Diplomatic Relations³ was more precise and therefore preferable. In its editorial suggestions, the Secretariat of the United Nations had expressed the view that in the fourth line of paragraph 1 it would be better to say “if *he is* already in its territory” instead of “if already in its territory”.

13. One government had regretted the omission from paragraph 2 of the expression “but shall subsist until that time, even in case of armed conflict”, which appeared in article 39, paragraph 2 of the Vienna Convention on Diplomatic Relations. During the debate in the Sixth Committee, the use of the expression “a reasonable period” in paragraphs 2 and 3 had been criticized on the ground that it was too imprecise.

14. With regard to paragraph 4, one government had commented that: “It is understood that the movable property of member of the permanent mission or a member of his family referred to in paragraph 4 does not include ‘property of an investment nature’”.

15. His replies to those comments were to be found in paragraphs 13-22 of his observations on article 42 (A/CN.4/241/Add.3). He had introduced a number of changes into the article, his proposed new text of which read :

Article 42

Duration of privileges and immunities

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

2. Members of the family of a member of the permanent mission forming part of his household and members of his private staff shall receive the privileges and immunities to which they are entitled from the date from which he enjoys privileges and immunities in accordance with paragraph 1 of this article or from the date of their entry into the territory of the host State or from the date of their becoming a member of such family or private staff, whichever is the latest.

3. When the functions of a member of the permanent mission have come to an end, his privileges and immunities and those of a member of his family forming part of his household or a member of his private staff shall normally cease at the moment when the person concerned leaves the territory of the host State or on the expiry of a reasonable period in which to do so, whichever is sooner. In the case of the persons referred to in paragraph 2 of this article, their privileges and immunities shall come to an end when they cease to belong to the household

¹ United Nations, *Treaty Series*, vol. 500, p. 118.

² For resumption of the discussion see 1114th meeting, para. 31.

³ Article 39, para. 1; United Nations, *Treaty Series*, vol. 500, p. 118.

or to the private staff of a member to the permanent mission provided, however, that if such persons intend leaving the territory of the host State within a reasonable period thereafter, their privileges and immunities shall subsist until the time of their departure.

4. However, with respect to acts performed by a member of the permanent mission in the exercise of his functions, immunity [from jurisdiction] shall subsist [without limitation of time].

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

6. In the event of the death of a member of the permanent mission not a national of or permanently resident in the host State or of a member of his family forming part of his household, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in its territory, the export of which was prohibited at the time of his death. Estate, succession and inheritance duties, shall not be levied on movable property which, at the time of the death of a member of the permanent mission or of a member of the family of a member of the permanent mission, was in the host State solely because of the presence there of the deceased.

16. Mr. SETTE CÂMARA said that the expression "a reasonable period", used in paragraph 3 of the Special Rapporteur's next text, was indeed very vague and should be referred to the Drafting Committee.

17. Paragraph 4 contained a very extensive provision for immunity with respect to acts performed by a member of a permanent mission in the exercise of his functions. That too was a very vague clause and it would be difficult to decide what acts really were performed in the exercise of official functions. Traditional diplomatic usage was to confine such immunity to official pronouncements, speeches and the like, and not to grant it for all acts performed by a member of the mission.

18. Mr. USHAKOV said he was not convinced of the advisability of some of the drafting changes made by the Special Rapporteur in article 42. In paragraph 1, the expression "Every person" had been replaced by the expression "Every member of the permanent mission", and that had made it necessary to draft a second paragraph concerning "Members of the family of a member of the permanent mission forming part of his household and members of his private staff". He wondered, too, whether it was possible to speak of members of the private staff of a member of a permanent mission, and whether what was meant was not rather persons in the private service of a member of a permanent mission, which was something quite different.

19. Paragraph 2 of the French version of the new text proposed by the Special Rapporteur contained a new expression: the paragraph applied to members of the family of a member of the permanent mission "forming part of his household", and the French version now spoke of them as "*vivant à son foyer*", whereas the expression normally used by the Commission was "*qui fait partie de son ménage*". Paragraph 2 also applied to members of the private staff of members of the perma-

nent mission. In his view, persons in the private service of a member of the permanent mission were themselves members of the permanent mission. The new paragraph 2 laid down three dates, from the latest of which the persons to whom it applied would receive privileges and immunities. But the first two dates mentioned—the date from which the member of the mission "enjoys privileges and immunities in accordance with paragraph 1" and the date of "their entry into the territory of the host State"—were the same. The third date—that of "their becoming a member of such family or private staff"—was not a precise date. In his opinion, therefore the division of the original paragraph 1 into two paragraphs was not satisfactory.

20. The new paragraph 3 proposed by the Special Rapporteur no longer referred to the "functions of a person enjoying privileges and immunities", but to the "functions of a member of the permanent mission", which considerably restricted the field of application of the paragraph.

21. In the new paragraph 4, the Special Rapporteur had inserted the words "from jurisdiction" in square brackets after the word "immunity". It seemed, however, that the provision referred not only to immunity from jurisdiction, but also to other immunities, such as personal inviolability and inviolability of the residence and property. The phrase "without limitation of time", which had also been included in square brackets, was not necessary, since the use of the word "subsist" adequately conveyed the idea of permanence.

22. The Drafting Committee should carefully re-examine the wording of the article and perhaps revert to the previous version, at least for paragraph 1.

23. Mr. REUTER observed that the points raised by Mr. Ushakov would oblige the Drafting Committee to review the text of article 42 as a whole.

24. He himself had noted a certain lack of symmetry between the two possibilities contemplated in paragraph 1, with regard to the effects of notification of the appointment to the host State. If notification was not necessary in the first case, but was necessary in the second, it was probably because the host State was considered to be aware of the status of the person concerned as soon as he entered its territory. If that were so, there would be a choice between two solutions: either to dispense with the requirement of notification in the second case also and to stipulate that the privileges were retrospective to the time when they had been accorded, or to extend the requirement of notification to the first case. Without asking the Commission to decide on either solution, he wished to draw its attention to that point, which was not just a matter of drafting.

25. Mr. ROSENNE said that, with all respect, he did not consider that paragraph 13 of the Special Rapporteur's observations on article 42 was an adequate reply to the comment of the government which had suggested that the immunities of the members of the permanent mission should begin from the moment when their appointment was notified to the Ministry for Foreign

Affairs, as provided in article 39, paragraph 1, of the Vienna Convention on Diplomatic Relations (A/CN.4/238, section B.2). In general, the principle of the recognition of diplomatic status by the host State was controlled through the Ministry for Foreign Affairs of the host State and only exceptionally by some other authority. That was the standard practice at United Nations Headquarters in New York and at the Office of the United Nations at Geneva. That was a question of principle which had first arisen in connexion with article 17⁴ and to which he thought the Drafting Committee should give careful consideration.

26. He was not sure whether paragraph 1 of the proposed new text dealt adequately with the case of a member of a delegation to the General Assembly, who would normally remain at Headquarters for only three or four months under the Headquarters Agreement, but who during that time was appointed a member of the permanent mission.

27. The Special Rapporteur had proposed a large number of changes in article 42, which he found it difficult to evaluate. The language of the report was often confusing; such references as "one government" or "another government" did not facilitate a dispassionate study of the subject.

28. With regard to the new paragraph 4, he thought that the hypothesis presented by the Special Rapporteur was absolutely correct, since it was supported by many years of jurisprudence. He fully agreed that that hypothesis should be embodied in a separate paragraph, but the present drafting was not entirely satisfactory and he hoped the Drafting Committee would give it due consideration.

29. Mr. ELIAS said that of all the articles which the Commission had to consider at the present session, article 42 seemed to have undergone the greatest metamorphosis. Some of the Special Rapporteur's changes were undoubtedly improvements, but others were difficult to accept, because they raised questions of substance as well as of drafting.

30. Like Mr. Ushakov, he was not entirely satisfied with the elimination of the original paragraph 1, though he thought that the substitution of the words "every member" for "every person" was a definite improvement.

31. Paragraph 2 was a necessary result of the decision to include a provision concerning the members of the family of a member of the permanent mission, which had not been included by the original draft. He was not sure that the Special Rapporteur had succeeded in blending the relevant provisions of the original article, but he did believe that the principle was one which should be clearly stated.

32. Paragraph 3 had undergone extensive revision in view of various difficulties which had been pointed out by a number of governments. It had been suggested that the words "whichever is sooner" introduced an element of uncertainty; the same could, of course, be

said of the words "whichever is the latest" in paragraph 2.

33. In paragraph 4, as Mr. Ushakov had rightly pointed out, it seemed hardly appropriate to limit the immunity to immunity from jurisdiction. The words "from jurisdiction", in square brackets, should be deleted; the member of the permanent mission would then continue to enjoy the customary immunities after the termination of his functions. He believed, however, that the Special Rapporteur had been right to place the last sentence of the original paragraph 2 in a separate paragraph, since to subordinate it to the idea of the cessation of functions would not do justice to the principle involved.

34. He hoped that the Drafting Committee would give careful consideration to paragraphs 2, 3 and 4 of the new draft, particularly paragraph 4.

35. Mr. ALBÓNICO, referring to paragraph 1, said that he agreed with the government which had suggested that every member of a permanent mission should enjoy privileges and immunities from the moment when his appointment was notified to the Ministry of Foreign Affairs of the host State, as provided in article 39, paragraph 1 of the Vienna Convention on Diplomatic Relations.

36. Mr. AGO said that the Drafting Committee would have to reconsider article 42 paragraph by paragraph and try to find a solution for each of the problems raised. Several of them were probably due to the fact that the sending State had to notify appointments to the host State through the organization, a system to which he had raised objections during the consideration of article 17.⁵

37. In trying to cover a wide variety of possible situations, the Special Rapporteur had unfortunately ended by producing an article which was even more complex than the corresponding provision in the Convention on Diplomatic Relations, and might give rise to practical difficulties not only between the sending State and the host State, but also between those two States and the organization. He hoped, therefore, that the Drafting Committee would be able to simplify the present text of article 42 without, however, reverting to the wording of article 39 of the Vienna Convention on Diplomatic Relations.

38. Mr. USTOR said he agreed with Mr. Rosenne that the new paragraph 4 embodied a well-established rule of international law and should be retained. It was in accordance with the theory that acts in the exercise of official functions were, in fact, acts of the sending State and that the immunity applied not to the person of the member of the mission, but to the sending State itself and so could not be restricted. It should be made clear, therefore, that the immunity of the member of the mission would subsist even if he left the host State and returned to it later as a private person. In that case, he might be indicted for acts formerly committed in his private capacity, but he would still enjoy immunity for all acts performed in the exercise of his official functions.

⁴ See 1092nd meeting, para. 16.

⁵ *Ibid.*, paragraphs 22, 23, 33, 44 and 45.

39. Mr. EL-ERIAN (Special Rapporteur) said that just as he had been led to make changes in article 42 by the comments of governments and of the Secretariat, so he had now been persuaded of the need to make further changes by the comments of members. He wished to emphasize, however, that all the draft articles had been painstakingly prepared and that governments and organizations had been in general agreement on his basic approach. He had not found it an easy task to cover all the 116 articles in the time available, but he could assure the Commission that there was not a single observation by a government which had not been taken into account. If he had not always referred to governments by name, that did not imply any lack of objectivity. He had made specific references to Switzerland and to the United States of America because both were host States with a good deal or practice in relations with international organizations.

40. Mr. Ushakov had objected to the division of the original paragraph 1 into two separate paragraphs; however, he (the Special Rapporteur) had thought, like Mr. Elias, that that would clarify the position of the family of a member of the permanent mission. Moreover, he had thought that a specific reference in paragraph 2 to members of the private staff would be appropriate, since the private staff was not included in the definition of "members of the permanent mission" given in article 1. In the light of the debate, he now had doubts about that question and would try to merge the two paragraphs.

41. As to the notification of appointment in paragraph 1, referred to by Mr. Reuter, that provision was contained both in the Vienna Convention on Diplomatic Relations⁶ and in the Convention on Special Missions,⁷ and he would be reluctant to depart from it. He did not consider it really necessary that the appointment should be notified to the Ministry for Foreign Affairs, as suggested by one government, since the situation was not the same as in bilateral diplomacy; but perhaps some mention of that point might be made in the commentary.

42. He agreed with Mr. Ustor and Mr. Ushakov that in paragraph 4 the words "from jurisdiction" in square brackets should be deleted. His original hypothesis had been that the member of the permanent mission had already left the territory of the host State, so that the question of any immunity other than that from jurisdiction would not really arise.

43. There appeared to be no difficulties with paragraphs 5 and 6, but he agreed with Mr. Ago that the article had become more complicated than it had been before.

44. He suggested that the Commission should leave the revision of article 42 to the Special Rapporteur and the Drafting Committee.

45. The CHAIRMAN suggested that article 42 be

referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.⁸

ARTICLE 43

46. The CHAIRMAN invited the Special Rapporteur to introduce article 43.

47.

Article 43

Transit through the territory of a third State

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

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

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

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

48. Mr. EL-ERIAN (Special Rapporteur) said that the comments of governments and of the United Nations Secretariat on paragraphs 1, 2 and 4 were summarized in his report (A/CN.4/241/Add.3). He had accepted editorial suggestions by the Secretariat (A/CN.4/L.162/Rev.1) and had introduced them into the amended text he now proposed for the article, which read:

Article 43

Transit through the territory of a third State

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

⁶ United Nations, *Treaty Series*, vol. 500, p. 118, article 39.

⁷ See General Assembly resolution 2530 (XXIV), Annex, article 43.

⁸ For resumption of the discussion see 1114th meeting, para. 34.

enjoying privileges or immunities who are accompanying one of the persons 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 passage of members of the administrative and technical or service staff of the permanent mission, 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 is accorded by the host State. They shall accord to the couriers of the permanent mission who have been granted a passport visa if such visa was necessary, and to the bags of the permanent mission in transit the same inviolability and protection as the host State is bound to accord.

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

49. Mr. USHAKOV said that the changes made did not seem to affect the substance of the article. On the other hand, some of them did not appear to be really necessary. For example, at the beginning of the second sentence in the French version of paragraph 1, the words "*L'Etat tiers*" had been replaced by the pronoun "*Il*". In view of the complexity of the preceding sentence, that simplification seemed ill-advised.

50. In the same sentence, the Special Rapporteur had replaced the words "who are accompanying the permanent representative or member of the diplomatic staff of the permanent mission" by the words "who are accompanying one of the persons referred to in this paragraph". That change did not alter the meaning of the provision, but it did make it less clear; moreover, the former version had been modelled on the corresponding provisions of the Vienna Conventions on Diplomatic and Consular Relations. With the exception of those two drafting points, article 43 as a whole was satisfactory.

51. Mr. ELIAS said he agreed with the view expressed by Mr. Ushakov. He found it difficult to accept the editorial changes proposed by the Secretariat, which appeared to be of a pedantic nature; almost all of them should be rejected by the Drafting Committee. In his opinion, the original article 43 was better from the point of view of both substance and grammar.

52. Mr. EUSTATHIADES said he doubted whether the guarantee of immunities should be made subject to the grant of a passport visa. It was true that some States would wish to require a transit visa before they considered themselves obliged to guarantee immunities, but the facts of the situation could not be disregarded either. The fundamental rule of transit, as established by general international law in bilateral relations, applied all the more in the case contemplated in article 43, which involved international collaboration. It was therefore inadvisable to emphasize passport visas in that way.

53. Mr. BARTOŠ said that he too thought the question of passport visas should be given as little prominence

as possible in article 43, if the Commission wished to take account of the facts of the situation. Yugoslavia, for example, had entered into agreements with a large number of States to abolish visa formalities reciprocally; and it was impossible to imagine that in spite of such general abolition of visas the formalities would be maintained for permanent representatives and members of the staff of permanent missions. Very few countries now required visas, and some did not even insist on reciprocity. It was true that the situation depended on political factors and that visas might one day be re-introduced, but in the present circumstances the Commission should not give the impression that it supported the visa system and believed that the enjoyment of immunities was dependent on the grant of a visa.

54. Mr. EL-ERIAN (Special Rapporteur), replying to Mr. Eustathiades and Mr. Bartoš, pointed out that paragraph (4) of the commentary to article 43 contained an elaborate clarification of that question in its opening passage, which read: "During the discussion in the Commission the question was raised of deleting the sentence 'which has granted him a passport visa if such visa was necessary' in paragraph 1 of article 43. It was noted, however, that when the Commission had drafted the corresponding articles of the Vienna Convention on Diplomatic Relations and of the draft on special missions, it had not intended to lay down an obligation for third States to grant transit, but merely wished to regulate the status of diplomatic agents in transit. Doubts were expressed as to whether such an obligation would be a positive rule at present and as to whether States would be prepared to accept it as *lex ferenda*."

55. He was prepared to accept the drafting suggestions which had been made concerning that article.

56. The CHAIRMAN suggested that article 43 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁰

ARTICLE 44

57. The CHAIRMAN invited the Special Rapporteur to introduce article 44 on non-discrimination.

58.

Article 44

Non-discrimination

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

59. Mr. EL-ERIAN (Special Rapporteur) said that there had been two groups of comments on article 44: those relating to the underlying principle of the article and those relating to the wording.

60. In the Sixth Committee it had been suggested that article 44 should be moved to the end of the draft;

⁹ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 218.

¹⁰ For resumption of the discussion see 1114th meeting, para. 36.

he had dealt with that suggestion in his observations on the contents and title of Part I (A/CN.4/241, paragraphs 29-31). Article 44 formed part of the general provisions which he proposed to place at the end of the whole draft.

61. The comments on certain exceptional situations were dealt with in a working paper he had prepared for consideration by the Commission in connexion with articles 47 and 49 (A/CN.4/L.166).

62. Some governments had suggested that the principle of reciprocity should be mentioned in article 44 and he had replied (A/CN.4/241/Add.3) by referring to paragraphs (4) and (5) of the Commission's commentary,¹¹ which explained why the rules of reciprocity applicable to bilateral diplomacy were not relevant to relations with international organizations.

63. He had explained his reasons for not adopting certain drafting suggestions (*ibid.*) and proposed that the article be retained in the form in which the Commission had adopted it in 1969.

64. Mr. KEARNEY said he wished to draw attention to the comments of the United States Government (A/CN.4/238/Add.2, section B.8) in which the understanding was expressed that the provision of draft article 44 did not prohibit distinctions based on rational grounds, which were warranted in certain instances. For example, with regard to the special duty of protection laid down in article 25, paragraph 2, different circumstances could require different grades of protection, and distinctions of that kind would not violate the provisions of article 44. He suggested that the Special Rapporteur should prepare a passage dealing with that problem for inclusion in the commentary of article 44.

65. Mr. EUSTATHIADES said he thought the Commission might well refer article 44 to the Drafting Committee. Of the two main questions which had given rise to comments by governments, one—reciprocity—had already been considered and settled by the Commission at the first reading, and the other—the exceptional situation created by the absence of recognition—would be considered by the Commission when it came to examine the possible effects of such exceptional situations on the representation of States to international organizations.

66. Mr. ROSENNE said he was in general agreement with the Special Rapporteur's conclusions.

67. The position of article 44 was important for its wording. The article referred to the application of the provisions of the "present articles", whereas the corresponding article 75 in Part III and article 111 in Part IV¹² referred to the application of the provisions "of the present part". If, as he hoped, the Drafting Committee combined those three provisions into one, in the form of a general provision applicable to the whole draft, care would be needed in the drafting.

68. Mr. EL-ERIAN (Special Rapporteur) said that the valid point raised by Mr. Kearney would be dealt with in the commentary.

69. If the Drafting Committee retained article 44 in its present position it would have to refer to the application of the articles in Part II. But article 44 might be replaced by a general provision on non-discrimination, so worded as to apply to all the draft articles.

70. Mr. ROSENNE said that articles 75 and 111 were correctly worded if they were left in their present places. The drafting of a general provision could have the effect of extending the principle of non-discrimination rather further than appeared at first sight.

71. The CHAIRMAN suggested that article 44 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹³

ARTICLE 45

72. The CHAIRMAN invited the Commission to consider section 3: Conduct of the permanent mission and its members, beginning with article 45, on respect for the laws and regulations of the host State.

73.

Article 45

Respect for the laws and regulations of the host State

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

2. In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from criminal jurisdiction, the sending State shall, unless it waives this immunity, recall the person concerned, terminate his functions with the mission or secure his departure, as appropriate. This provision shall not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission within either the Organization or the premises of a permanent mission.

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

74. Mr. EL-ERIAN (Special Rapporteur) said that the provisions of article 45 were the result of a compromise and the comments on the article simply showed that the text had all the merits and defects of a compromise.

75. In the discussions in the Sixth Committee, the opinion had been expressed that the rule in paragraph 1 might be misinterpreted to mean that failure to respect the laws and regulations of the host State would absolve that State from its obligation to respect the immunity of the person concerned.¹⁴ In reply, he had pointed out

¹¹ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 219.

¹² *Op. cit.*, 1970, vol. II, document A/8010/Rev.1, chapter II.

¹³ For resumption of the discussion see 1114th meeting, para. 38.

¹⁴ See *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 55.

that the opening proviso, "Without prejudice to their privileges and immunities . . .", precluded any such interpretation.

76. There had been numerous comments on the question of remedies, in view of the fact that the host State could not declare a member of a permanent mission *persona non grata*, which was the remedy available in bilateral relations when a diplomatic agent failed to respect the laws and regulations of the receiving State.

77. The comments on paragraphs 2 and 3 of article 45 were summarized in his report (A/CN.4/241/Add.3) and followed by his replies.

78. Mr. KEARNEY said that article 45 was of fundamental importance to the acceptability of the whole draft: if it was to become a generally acceptable convention, a suitable formulation of the article must be found. It was significant that the States which were hosts to international organizations unanimously opposed the present text.

79. The United Kingdom Government had stated that "some means must be found to deal with the case where the host State cannot tolerate, for reasons of public order or national security, the presence on its territory of a particular representative" (A/CN.4/239, section B.3).

80. The Government of Switzerland had pointed out a number of drawbacks in article 45 and had suggested two possible alternative texts to replace it. The first was a general provision on the protection of the security of the host State similar to the provision included in several headquarters agreements, beginning with the words: "Nothing in these articles shall affect the right of the host State to take the necessary precautions in the interest of its security" (*ibid*, section C). The second alternative was to include a provision on the procedure to be followed in the event of expulsion, on the lines of section 13 of the United Nations Headquarters Agreement.¹⁵

81. The United Nations Secretariat had urged that paragraph 2 should be replaced by the language of section 13 (b) of the United Nations Headquarters Agreement, in which reference was made to the "case of abuse of such privileges of residence" (*ibid*, section D.1.II). The 1947 Convention on the Privileges and Immunities of the Specialized Agencies referred to the "abuse of privileges of residence" committed outside official functions as grounds for expulsion.¹⁶

82. The United States Government had pointed out that, if privileges and immunities were to be granted on the broad basis provided for in the draft articles, it was essential to afford some corresponding protection to the host State (A/CN.4/238/Add.2, section B.8).

83. The Government of France, also a host State, had expressed the view that article 45, and the corresponding articles in Parts III and IV of the draft, provided for

exceptions which seemed "difficult to explain in law, since they are apparently based on a principle of extritoriality which is no longer recognized". It had therefore expressed the hope that the Commission would reconsider the matter, and had pointed out one serious omission in the draft: it did not contain any provision concerning the possible expulsion of the persons whose immunities it defined, although a provision to that effect was essential in order to strike a fair balance between the interests of the host State and those of the sending State (A/CN.4/240/Add.5, section B.12).

84. The position taken by host States clearly showed that there was general dissatisfaction with article 45 in its present form, which did not take full account of the right of the host State to its fair share of protection. He realized that article 45 was the result of a difficult compromise, but it was evident that the compromise was not going to prove effective, since it was unacceptable to the States most directly concerned. He therefore urged that the Commission reconsider the wording of paragraph 2. As a first step, he would suggest that the first sentence might be reworded to incorporate the substance of the corresponding provision of the United Nations Headquarters Agreement, on the following lines:

"In case of grave abuse of privileges of residence in the host State by a person enjoying privileges and immunities under these articles, the sending State shall recall the person concerned, terminate his functions with the mission or secure his departure, as appropriate."

85. It must be realized that, unless the justified concern of the host States was met, the proposed convention would remain a dead letter.

86. Mr. CASTRÉN said that article 45 had already given rise to a long discussion at the first reading and its present wording was the result of a compromise. Unfortunately that compromise did not seem to satisfy the host States and the new wording now proposed by Mr. Kearney departed from it considerably. For instead of specifying the circumstances which could lead the sending State to take the various steps mentioned in paragraph 2, he had made the very general proposal that, in case of abuse of privileges and immunities, the host State should be entitled to demand the recall of the person concerned. That was going too far in defence of the host State's interests. In the first place, to speak of abuse in general was too vague a formula and, in the second, the present text was more flexible in that it allowed the sending State to choose one of several measures.

87. For all those reasons he could not accept Mr. Kearney's proposal at first hearing; he hoped that the Commission and the Drafting Committee would manage to draft another compromise text somewhere between the present text and Mr. Kearney's proposal.

88. Mr. USHAKOV said he could not give an opinion on Mr. Kearney's proposal until he had seen it in writing. Generally speaking, he had the following comments to make on article 45.

¹⁵ United Nations, *Treaty Series*, vol. 11, p. 22.

¹⁶ *Op. cit.*, vol. 33, p. 278, section 25, para. 1.

89. Paragraph 1 clearly stated the principle, already established in the earlier conventions, that it was the duty of persons enjoying privileges and immunities to respect the laws and regulations of the host State and not to interfere in the internal affairs of that State. Such were the essential obligations of the sending State, and they ought to satisfy any host State.

90. Some speakers maintained that it was not sufficient to lay down that general rule and that it was also necessary to lay down a particular rule to prevent possible abuse of privileges and immunities by the sending State. He did not share that view.

91. On the contrary, considering that the sending State was in a position of inferiority in relation to the host State, which was all-powerful with respect to it, in order to keep the article in balance, appropriate measures should be specified to prevent any abuse of power by the host State. It was unfair to lay down as a principle that only the sending State was liable to commit abuses and to leave the host State free to prevent them in whatever way it pleased. At the very least, the sending State should also be granted the right to defend itself and, for that purpose, to engage in consultations with the host State and the organization under article 50, or even to have recourse to other measures, since its position was weaker than that of the host State.

92. He was ready to consider any formula for safeguarding the interests of the host State, provided that it took account of the principles of reciprocity and of the equality of States.

93. Mr. EUSTATHIADES said that at the present stage he would confine himself to one point in Mr. Kearney's proposal: the deletion of the words "unless it waives this immunity" in paragraph 2. If that change was made, the sending State would have no other choice, in case of a grave and manifest violation of the criminal law of the host State by a person enjoying immunity from criminal jurisdiction, but to recall the person concerned, terminate his functions or secure his departure. To omit the phrase in question would be tantamount to saying that one would have nothing more to do with persons compromised by a grave and manifest violation.

94. If the text covered cases of grave violation only, there would be no objection to eliminating the possibility of waiving immunity, but the violation could also be "manifest". At the first reading, the Commission had deliberately decided to use that term in order to cover cases where a violation of the criminal law of the host State had not yet been subject of a judicial decision. In that context, it might therefore be better to leave the sending State the option of waiving immunity. It was obviously difficult to draft a provision which would cover both a grave and established violation and a violation which, though manifest, was not yet *res judicata*. The best course would be to deal with the two cases in two separate provisions and it would then be well to adopt Mr. Kearney's proposal, which, moreover, included another change consisting in making provision for cases of grave abuse of privileges of residence.

95. He reserved the right to revert later to the other aspects of Mr. Kearney's proposal, which had the merit of taking into account the observations of host States, which were anxious to be able to deal with grave abuses of privileged status and might otherwise not be prepared to accept the future convention.

The meeting rose at 1 p.m.

1098th MEETING

Wednesday, 12 May 1971, at 10.5 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 3; A/CN.4/L.162/Rev.1; A/CN.4/L.166)

[Item 1 of the agenda]

(continued)

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

1. The CHAIRMAN invited the Commission to continue consideration of article 45 in the Special Rapporteur's sixth report (A/CN.4/241/Add.3).
2. Mr. TAMMES said that the governments and secretariats of international organizations which had submitted comments on article 45 had all, without exception, declared themselves opposed to it. The governments concerned included both host States and States less directly interested in the draft articles.
3. The criticisms made had been of two kinds, the first directed mainly to the words "grave and manifest violation of the criminal law", in paragraph 2, and the second to the ineffectual character of the obligation imposed on the sending State.
4. In order to meet the first type of criticism he suggested, for the consideration of the Drafting Committee, that a closer link be established between paragraphs 1 and 2 by replacing the opening words of paragraph 2, "In case of grave and manifest violation of the criminal law of the host State", by the words "In case of violation of the

duty contained in paragraph 1". That amendment would meet the objection, made among others by the United Nations Secretariat (A/CN.4/239, section D.1.II), that the present text did not cover serious abuses which did not constitute grave violations of criminal law.

5. At its twenty-first session, the Commission had concentrated on drafting a provision covering violations of criminal law; it had done so because paragraph 2 was based on a proposal then made by Mr. Kearney, which referred only to "violations of the criminal laws or regulations of the host State".¹

6. His proposal to introduce into paragraph 2 a specific reference to breaches of the duty specified in paragraph 1 would make the provisions of paragraph 2 much more precise than a reference to abuse of "privileges of residence", which was the language used in section 13 of the United Nations Headquarters Agreement and other similar instruments. It would also be more capable of impartial determination and thus more in keeping with the interests of the sending State itself.

7. The criticisms of the ineffectiveness of the obligation of the sending State to waive immunity, recall the person concerned, terminate his functions or secure his departure, were closely related to the problem of the inconclusive course of the consultations provided for in article 50. There was, of course, a direct connexion between the principle laid down in article 45 and the means of making it effective. It was therefore a sound approach to make provision in the substantive articles for means of making the obligations of the sending State effective, instead of leaving it to the final clauses. At the twenty-first session, he himself had submitted an amendment to the article on consultations which read: "If such consultations fail to achieve a result satisfactory to the parties concerned, the matter shall be submitted to an impartial procedure which shall be established within the Organization".² He suggested that that text be taken into account by the Drafting Committee in considering the whole problem.

8. Mr. KEARNEY said that his proposed redraft of paragraph 2 had just been circulated. It read as follows:

"2. In case of grave abuse of privileges of residence in the host State by a person enjoying privileges and immunities under these articles, the sending State shall recall the person concerned, terminate his functions with the mission or secure his departure, as appropriate. This provision shall not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission within either the Organization or the premises of a permanent mission."

9. Mr. YASSEEN said he was aware that article 45 had been the subject of long discussions in the Commission and that its wording was the result of a compromise. Nevertheless, he wished to suggest that the

words "within either the Organization or the premises of a permanent mission", at the end of paragraph 2, be deleted, because they evoked the obsolete concept of extritoriality, which was not compatible with recent developments in international law. The essential criterion was that the act should have been performed in carrying out the functions of the permanent mission.

10. Mr. ALCÍVAR said that he had not been a member of the Commission at the time when it had adopted article 45, but he would prefer to abide by that compromise formula. Although there were some elements in text which he did not find satisfactory, he was prepared to accept it, but could go no farther.

11. Article 45 was an attempt to strike a balance between two principles. The first was that the absolute independence of international organizations and of representatives to them must be ensured so that they were guaranteed full freedom of action. The second was that the host State must be protected by laying down the duty of permanent representatives and members of permanent missions to respect its laws and regulations. In his view, the text of the article gave more weight to the second principle than to the first.

12. In bilateral relations, it was possible to declare a diplomatic agent *persona non grata*; that faculty was sometimes used with undue severity, but it was a right granted by the 1961 Vienna Convention on Diplomatic Relations, and was exercised by the receiving State at its discretion. In bilateral relations, however, there was the element of reciprocity and consequently the possibility of counter-action by the sending State. No such possibility existed in multilateral diplomacy.

13. For those reasons, he could not support the text proposed by Mr. Kearney, which went even further than the present text of article 45 in protecting the host State. He agreed with the view that the host State had means of enforcing its laws and regulations and that it was necessary to protect the members of permanent missions against possible abuses by the host State.

14. He did not favour drawing inspiration from the provisions of the United Nations Headquarters Agreement³ which had been drawn up in 1946, when the only experience available had been that of the League of Nations, a body which had comprised a comparatively small number of members of the international community; the United Nations had a much broader and more nearly universal membership. Experience since 1946 had shown the inadequacies of the provisions of the headquarters agreements, which had led to a number of disputes that had even provoked intervention by the United Nations itself.

15. He supported Mr. Yasseen's suggestion that the Commission should delete the concluding words of paragraph 2, "within either the Organization or the premises of a permanent mission", which revived the obsolete notion of extritoriality.

¹ See *Yearbook of the International Law Commission, 1969*, vol. I, p. 39, para. 71.

² *Ibid.*, p. 195, para. 7.

³ United Nations, *Treaty Series*, vol. 11, p. 12.

16. Mr. ROSENNE said that a study of the documentation before the Commission produced an impressive list of governments and secretariats of international organizations which had criticized article 45, especially paragraph 2. The list comprised, in the order of arrival of the comments, Israel (A/CN.4/238, section B.2), the Netherlands (*ibid.*, section B.3.), Sweden (*ibid.*, section B.7), United States of America (*ibid.*, section B.8), Belgium (A/CN.4/239, section B.1), United Kingdom (*ibid.*, section B.3), Switzerland (*ibid.*, section C), United Nations Secretariat (*ibid.*, section D.1), UNESCO Secretariat (*ibid.*, section D.3), Australia (A/CN.4/240, section B.1) and France (*ibid.*, section B.12). Going through all that documentation, he had been unable to find a single statement in favour of article 45.

17. The Commission was thus faced with a dilemma; it had to decide whether it should adopt a new approach taking into account some, at least, of the criticisms made, or whether it could convincingly explain, in its report to the General Assembly, why it was unable to take those criticisms into account.

18. In his view the Commission had not yet reached the stage where it could take a decision and he would therefore suggest that the Drafting Committee be invited to discuss the problem dispassionately. He was encouraged to make that suggestion by some of the remarks in the first part of paragraph 20 of the Special Rapporteur's observations on article 45 in his sixth report. The Commission's answer to the basic question how to explain the retention of the 1969 text of article 45 would have a decisive effect on the future of the draft articles, at the least.

19. On the substance of the matter, he continued to believe, as he had in 1969, that the host State should be the subject, if not of the first sentence of paragraph 2 from a drafting point of view, at all events of the action from a conceptual point of view, in the sense that its right of initiative was what had to be realistically recognized. Mr. Kearney's proposal should be scrutinized from that point of view.

20. Mr. USTOR said he was fully aware of the difficult situation created by the need to find a solution that would satisfy all the interests involved. The text adopted by the Commission in 1969 had not satisfied many governments and the same was true of several members of the Commission. In the circumstances, he wished to revive a simple suggestion which he had put forward in 1969, namely, that paragraph 2 be dropped altogether.⁴

21. It might be asked whether, after the elimination of paragraph 2, the host State would still have the necessary protection. The provisions of paragraph 1 would safeguard the position of the host State, for they laid down the duty of the persons concerned to respect its laws and regulations. That duty was incumbent not only on the permanent representative and the members of the permanent mission, but also on the sending State itself. Any failure of a member of a permanent mission to

respect the laws and regulations of the host State would be a clear breach of the sending State's own obligations, and the breach would give rise to international responsibility of the sending State, which the host State could then hold answerable.

22. One advantage of that approach was that the sending State's obligation would not be restricted to cases of "grave and manifest violation of the criminal law of the host State by a person enjoying immunity". In fact, it would not be appropriate to restrict that obligation even to cases of so-called "abuse of privileges of residence". The obligation was much wider in scope and included not only the duty not to interfere in the internal affairs of the host State, but even duties of courtesy which were part of international practice. The deletion of paragraph 2 would thus give the host State wider rights to make representations to the sending State. The provisions of paragraph 2 belonged to the realm of State responsibility; their elimination from the present draft would not involve any difficulties and would have obvious advantages.

23. Mr. KEARNEY asked whether Mr. Ustor would also be prepared to drop the opening proviso in paragraph 1, "Without prejudice to their privileges and immunities . . ." or whether it was his view that the proviso merely related to individuals and had no bearing on the violation imputed to the sending State.

24. Mr. USTOR said he would not wish to drop the opening proviso in paragraph 1, which could not be interpreted to mean that a person enjoying immunity could invoke that immunity to break the laws and regulations of the host State with impunity. The meaning of the proviso was simply that the privileges and immunities stood, despite any failure on the part of the persons concerned to observe the duty stated in the main clause of the first sentence of paragraph 1.

25. Mr. USHAKOV said that paragraph 1 was based directly on the corresponding provisions in the Conventions on Diplomatic Relations, Consular Relations and Special Missions; but while the meaning of the second sentence was quite clear in the case of bilateral relations, it was not clear in the case of permanent missions to international organizations. Was it to be understood, for example, that criticisms of the policy of the host State expressed within the organization or at a press conference, constituted interference in the internal affairs of the host State? Or what did the sentence mean? It should not be deleted, since it was essential for the protection of the interests of the host State; but its meaning should be expressed very carefully in order to prevent any abuses of power which might be committed by the host State on the basis of an interpretation favourable to itself.

26. The second sentence of paragraph 2 also raised problems of interpretation. It was difficult to understand what was meant by the phrase "in carrying out the functions of the permanent mission within . . . the premises of a permanent mission"; those terms were so vague that the Commission itself would find it difficult

⁴ See *Yearbook of the International Law Commission, 1969*, vol. 1, p. 218, para. 26 and p. 221, para. 53 *et seq.*

to explain their meaning in its commentary. He agreed with other members of the Commission and certain governments that the words "within either the Organization or the premises of a permanent mission" did not add anything to the provision and were therefore redundant. But, in order to abide by the compromise which had produced those words—however unsatisfactory it might be—he would not propose that they be deleted.

27. Mr. Kearney's proposal, which replaced the words "In case of grave and manifest violation of the criminal law of the host State" by the words "In case of grave abuse of privileges of residence in the host State", was unacceptable for a number of reasons. First, the notion of grave abuse was so vague that it was open to all manner of interpretations. The same was true of the words "privileges of residence". It was true that those words were used in the United Nations Headquarters Agreement, but they had no legal meaning. Lastly, it was not clear who would decide whether there had been a grave abuse of privileges of residence, and by what means.

28. Such a provision would have the effect of giving the host State a completely free hand. Consequently, he could not support it, though the Drafting Committee might possibly be able to produce an acceptable text taking that or other proposals as a basis.

29. Mr. ELIAS said it was important to remember that article 45 was the result of a compromise reached after protracted discussions in 1969. When the Commission had adopted paragraph 2, it had focussed its attention on giving a more precise meaning to the limits of the activities of the permanent mission. The intention had been to exclude civil jurisdiction and an attempt had therefore been made to define those criminal acts which would be regarded as violations of the privileges of the sending State in the host State.

30. The adverse comments on the present text of the article had come from only eight or nine States, though it was true that they included some important host States. It was by no means certain, however, that their views were shared by the States which had not sent in comments.

31. He was not in favour of deleting the opening proviso of paragraph 1, which formed part of the compromise formula of 1969. Nor was he in favour of replacing the formula "grave and manifest violation of the criminal law" by the still less precise language "grave abuse of privileges and residence"; it should be noted that the Commission had not previously drafted any article in those terms. He also had misgivings about the suggestion that the words "unless it waives this immunity" be deleted from paragraph 2.

32. He agreed with the criticism that paragraph 1 did not cover the possibility of abuses by the host State, especially where the important provision on the duty of non-interference in internal affairs was concerned. At the same time, it was possible to over-emphasize the possibility of such abuses.

33. At the opening of the session, when he had reported on the Sixth Committee's discussion on the Commission's last report, he had drawn attention to the complaints by many governments that the Commission had a tendency to minimize the rights of the host State and to exaggerate the rights and privileges of the sending State.⁵ The Commission should take those criticisms into consideration.

34. He suggested that the Drafting Committee review article 45, together with Mr. Kearney's proposal, in the light of the discussion and frame the article so as to retain the spirit of the 1969 compromise while improving its formulation.

35. Mr. RAMANGASOAVINA said it was natural that the Commission should include in the draft articles a formal article such as article 45 addressed to all persons enjoying privileges and immunities. But the Commission had not confined itself to stating a general rule: it had seen fit to place the emphasis on certain possible attitudes of members of the permanent mission, insofar as those attitudes were not already covered by the laws and regulations of the host State; that was why it had added the last sentence of paragraph 1 and paragraph 3. But wishing also to prevent violations of those provisions, the Commission had drafted paragraph 2, the desirability of which was still seriously disputed.

36. Two possibilities were now open to it: to delete paragraph 2 and rely on the good faith of the sending State and the members of the permanent mission, or to clarify the meaning of the paragraph by improving the wording.

37. To delete paragraph 2, which was a compromise and contained some essential provisions, was hardly possible. Nor was it possible to introduce into the draft the concept of *persona non grata*, which belonged to bilateral diplomacy.

38. However—and in that context Mr. Kearney's proposal was quite understandable—it was not sufficient to refer only to violations of the criminal law, for those were not the only offences of which members of the permanent mission might be accused. But Mr. Kearney's proposal did not cover all possible violations either, since an abuse was not necessarily a violation, as the United Nations Secretariat had rightly pointed out in its observations (A/CN.4/239, section D.I.II), when it had referred to cases in which members of the permanent mission might abuse their privileges by carrying on activities outside their official capacity in the territory of the host State. It would be better, therefore, to rely on the Drafting Committee to find a formula which would cover both violations of the criminal law and abuses of privileges and immunities.

39. Some people had wondered why the Commission had not tried to provide a counterpart to the possibility of abuses by the host State. But such a counterpart was in fact provided by all the privileges and immunities

⁵ See 1087th meeting, paras. 4 and 5.

enjoyed by members of permanent missions, and in any event it would always be possible to have recourse to article 50. If paragraph 2 were deleted, article 50 could be applied whenever a dispute arose, to determine whether there had been an abuse and whether the sending State should take appropriate measures.

40. The words "within either the Organization or the premises of a permanent mission", at the end of the last sentence of paragraph 2, should be deleted. The host State was not of course entitled to concern itself with what went on in the premises of a permanent mission; but it was going too far to deny it even the possibility of making representations over the presence in the country of a person who had committed grave violations. In any case, paragraph 3 provided an adequate safeguard.

41. Mr. ALBÓNICO said that paragraph 1 merely repeated the provisions of article 41 of the 1961 Vienna Convention on Diplomatic Relations and article 55 of the 1963 Vienna Convention on Consular Relations; it neither added to nor took anything away from those provisions. It clearly set forth the duty of the persons concerned to respect the laws and regulations of the host State and to refrain from interfering in the internal affairs of that State; that duty applied both to the official and to the private activities of those persons.

42. He was, however, surprised that paragraph 2 should cover only cases of violations of criminal law and remain silent on other breaches of the duty stated in paragraph 1. Obviously, the Commission had never intended that such other breaches should remain without any remedy, but paragraph 2 did not contain any provision on the steps which the host State might take in the event of abuses of that kind.

43. It was essential to supplement the provisions of paragraph 2 or else to clarify the matter in the commentary. Such breaches of the duty stated in paragraph 1 as violations of tax laws and exchange control regulations, even if they did not constitute crimes, were nevertheless abuses which the host State could not tolerate. The same was true of acts of interference in the internal affairs of the State, many examples of which could unfortunately be cited, though mostly from bilateral diplomacy.

44. It was important to co-ordinate paragraph 2 with paragraph 1 and he supported Mr. Tammes' proposal on that point.

45. Mr. AGO said it was a mistake to think that article 45 as a whole, and paragraph 2 in particular, belonged to the responsibility of States. All violations of the draft articles could raise problems of responsibility, but article 45 raised special problems. The members of the Commission were well aware of the reason for including paragraph 2. If there was no corresponding provision in the Vienna Convention on Diplomatic Relations it was because that Convention contained other provisions which sufficiently protected the interests of the receiving State. Hence, if provision in paragraph 2 did not exist, it would be necessary to invent it. He was therefore in favour of retaining article 45 and, in particular, paragraph 2.

46. However, the wording should be improved. The expression "grave and manifest violation of the criminal law" was unsatisfactory for two reasons. First, there could be grave violations of laws other than criminal laws; and secondly, the fact that there had been a grave and manifest violation of the criminal law was normally established only as the result of a trial. In the present case, however, that fact would have to be established without any legal decision.

47. It was such considerations which had led Mr. Kearney to propose his amendment. But his solution was hardly any better, since it merely replaced the notion of a grave violation, which was itself difficult to define in law, by the even vaguer notion of abuse of a right. The best course, therefore, would be to refer article 45 to the Drafting Committee in the hope that it would be able to find a way of expressing the basic principles more clearly; otherwise, the Commission would have to adhere to the text it had adopted at its twenty-first session.

48. Mr. CASTRÉN said that in order to give effect to Mr. Tammes' proposal that a closer link be established between paragraphs 1 and 2, he proposed that the beginning of paragraph 2 be amended to read: "In case of grave and manifest violation of the obligations prescribed in paragraph 1, the sending State, unless it waives the immunity of the person concerned, shall recall . . .". That formulation was more precise than the wording proposed by Mr. Kearney; and the obligation stated in the second sentence of paragraph 1 would thus be confirmed, which would meet the point made by Mr. Ushakov. The second sentence of paragraph 1 had its place in non-bilateral relations too, since interference in the internal affairs of the host State by high-ranking members of permanent missions could have serious consequences.

49. The last phrase in the second sentence of paragraph 2, "within either the Organization or the premises of a permanent mission", was clear and should be retained. Its meaning had been sufficiently clarified by the Commission's discussions during the first reading.

50. He too was in favour of strengthening article 50; but it was also very desirable to include in the draft, as several governments and certain members of the Commission had proposed, a general provision on the settlement of disputes which might arise out of the application of the articles.

51. Mr. EL-ERIAN (Special Rapporteur) said the discussion had shown that it was essential to adhere to the compromise represented by the present text of article 45, though it was possible to improve the language so as to make it more attractive.

52. At the previous meeting Mr. Kearney had suggested that, unless the article were amended, the whole draft might remain a dead letter.⁶ The Commission had done its best to include a number of provisions which compensated for the absence of the remedies available in

⁶ See previous meeting, para. 85.

bilateral diplomacy; the provisions of article 45, paragraph 2 were most important in that respect.

53. The text now proposed by Mr. Kearney for paragraph 2 was open to serious objections, connected, in particular, with the interpretation of the expression "privileges of residence", which was not to be found anywhere in the present draft. Mr. Kearney's proposal and the suggestion made by Mr. Tammes should be referred to the Drafting Committee; if that Committee was unable to improve article 45, the 1969 text should be retained, as suggested by Mr. Ago.

54. He agreed to the proposal to delete the concluding words of paragraph 2: "within either the Organization or the premises of a permanent mission". Those words, in addition to injecting an element of ambiguity, might well not be comprehensive enough. The legal criterion was the fact that the act had been performed by the person concerned in carrying out the functions of the permanent mission; the question where those functions had been carried out was not material.

55. A very important point on which he wished to comment was the interpretation of the silence of governments. It had been said during the discussion that not a single government had expressed support for the present text of article 45. In paragraph 2 of the comments on article 45 in his sixth report (A/CN.4/241/Add.3) he had noted that in the Sixth Committee it had been pointed out that article 45 "was the result of a compromise". That statement described the consensus of opinion in the Sixth Committee.

56. The fact that seven or eight governments held strong views against article 45 did not mean that the governments which had not made any comments held similar views. In paragraph 14 of the chapter on preliminary considerations in his sixth report (A/CN.4/241), dealing with the weight to be attached to the absence of specific comments, he had stressed that the problems was one of interpretation—a point which had also been made by Sir Humphrey Waldock in one of his reports on the law of treaties.

57. It should be remembered that the Commission had before it comments by governments on articles 10 and 50, which in a sense formed a single unit with article 45; together, those articles constituted a system designed to make up for the absence of the traditional remedies available in bilateral diplomacy.

58. The CHAIRMAN suggested that article 45 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.⁷

ARTICLE 46

59. The CHAIRMAN invited the Special Rapporteur to introduce article 46.

60.

Article 46

Professional activity

The permanent representative and the members of the diplomatic staff of the permanent mission shall not practise for personal profit any professional or commercial activity in the host State.

61. Mr. EL-ERIAN (Special Rapporteur) said he had rejected the suggestion made in the Sixth Committee regarding teaching activities (A/CN.4/241/Add.3). He had agreed to accept the suggestion of the United Nations Secretariat that the title be amended to read: "Professional or commercial activity".

62. Mr. YASSEEN said he approved of the change in the title of the article.

63. Like the Special Rapporteur, he thought that the suggestion than an exception be made in the case of teaching activities could not be justified. Although the persons covered by article 46 could give lectures, for example, they should not do so for personal profit.

64. The CHAIRMAN suggested that article 46 be referred to the drafting Committee.

It was so agreed.⁸

ARTICLE 47

65. The CHAIRMAN invited the Special Rapporteur to introduce article 47.

66.

Article 47

End of the functions of the permanent representative or of a member of the diplomatic staff

The functions of the permanent representative or of a member of the diplomatic staff of the permanent mission come to an end, *inter alia*:

- (a) on notification to this effect by the sending State to the Organization;
- (b) if the permanent mission is finally or temporarily recalled.

67. Mr. EL-ERIAN (Special Rapporteur) said that during the debate in the Sixth Committee it had been suggested that a new sub-paragraph (c) be added, reading "in case of death". Comments had been made by the secretariat of the International Atomic Energy Agency (IAEA) and two editorial suggestions had been submitted by the United Nations Secretariat. He had replied to those comments in his observations (A/CN.4/241/Add.3) and proposed a new wording which read:

Article 47

End of the functions of the permanent representative or of a member of the diplomatic staff

The functions of the permanent representative or of a member of the diplomatic staff of the permanent mission shall come to an end, *inter alia*:

- (a) on notification of their termination by the sending State to the Organization;
- (b) if the permanent mission is finally or temporarily recalled.

⁷ For resumption of the discussion see 1114th meeting, para. 47.

⁸ For resumption of the discussion see 1115th meeting, para. 23.

68. Mr. USHAKOV said the new wording for subparagraph (a) was an improvement, but pointed out that in the French version the word "organization" in subparagraph (a) should begin with a capital letter. Furthermore, the English and French versions of that subparagraph did not quite agree; the Drafting Committee should bring them into line.

69. Mr. EUSTATHIADES said that, quite apart from the fact that the words "*inter alia*" were used, it would be pointless to mention death, as had been suggested in the Sixth Committee, since it was self-evident that the functions came to an end in that case.

70. With regard to Mr. Ushakov's comment concerning the lack of conformity between the English and French versions of subparagraph (a), he suggested that the English version might begin with the words: "on notification of the termination of these functions".

71. Mr. ELIAS suggested that the words "on notification of their termination" might be replaced by the words "on notification of termination of such functions".

72. The Drafting Committee should also give careful consideration to the point raised by the secretariat of the IAEA (A/CN.4/239, section D.9, para. 6 (d)).

73. The CHAIRMAN suggested that article 47 be referred to the Drafting Committee.

*It was so agreed.**

ARTICLE 48

74. The CHAIRMAN invited the Special Rapporteur to introduce article 48.

75.

Article 48

Facilities for departure

The host State shall, whenever requested, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave its territory. It shall, in case of emergency, place at their disposal the necessary means of transport for themselves and their property.

76. Mr. EL-ERIAN (Special Rapporteur) said that one government had criticized the substitution of the words "to leave its territory" for the words "to leave at the earliest possible moment", which appeared in article 44 of the Vienna Convention on Diplomatic Relations. Another had taken the view that the insertion of the words "whenever requested" was likely to be interpreted as placing a greater responsibility on the host State than article 44 of the Vienna Convention on Diplomatic Relations placed on the receiving State. Certain editorial suggestions had also been made by the United Nations Secretariat (A/CN.4/L.162/Rev.1).

77. With regard to the second sentence, one government had stated that "the last sentence of article 48, by requiring the host State to place at the disposal of persons

enjoying privileges and immunities the necessary means of transport for their property, would appear to be imposing an unrealistic duty on the host State" and had suggested an alternative wording. He had replied to those comments in his observations (A/CN.4/241/Add.3) and in his working paper on articles 47 and 48 (A/CN.4/L.166).

78. Mr. EUSTATHIADES said that he endorsed the Special Rapporteur's observations. With regard to the proposal that the phrase "at the earliest possible moment", used in article 44 of the Vienna Convention on Diplomatic Relations, should be included, that phrase would be useful for the case of armed conflict. The addition would only be justified, however, if it were intended to meet the case of an armed conflict between the sending State and the host State; but that would be one of the exceptional situations which the Commission had decided to consider at a later stage. It was only if the Commission failed to agree on an article on that exceptional situation, that it might perhaps be necessary to insert the words "at the earliest possible moment" in article 48.

79. Furthermore, the second sentence of article 48 was not intended to cover armed conflicts only, but all kinds of exceptional circumstances, such as natural disasters, epidemics and general strikes. Although of secondary importance, those comments should be borne in mind when the Commission came to consider the consequences of certain exceptional situations.

80. Mr. USTOR asked whether it would not be possible to combine article 27 *bis*, on entry into the host State (A/CN.4/241/Add.3), with article 48, on facilities for departure, since logically they seemed to belong together.

81. Mr. USHAKOV said he doubted whether article 48 was really appropriate. Such a provision was justified in bilateral diplomatic relations, but it was difficult to see in what situations article 48 might apply. The only conceivable case was that of a member State being excluded from an organization with the result that its permanent mission was obliged to leave the territory of the host State. That was the only case in which urgent measures would be required, but it did not concern relations between the sending State and the host State. He would like the Special Rapporteur to clarify that point.

82. Mr. EL-ERIAN (Special Rapporteur), said he was not sure that he could give a fully satisfactory reply to Mr. Ushakov's question, beyond pointing out that article 48 was modelled on previous conventions and that it was useful to provide a suitable provision for departure as well as for entry.

83. He would like to reflect further on Mr. Ustor's suggestion that article 48 might be combined with article 27 *bis*.

84. The CHAIRMAN suggested that article 48 be referred to the Drafting Committee.

It was so agreed.¹⁰

* For resumption of the discussion see 1115th meeting, para. 26.

¹⁰ For resumption of the discussion see 1115th meeting, para. 30.

ARTICLE 49

85. The CHAIRMAN invited the Special Rapporteur to introduce article 49.

86.

*Article 49**Protection of premises and archives*

1. When the permanent mission is temporarily or finally recalled, the host State must respect and protect the premises as well as the property and archives of the permanent mission. The sending State must take all appropriate measures to terminate this special duty of the host State within a reasonable time.

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

87. Mr. EL-ERIAN (Special Rapporteur) said that one government had suggested certain changes in the second sentence of paragraph 1, while another thought the sentence was reasonable and should be retained. The Government of Switzerland had also made a proposal concerning that sentence to which he had replied in paragraph 7 of his observations (A/CN.4/241/Add.3). His proposed new wording of the article reflected his acceptance of the Swiss proposal. It read:

*Article 49**Protection of premises, property and archives*

1. When the permanent mission is temporarily or finally recalled, the host State shall respect and protect the premises as well as the property and archives of the permanent mission. The sending State shall take all appropriate measures to terminate this special duty of the host State within a reasonable time. In the discharge of its obligations under the present paragraph, the sending State may entrust the custody of the premises, property and archives of the permanent mission to a third State.

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

88. Mr. USHAKOV said he was surprised that the words "must respect and protect" should have been replaced by the words "shall respect and protect", although they were similar to the formula used in article 45 of the Vienna Convention on Diplomatic Relations.¹¹ The third sentence of paragraph 1, added by the Special Rapporteur, was based on article 45, sub-paragraph (b) of the same Convention. The latter provision was very different, however, both in form and in substance from that proposed by the Special Rapporteur. In particular, the phrase "acceptable to the receiving State" had not been reproduced, and the words "In the discharge of its obligations under the present paragraph" had been added. That addition was not felicitous because it referred to obligations stated in the same paragraph. Moreover, the concept of "reasonable time", which appeared in the second sentence, did not appear in the third.

89. He suggested that the Drafting Committee should take those comments into account when considering the form of the article.

90. Mr. EUSTATHIADES said that the article proposed by the Special Rapporteur had the merit of mentioning the custody of the premises, property and archives by a third State. With reference to the comments made by Mr. Ushakov on paragraph 1, he would suggest that the words "In the discharge of its obligations under the present paragraph" be simply deleted, and that the third sentence and the second sentence be transposed.

91. The second sentence of paragraph 1 might be interpreted as applying to a temporary recall as well as to the final recall. Logically speaking, it could only apply to the final recall, but that should nevertheless be specified.

92. Mr. ROSENNE said he found the Special Rapporteur's proposed new draft of article 49 in some respects an improvement on the original text, though he still had doubts about the words "special duty" in the second sentence of paragraph 1. What precisely was the meaning of the adjective "special"?

93. He suggested that the Drafting Committee might combine the first and second sentences of paragraph 1 by replacing the full stop after the words "permanent mission" by a semicolon and then continuing "however, the sending State shall take all appropriate measures . . .".

94. He agreed with Mr. Eustathiades' comment about temporary and final recall.

95. Mr. CASTAÑEDA said that if the third sentence of paragraph 1 were to begin with the words: "In the discharge of this obligation", that would solve one of Mr. Ushakov's problems. He doubted, however, whether it was advisable to be so precise and would propose instead that the opening phrase be deleted so that the third sentence would then begin with the words: "The sending State may entrust . . .". The words omitted were no more than an indication of the reason why the sending State might have recourse to a third State and were inappropriate in such an article. Moreover, the sending State might also have other reasons for such action. If the phrase were deleted, every State would be free to determine its reasons for transferring the responsibility to a third State.

96. Mr. YASSEEN said he agreed with Mr. Castañeda.

97. Mr. EL-ERIAN (Special Rapporteur) said that the first sentence of paragraph 1 was based on the first sentence of article 48, paragraph 1 of his 1969 draft, which read: "When the functions of a permanent mission come to an end, the host State must, even in the case of armed conflict, respect and protect the premises as well as the property and archives of the permanent mission".¹² That text was in turn based on article 45, sub-paragraph (a) of the Vienna Convention on Diplomatic Relations, which read: "the receiving State must, even

¹¹ United Nations, *Treaty Series*, vol. 500, p. 122.

¹² See *Yearbook of the International Law Commission*, 1969, vol. II, p. 20.

in case of armed conflict, respect and protect the premises of the mission, together with its property and archives”.

98. The words “In the discharge of its obligations”, in the second sentence of paragraph 1, referred to the obligation of the sending State to take all appropriate measures to terminate the special duty of the host State to “respect and protect the premises as well as the property and archives of the permanent mission.” However, he agreed with Mr. Ushakov and Mr. Eustathiades that the expression was ambiguous.

99. Some criticism had been made of the use of the adjective “special” in the words “special duty of the host State” in the second sentence. He could only refer to an incident before the Second World War, when an Italian general had been killed by terrorists while helping to demarcate the frontier between Greece and Albania. It had then been held that, while a State had a general duty to protect all aliens in its territory, it had a special duty to do so when an alien was engaged on a politically difficult mission.¹³

100. The CHAIRMAN suggested that article 49 be referred to the Drafting Committee.

*It was so agreed.*¹⁴

ARTICLE 39 (Exemption from laws concerning acquisition of nationality)¹⁵

101. Mr. KEARNEY said that at an earlier meeting he had said he would try to explain exactly what was provided for on the subject of the acquisition of nationality in the laws of his country.¹⁶ Article XIV of the amendments to the Constitution of the United States provided that: “All persons born and naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside . . .”. The Supreme Court, however, had never held that that amendment applied to the children of accredited diplomats.

102. In the *Slaughterhouse Cases*,¹⁷ it had been said that the phrase “subject to the jurisdiction thereof” was intended to exclude from the operation of the amendment “children of ministers, consuls and citizens or subjects of foreign States, born within the United States”. However, in the case of the *United States v. Wong Kim Ark*,¹⁸ the Supreme Court had ruled that that dictum was unsupported by any reference to authority, and that consuls, as such, and unless expressly invested with a diplomatic character in addition to their ordinary powers, were not considered as entrusted with authority to represent their sovereign in his intercourse with foreign

States, but were subject to the jurisdiction, civil and criminal, of the courts of the country in which they resided. That ruling, of course, had applied only to consular officials, and there had as yet been no Supreme Court decision concerning the technical and administrative staff of permanent missions, whose status in his country must still be considered unsettled.

103. Mr. USTOR thanked Mr. Kearney for that information and said he hoped that the Secretariat would be able to provide similar information concerning the acquisition of nationality in Switzerland, a country which had no nationality laws based on *jus soli*, but which undoubtedly experienced many problems with respect to mixed marriages.

104. Mr. USHAKOV asked what would be the legal situation of the staff of diplomatic missions in the United States who were not themselves diplomats but served in some other capacity.

105. Mr. KEARNEY replied that their status would be substantially the same as that of administrative and technical staff in permanent missions, though there had never been a ruling on that subject by the Supreme Court. The United States Department of State had on occasion made decisions to the effect that children born of members of the administrative staff of diplomatic missions did not fall within the exemption to which he had referred. Those cases, however, had never been the subject of a court decision.

The meeting rose at 1.5 p.m.

1099th MEETING

Thursday, 13 May 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Baroš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add 1-6; A/CN.4/241 and Add.1-3; A/CN.4/L.162/Rev.1; A/CN.4/L.166)

[Item 1 of the agenda]

(continued)

¹³ See *Official Journal of the League of Nations* (minutes of the Council), 5th year, No. 4, April 1924, p. 524, Question V.

¹⁴ For resumption of the discussion see 1115th meeting, para. 50.

¹⁵ For previous discussion see 1096th meeting, para. 77.

¹⁶ *Ibid.*, para. 99.

¹⁷ 16 Wallace 36 (1873).

¹⁸ 169 US 649 (1898).

ARTICLE 39 (Exemption from laws concerning acquisition of nationality) (*continued*)

1. The CHAIRMAN invited the Secretariat to reply to the question asked by Mr. Ustor concerning the legal situation with respect to the acquisition of nationality in Switzerland.¹

2. Mr. RATON (Secretariat) said that there was no exemption under Swiss law. The law applicable was the Federal Law of 29 September 1952 on the Acquisition and Loss of Swiss nationality. As Switzerland was a *jus sanguinis* country, cases were rather rare in practice, though they could arise, for women members of missions in particular. In any case, a Swiss citizen had to be directly involved. For example, if a woman member of a mission had an illegitimate child by a Swiss citizen, then the child could acquire Swiss nationality as a result of the subsequent marriage of its father and mother or of a legitimation decree. If a woman member of a mission married a Swiss citizen, she acquired nationality. The legitimate child of an alien father and a Swiss mother acquired at birth the cantonal and communal citizenship of its mother, and thereby, if it was unable to acquire another nationality at birth, Swiss nationality.

3. On the basis of the information he had obtained from the Federal Political Department, he could say that the Swiss Government encountered no serious practical difficulties. His reply should therefore be understood as indicating that there were no exceptions to the Federal Law of 1952.

4. Mr. USTOR said that the Government of Switzerland had stated that it could not agree with the views of the International Law Commission on article 39. Its comment on the article went on to say: "Switzerland approves *per se* of the rule that the child of a member of the permanent mission may not acquire the nationality of the host State by the operation of *jus soli*. However, the rule laid down in article 39 is wider in scope: it covers all provisions for the automatic acquisition of the nationality of the host State, whether or not they make such acquisition dependent on residence in that State. For the reasons which guided the Vienna Conferences of 1961 and 1963, the Swiss Government recommends that this provision should be dealt with in a separate protocol" (A/CN.4/239, section C.II).

5. It would therefore appear that under Swiss law the child of a member of a permanent mission whose wife was Swiss would become a Swiss national at birth.

6. Mr. RATON (Secretariat) replied that that was so under certain conditions. The child concerned must have been unable to acquire another nationality at birth; and the child would lose his Swiss nationality if, before his majority, he acquired the foreign nationality of his father.

7. Mr. USTOR, thanking the representative of the Secretariat for the information which he had provided,

said he hoped the Drafting Committee would take that information into consideration when considering article 39.²

QUESTION OF THE POSSIBLE EFFECTS OF EXCEPTIONAL SITUATIONS: ARTICLES 49 (*bis*), 77 (*bis*) and 116 (*bis*).

8. The CHAIRMAN invited the Commission to consider the Special Rapporteur's working paper on the question of the possible effects of exceptional situations on the representation of States in international organizations (A/CN.4/L.166).

9. Mr. EL-ERIAN (Special Rapporteur) said that his working paper gave a summary of the discussions which had taken place in the Commission in 1969 and 1970. At the twenty-first session, the discussion had arisen from the reference to armed conflict in draft articles 47 (Facilities for departure) and 48 (Protection of premises and archives), as prepared by the Drafting Committee. At the 1026th meeting, Mr. Ustor had suggested that the Commission consider the possibility of a separate article which would state that, in case of armed conflict, all the privileges and immunities accorded under the convention must be granted.³ The question had then been referred to the Drafting Committee, which had prepared the new draft article reproduced in paragraph 10 of his working paper. When that text had been submitted to the Commission at its 1035th meeting, one member had submitted an elaborate amendment, which was reproduced in paragraph 11 of his working paper, and advanced supporting arguments, which were summarized in paragraph 12, and another member had then submitted a shorter and more precise amendment, which was reproduced in paragraph 13.⁴

10. During the discussion, the view had been expressed that the situation of armed conflict was more complex in the case of permanent missions to international organizations than in that of bilateral diplomacy. The majority had doubted the desirability of dealing with that situation in the draft articles. The Commission had resumed the discussion at its twenty-second session in connexion with the draft articles on permanent observer missions, but had decided to defer consideration of the effects of exceptional situations, such as armed conflict, until the second reading.

11. His conclusions from those discussions were, first, that the Commission did not consider it appropriate to deal with exceptional situations such as armed conflict in the articles on facilities for departure and protection of premises and archives, because it was anxious not to imply that, in case of armed conflict between the host State and the sending State, members of the permanent mission of the sending State would have to leave the territory of the host State; secondly, that there was general agreement on the desirability of dealing in one or more articles with the implications of the severance

² For resumption of the discussion see 1116th meeting, para. 2.

³ See *Yearbook of the International Law Commission, 1969*, vol. I, p. 190, para. 75.

⁴ *Ibid.*, pp. 232-234.

¹ See previous meeting, para. 104.

or absence of diplomatic or consular relations between the host State and the sending State, as well as with the question of recognition; thirdly, that where armed conflict was concerned, opinion in the Commission was divided, and that the attempt to deal with the effects of armed conflict in the present draft articles would raise complex problems, owing to the great variety of situations which might arise in the context of multilateral diplomacy.

12. He had therefore submitted his proposed new articles 49 *bis*, 77 *bis* and 116 *bis*, on which the Commission could take a decision at the final stage of its work. Those articles read:

Article 49 bis

The severance or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles. The establishment or maintenance of a permanent mission by the sending State does not in itself imply recognition by that State of the host State or by the latter State of the sending State, nor does it affect the situation in regard to diplomatic or consular relations between the host State and the sending State.

Article 77 bis

The severance or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles. The establishment or maintenance of a permanent observer mission by the sending State does not in itself imply recognition by that State of the host State or by the latter State of the sending State, nor does it affect the situation in regard to diplomatic or consular relations between the host State and the sending State.

Article 116 bis

The severance or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles. The sending of a delegation to an organ or to a conference by the sending State does not in itself imply recognition by that State of the host State or by the latter State of the sending State, nor does it affect the situation in regard to diplomatic or consular relations between the host State and the sending State.

13. Mr. CASTRÉN said that the Special Rapporteur had prepared an excellent document for the Commission's resumed consideration of the question of exceptional situations.

14. It was clear that the question of armed conflict raised serious difficulties and that opinions on it differed widely, so that it would be difficult to reach agreement on a text. The most frequent case would obviously be armed conflict between the host State and one or more sending States; but there could conceivably be a conflict between the organization and one of its members, if the organization resorted to military sanctions. In theory, the obligations of the host State to a sending State should not be affected in the former case; but for reasons of security the host State might consider it necessary to place the members of the permanent mission under supervision and to limit their privileges and immunities to some extent.

15. Some members of the Commission had nevertheless proposed that the interests of the host State should be

so well protected that the work of the permanent mission and even that of the organization might suffer. It had been proposed, for example, that severe limitations should be placed on freedom of communication, which was so essential for a permanent mission, and on freedom of movement. It would therefore be better not to try to settle that question in the draft articles. The Commission could either add a reservation, as it had done in the case of the Law of Treaties, or confine itself to mentioning the question in the commentary, or refrain from mentioning it at all.

16. The other exceptional situations should be covered in the draft, and the new articles proposed seemed to be acceptable in substance. It should, incidentally, be possible to combine them in a single article.

17. Mr. KEARNEY said that the Special Rapporteur's working paper provided an excellent basis for discussion of the very difficult problems which could arise in the absence of diplomatic or consular relations between the host State and the sending State.

18. He agreed that the Commission should not attempt to deal with the problem of armed conflict in an article, but the reasons should be stated in the commentary, since that might be of assistance to the future conference.

19. In article 49 (*bis*), the second sentence should be amplified to include the possibility of recognition as a result of routine consultations and negotiations between the sending State and the host State. He proposed that the first part of that sentence be amended to read: "Neither the establishment or maintenance of a permanent mission by the sending State nor any action taken pursuant to the provisions of these articles shall imply recognition . . .". He questioned whether the last part of the sentence was really necessary.

20. As had been pointed out before, the severance or absence of diplomatic or consular relations between the sending State and the host State, or their non-recognition of each other, indicated that there were probably outstanding problems of a political nature between them; but where an actual breach or severance of such relations occurred, there was likely to be a state of considerable tension between them, which could affect public opinion and place the host State in an increasingly difficult situation with respect to its obligation to safeguard the persons and premises of the permanent mission.

21. To deal with that situation, he had suggested that the host State be empowered to place certain limitations on the movements and communications of the permanent mission,⁵ but in the light of the attachment of many members of the Commission to the principle of complete freedom of movement, he had reconsidered that suggestion and now proposed that the following sentence be added to article 49 (*bis*): "Failure by members of a permanent mission in the foregoing circumstances to comply with regulations adopted by the host State to safeguard the mission and its members shall relieve the host State of any responsibility for the consequences of such failure."

⁵ *Ibid.*, p. 233, para. 13.

22. Mr. USHAKOV said that the exceptional situations which the Commission was considering could raise many problems. Political, economic or other tensions between the host State and the sending State might, as Mr. Kearney had said, affect the protection of permanent missions. In Mr. Kearney's opinion, the absence of diplomatic or consular relations might give rise to tensions between the host State and the sending State, but in his own opinion, tensions could arise even when such relations did exist between the two States, for example, if the protection afforded by the host State was inadequate. But in cases of tension, it was for the host State alone to decide what measures should be taken; the Commission should not interfere in that matter.

23. Nor should the Commission deal with armed conflict in the draft, although it was mentioned in the Vienna Conventions on diplomatic and consular relations and in the Convention on Special Missions. Apart from armed conflict between the host State and a sending State or between the organization and a sending State, there might also be conflict between two States members of the organization or between the organization and the host State, itself a member of the organization. The question of armed conflict was more complex than the working paper implied. Since the situations he had mentioned were highly exceptional, he agreed with the Special Rapporteur that the Commission should not draft separate provisions on the subject.

24. Articles 49 *bis*, 77 *bis* and 116 *bis*, proposed by the Special Rapporteur, provided a good working basis for the Drafting Committee and for the Commission; but he wished to make some comments on them. The words "under the present articles", in the first sentence of each article, should be replaced by the words "under the present Part", since each of the three articles referred only to one part of the draft. In addition, in each case, the first sentence failed to state expressly that the rights of the States, as well as their obligations, were not affected.

25. With regard to article 116 *bis*, he wondered whether it was really possible to link the sending of a delegation to an organ or a conference with the recognition of the sending State by the host State, or *vice versa*, and the diplomatic or consular relations between the two States. The problems raised by the sending of a delegation to an organ or a conference, including the question of recognition, should be dealt with only in the rules of the organization, so the second sentence of article 116 *bis* could be deleted. The Drafting Committee might also consider the possibility of combining all three articles in a single article.

26. Mr. REUTER said he congratulated the Special Rapporteur on his working paper and, particularly on his proposed articles; allowing for a few possible improvements, the articles were very satisfactory and constituted the logical continuation of the Commission's work.

27. The Commission would probably decide not to deal with armed conflict, but it should give a detailed account of its discussions on the subject in its report. It might

some day be called upon to codify the international law concerning armed conflict, but for the time being it was for States to adopt general provisions.

28. Although it might be true that, apart from armed conflict, the exceptional circumstances contemplated by the Commission did not affect the substance of the obligations of States, it did appear that, as Mr. Kearney had indicated, the implementation of their rights and obligations was nevertheless modified. In fact, Mr. Kearney's suggestions were based on the general principles of international responsibility. The obligation of the host State to protect missions or delegations varied according to circumstances and, if the State enjoying that protection did not respect the regulations of the host State, it relieved the latter State of its responsibility. In view of that principle, it would seem that the word "affect" should be replaced by the word "modify" in the first sentence of each of the three articles proposed. For even if they did not modify the obligations of the States concerned, the circumstances envisaged did have effects on the manner of fulfilling those obligations.

29. In its commentary, the Commission should specify that exceptional circumstances other than those mentioned in the articles could arise. Natural disasters or civil war in cities housing international organizations could produce exceptional circumstances approximating to cases of *force majeure*.

30. Mr. EUSTATHIADES congratulated the Special Rapporteur on his excellent working paper. The suggestion that the three new articles should be combined in one might surprise anyone who was unaware of the circumstances of their preparation: it was because the Commission had decided to consider the various cases of exceptional situations separately that it might end by dealing with them in a single article.

31. The question of recognition was a very complex one. In his view, however, it had no connexion with the other exceptional situations contemplated and, personally, he would have included the second sentence of articles 49 (*bis*) and 77 (*bis*) in the draft article dealing with the establishment of the permanent mission, though deleting the last part, "nor does it affect the situation in regard to diplomatic or consular relations between the host State and the sending State". He agreed with Mr. Kearney that that phrase was not of much value and rather obscured the effects of recognition. Some took the view that recognition was not connected with the existence of diplomatic or consular relations.

32. He noted that there was no reference at all to armed conflict in the new articles, although the subject had come up in connexion with articles 48 and 49. If the case of armed conflict were to be studied it would take the Commission very far afield. But was it to be ignored entirely? As there were special clauses on it in other codification conventions, the subject merited attention.

33. Mr. ROSENNE said that the draft article should not be overloaded with too many separate issues, such as the severance or absence of diplomatic or consular

relations, the problem of recognition and the question of the responsibility of the host State. It would be better to deal with those various issues in separate paragraphs, if not in separate articles.

34. On the question of the absence or breach of diplomatic or consular relations, the Special Rapporteur's first sentence in article 49 *bis* was correct and followed the general line laid down in article 74 of the Vienna Convention on the Law of Treaties.⁶ The question of recognition, however, was a much more difficult one; he wondered whether, in concrete terms and as a purely pragmatic matter, it was really any different from that of diplomatic or consular relations in so far as it might affect the drafting of a convention. In fact, the text he had proposed at the Commission's 1027th meeting⁷ seemed to assume that the issue of recognition itself need not be dealt with expressly, but could be covered by the issue of diplomatic or consular relations. If the Commission decided that the two issues should be dealt with separately, the second sentence of article 49 *bis* should be limited to recognition and the reference to diplomatic or consular relations be dropped.

35. With regard to the recognition issue, it should be remembered that in 1949 the Commission had included "Recognition of States and Governments" in its provisional list of topics for codification,⁸ though it had taken no further action on that topic. In paragraph (1) of the commentary to article 60 of its draft on the law of treaties, the Commission had written: "Similarly, any problems that may arise in the sphere of treaties from the absence of recognition of a Government do not appear to be such as should be covered in a statement of the general law of treaties. It is thought more appropriate to deal with them in the context of other topics . . . [such as] recognition of States and Governments".⁹

36. In 1967 the Commission had included a sentence concerning non-recognition in article 7 of its draft articles on special missions,¹⁰ but that sentence had been rejected by a roll-call vote in the Sixth Committee; the present article 7 of the Convention on Special Missions merely stated that "The existence of diplomatic or consular relations is not necessary for the sending or reception of a special mission".

37. He hoped the Commission would keep those incidents in mind in its general work of codification and not go too far in dealing with the recognition issue. On that issue and that of the responsibility of the host State, it should adopt a prudent attitude, as it had done in connexion with the Vienna Convention on the Law of Treaties and the Convention on Special Missions, and include a general reservation in the introductory part.

⁶ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 299 (United Nations publication, Sales No.: E.70.V.5).

⁷ See *Yearbook of the International Law Commission, 1969*, vol. I, p. 191, para. 2.

⁸ *Op. cit.*, 1949, p. 281.

⁹ *Op. cit.*, 1966, vol. II, p. 260.

¹⁰ *Op. cit.*, 1967, vol. II, p. 350.

38. He was in general agreement with the other conclusions reached by the Special Rapporteur.

39. Mr. RAMANGASOAVINA said the Commission should make it clear in the commentary why it had not devoted an article to armed conflict.

40. With respect to the severance or absence of diplomatic or consular relations, the new articles fairly reflected the various views expressed in the Commission. Situations of that kind certainly ought not to modify the obligations of the host State in regard to the staff of the permanent mission or those of the sending State in regard to the behaviour of the staff of its permanent mission towards the host State. The problem of recognition was more delicate. In moral diplomatic relations, the sending of a mission implied recognition; but the sending of a mission to an organization did not imply recognition of the host State by the sending State or *vice versa*.

41. Articles 49 *bis* and 77 *bis* proposed by the Special Rapporteur were identical, except that the former related to permanent missions and the latter to permanent observer missions. The discussions which the Commission would later devote to permanent observer missions, would show whether those missions could be assimilated to permanent missions for the purposes of the new articles. Once that question had been settled, it might even be possible to combine the three articles in one.

42. The obligations referred to in the new articles were undoubtedly of a reciprocal character, and it was that which had led Mr. Kearney to submit his amendment. It was obvious that members of a permanent mission who did not respect the regulations of the host State were in the wrong; it was so obvious that he doubted whether the amendment served any real purpose. Since it touched on the international responsibility of States, which was one of the general principles of law, its content was implicit; it followed from the maxim *nemo allegans turpitudinem suam est audiendus*, the so-called "clean hands" principle.

43. Mr. USTOR said he agreed with the Special Rapporteur's conclusion that any attempt to deal with the question of armed conflict would raise very complex problems and that the Commission should not include provisions on that question in the present draft, thus following the precedents of its drafts on the law of the sea and the law of treaties.

44. The Special Rapporteur proposed to restrict the provisions on exceptional situations to the cases of severance or absence of diplomatic or consular relations and non-recognition of one State by another. Those cases were complicated, but life was even more complicated and offered a wider variety of examples; one such example was non-recognition of a government, as distinct from non-recognition of a State. But on the whole, the three draft articles proposed by the Special Rapporteur provided a good basis for further work.

45. He appreciated the idea contained in the amendment to article 49 *bis* proposed by Mr. Kearney, but it would apply to a much broader range of cases than

the exceptional situations envisaged in article 49 *bis*. Even if diplomatic and consular relations existed between the host State and the sending State, situations of tension could occur which required the adoption of special regulations. In fact, special regulations might be required even where relations were perfectly normal; for example, during the fifteenth session of the General Assembly in 1960, the presence of many heads of State had induced the host State to introduce a number of extraordinary regulations with the concurrence of the sending States concerned. Cases of that kind should be dealt with by means of the consultation procedure provided for in article 50.

46. Mr. ALCÍVAR said that he, too, agreed with the Special Rapporteur's conclusion that the draft should not deal with armed conflict.

47. He was also in favour of including provisions to the effect that the severance or absence of diplomatic or consular relations between the host State and the sending State did not affect the rights or obligations of either State. He strongly supported the view expressed by Mr. Ushakov that not only the obligations, but also the rights of the two States should be referred to.

48. The problem of non-recognition was a political reality; it played an important and sometimes decisive role in international organizations. As the representative of Ecuador on the Special Committee on the Question of Defining Aggression, set up by the General Assembly,¹¹ he had had considerable experience of that problem and was inclined to favour the inclusion of provisions dealing with it in the draft articles.

49. He welcomed the inclusion of such provisions in regard to delegations to organs and conferences in article 116 *bis*. It was precisely in connexion with conferences that the problem had taken an acute form, having regard, in particular, to the "Vienna formula" concerning participation in conferences convened by the United Nations.¹²

50. The Drafting Committee should be invited to examine the other suggestions put forward, including Mr. Kearney's proposal, regarding the practical effects of which he had some misgivings, and the proposal to delete the last part of article 49 *bis*, to which he himself was opposed.

51. Mr. ELIAS said that each of the three draft articles proposed by the Special Rapporteur dealt with three different points. All were essential, and the commentary should explain the necessity of covering them. He proposed, however, that in each article the three points be dealt with in three separate paragraphs. The first would consist of the opening sentence; the second would state the rule that the establishment or maintenance of a permanent mission by a sending State did not in itself imply recognition by that State of the host State or by

the host State of the sending State; the third would embody the concluding proviso, with suitable drafting changes.

52. When the Commission had begun its debate on the Special Rapporteur's sixth report by discussing certain preliminary issues, he himself had pointed out that one of those issues was whether the draft should include a provision on the possible effect of armed conflict on the representation of States in international organizations.¹³ He now welcomed the Special Rapporteur's analysis of the question in his working paper (A/CN.4/L.166, paras. 15-18) and endorsed his conclusion that any attempt to deal with the subject in the context of the present draft articles would be unhelpful. It was not without good reason that the problem of armed conflict had been left outside the scope of the codification of the law of the sea by the 1958 Geneva Conference and of the codification of the law of treaties by the 1968/69 Vienna Conference.

53. On a question of drafting, he thought that in the concluding proviso the words "affect the situation" were inadequate and should be replaced by more suitable language.

54. He appreciated the reasons for Mr. Kearney's proposal, but was not convinced that a provision in that form should be included in the draft. The question should be examined by the Drafting Committee with the aim of including a passage dealing with the matter either in the draft, or, preferably, in the commentary.

55. The proposal to combine the three articles 49 *bis*, 77 *bis* and 116 *bis* must await the Commission's decision on the final form of the draft articles, particularly the fate of articles 51 to 77. The Commission would have to decide whether to propose one, two or possibly three draft conventions. Meanwhile, the Drafting Committee should be invited to make every effort to improve the language of the three proposed articles.

56. Mr. AGO said that the three articles proposed by the Special Rapporteur provided an excellent working basis for the Drafting Committee. He would not repeat what other members of the Commission had already said about the advisability of combining the three articles, but would merely comment on what he thought should be explained in the commentary and on the amendment proposed by Mr. Kearney.

57. In the form proposed by the Special Rapporteur, the text of the articles would be too stringent unless it was accompanied by explanations in the commentary clarifying its meaning and its finer points. For example, the statement that the severance or absence of diplomatic relations between the host State and the sending State did not affect the obligations of either State was correct in itself, but it was possible that some of those obligations or the ways in which they were carried out would, in fact, be affected. That should be explained in the commentary.

¹¹ See General Assembly resolution 2330 (XXII).

¹² See General Assembly resolutions 1450 (XIV), 1685 (XVI) and 2166 (XXI).

¹³ See 1088th meeting, para. 23.

58. It seemed that the Commission had been right not to mention armed conflict among the exceptional situations, but in order to prevent any misunderstanding it ought to explain its decision clearly in the commentary. The reason for that decision was that it would have been very difficult to draft a provision covering all the possible cases of conflict in which the host State and the sending State might be involved, together or separately. But it must be clearly understood that the Commission's silence should not be interpreted to mean that armed conflict was a situation in which the obligations assumed under the convention ceased to exist.
59. Mr. Kearney's amendment was not, as some seemed to believe, a matter of State responsibility. It was wrong to think that the use of term "responsibility" automatically placed a matter in the sphere of international responsibility. In the case in point, failure of the sending State to comply with certain procedures laid down by the host State to ensure the enjoyment of the facilities and privileges it was obliged to grant to the sending State could have the effect of relieving, not the sending State, but the host State of responsibility for the consequences of any failure to fulfil its obligations in the matter. In other words, if the host State had provided for certain procedures to fulfil its obligations and the sending State disregarded them, the host State could consider itself relieved of the duty to observe certain clauses of the convention, without its international responsibility being involved.
60. Obviously, that led to responsibility indirectly, but the question in fact related to the law of treaties and was, moreover, covered by article 60 of the Vienna Convention on the Law of Treaties,¹⁴ which stated that the breach of a treaty by one of the parties entitled the other to invoke the breach as a ground for suspending the operation of the treaty in whole or in part. Thus, since the problem was already covered by the Vienna Convention, it was questionable whether it should be mentioned in the present draft articles with regard to the particular case of severance or absence of diplomatic relations; the provisions of article 60 of the Vienna Convention would apply not only in that case, but in all other cases where the sending State did not carry out its obligations.
61. He proposed that it be left to the Drafting Committee to settle the question.
62. Mr. ALBÓNICO said that the cases covered by articles 49 *bis*, 77 *bis* and 116 *bis* did not exhaust the list of exceptional situations which might have an effect on the representation of States in international organizations. Apart from armed conflict, there were such cases as civil war, martial law, state of emergency and other cases of *force majeure*. Perhaps the Drafting Committee could formulate a text covering all those situations.
63. He accepted the first sentence of each of the proposed draft articles, but suggested that the second sentence be deleted. It was undesirable to deal with the question of non-recognition, which involved very complex problems and called for caution.
64. On the same grounds he supported the Special Rapporteur's conclusion that the question of armed conflict should not be dealt with in the draft. He agreed with Mr. Ago, however, that total silence on the matter could lead to dangerous interpretations, especially in view of article 46, paragraph 2, of the 1969 Convention on Special Missions.¹⁵
65. The main idea in Mr. Kearney's proposal was not that of State responsibility, but that of reflecting in international law the old principle of internal law that one of the parties to a contract could refuse to carry out its obligations under the contract in retaliation for a breach by the other party, the *exceptio non adimpleti contractus*.
66. Mr. BARTOŠ said that the question of exceptional situations was both extremely delicate and essential for the instrument the Commission was preparing, as was shown by the number of contemporary cases of severance or absence of diplomatic relations, non-recognition of States and armed conflict, even between States which were members of the same organization or had permanent missions on the territory of States which were in one of those situations. It was important that the situations arising from such circumstances should be governed by legal rules.
67. The problem should be dealt with on the basis of the United Nations Charter, which was founded on the principle of universality, thanks to which the fact that some States were in an exceptional situation with regard to other States did not prevent the Organization from existing or the other States from being members. It was important that the subject should be governed by precise legal rules, not only in the interests of the universality of international organizations and their proper functioning, but also because the settlement of some conflicts might be facilitated: for example, if the representatives of State parties to a conflict with the host State, or of States with which the host State did not maintain diplomatic relations, were called upon to appear before the organization for negotiations. During the Korean war, for example, the representatives of North Korea and the People's Republic of China had been able, through the tolerance of Washington, which had understood that the conflict could not be settled without their presence, to come to New York to defend their cause before the Security Council.
68. The same problem had already arisen in other cases and it might arise again if, for example, the States parties to the present conflict between Israel and the Arab countries were to meet one day under the auspices of an international organization whose headquarters was on the territory of one of them. A State which agreed to act

¹⁴ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 297 (United Nations publication, Sales No.: E.70.V.5).

¹⁵ See General Assembly resolution 2530 (XXIV), Annex.

as host to an international organization must also accept the consequences and was not entitled to exclude from its territory the representatives of States represented in the organization—whether as members, observers or with any other status—with which it did not maintain diplomatic relations, which it did not recognize or with which it was involved in armed conflict.

69. The Commission could therefore be grateful to the Special Rapporteur for having drafted the three articles now before it. Their number might perhaps be reduced to two or, on the contrary, their scope might be widened to cover cases of armed conflict or other cases such as that of a country which, though not admitted to membership of an organization, was called upon to be represented in it provisionally. The essential point was that there should be rules of international law governing relations between the host State and States members of the organization of States which had dealings with it. The Drafting Committee would decide how far the Commission could go, but in general the three articles proposed by the Special Rapporteur already provided a solid basis for drafting the necessary rules.

70. However, it was not only a matter of regulating relations between the host State and the States represented in the organization, but also relations between the latter States and States which were in the same situation with regard to them as the host State, and would, for example, have to authorize transit through their territory.

71. Since a general rule was being drafted for the first time and it ought to be complete, the obligations of States benefiting from the rules governing exceptional situations, for example, those involving propaganda or unfriendly acts, should also be laid down.

72. Lastly, apart from the host State, rules should be drafted governing the conduct of States which, being in one of the exceptional situations provided for with respect to each other, met within the organization. For as anyone could see, in the United Nations General Assembly, for example, animosity often broke out between enemy States in international discussions. In such cases, the question arose whether it was for the host State, the Chairman of the body concerned or the other participating States to restore harmony.

73. His conception of the subject under study might perhaps be too broad, but he had wished to show that that subject was not so limited as the three articles proposed by the Special Rapporteur suggested. The Special Rapporteur had preferred to go no farther; the Drafting Committee would decide whether it was advisable to do so. But for the time being the texts proposed were acceptable.

The meeting rose at 1 p.m.

1100th MEETING

Friday, 14 May 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Ramangasoavina, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 3; A/CN.4/L.162/Rev.1; A/CN.4/L.166)

[Item 1 of the agenda]

(continued)

QUESTION OF THE POSSIBLE EFFECTS OF EXCEPTIONAL SITUATIONS: ARTICLES 49 *bis*, 77 *bis* and 116 *bis* (continued)

1. The CHAIRMAN invited the Commission to continue consideration of the question of the possible effects of exceptional situations on the representation of States in international organizations and the Special Rapporteur's proposed articles 49 *bis*, 77 *bis* and 116 *bis* (A/CN.4/L.166).

2. Mr. KEARNEY said that, in response to the remarks of some members, he wished to explain his reasons for referring to State responsibility in the amendment he had submitted to article 49 *bis* at the previous meeting, which read: "Failure by members of a permanent mission in the foregoing circumstances to comply with regulations adopted by the host State to safeguard the mission and its members shall relieve the host State of any responsibility for the consequences of such failure". In that context, by "State responsibility" he meant State responsibility as defined by the Special Rapporteur for that topic in draft articles 1, 2 and 3 of his third report,¹ and in that context it was not possible to avoid referring to State responsibility. The draft articles now being considered contained many provisions which imposed obligations upon States. Failure to fulfil those obligations was bound to give rise to State responsibility.

3. At the same time, it was clear that some leeway was necessary to allow exceptional situations to be taken into account. For example, under article 21,² the permanent representative was entitled to use the flag of the sending

¹ See A/CN.4/246, paras. 48, 75 and 85.

² See *Yearbook of the International Law Commission, 1968*, vol. II, p. 212.

State on the means of transport of the permanent mission. In the event of tension between the host State and the sending State and the severance of diplomatic and consular relations between them, the authorities of the host State might suggest to the permanent representative that it was desirable not to display the flag of the sending State. The permanent representative might then reply that under article 21 he had a right to display that flag. Under the provisions of article 30,³ on personal inviolability, it was the duty of the host State to take "all appropriate steps" to prevent any attack on the person, freedom or dignity of the permanent representative. The question would then arise whether, in the circumstances created by the permanent representative's disregard of the suggestion made to him, it was the duty of the host State to supply an escort of police cars to protect the vehicle of the permanent mission from hostile demonstrations.

4. That example showed the need to make it clear in the present draft that there was room for some tolerance in the matter. If the permanent representative, or the member of the permanent mission concerned, did not take the reasonable steps requested of him, the host State was not obliged to take extraordinary measures and to go to extreme lengths in carrying out its duty of protection. He did not believe that the problem was covered by article 60 of the 1969 Vienna Convention on the Law of Treaties.⁴ Refusal by the permanent representative to take the steps in question did not constitute "a material breach" as defined in paragraph 3 of article 60. There was therefore no question of invoking paragraph 1 of article 60 and the host State remained under an obligation to take the "appropriate steps" provided for in the last sentence of article 30 of the present draft.

5. The problem was to determine what constituted "appropriate" steps. The purpose of his proposal was to clarify the duties of the host State, but he was only concerned with the substance of the matter; he did not insist on the actual wording he had proposed.

6. Mr. SETTE CÂMARA said he agreed with the Special Rapporteur's conclusion that the draft should not deal with the problem of armed conflict.

7. In view of the criticisms of the length of the draft made in the Sixth Committee, he supported the proposal to merge the three new draft articles.

8. With regard to the important problem of recognition and non-recognition, he shared the view that the reservation on the subject should apply to the whole text of the draft and should not be confined to the exceptional situations contemplated in the three new draft articles.

9. The Drafting Committee should be asked to consider Mr. Kearney's amendment to article 49 *bis* with a view to finding a way to meet the concern it reflected. The matter was connected with the general problem of the conduct

of permanent missions and delegations, and was not confined to exceptional situations. The problem connected with the display of the flag on means of transport could arise in any circumstances.

10. In considering that problem, the Drafting Committee should take into account the provisions of article 60 of the 1969 Vienna Convention on the Law of Treaties. It should bear in mind, however, that, as Mr. Kearney had pointed out, the breach in that case was committed by the sending State, not by the host State.

11. Mr. YASSEEN said that the subject the Commission was considering was one with respect to which the rules governing multilateral diplomatic relations differed essentially from those governing bilateral diplomatic relations. Although the draft articles would not be complete unless they dealt with the effects of armed conflict on the representation of States in international organizations, he must admit that the Special Rapporteur had been right to leave that matter aside, both because it was so complex that it would need more time for consideration than the Commission would be able to give it, and because the Commission had always declined to take up a matter connected with the law of war, which would take it far beyond the subject under study. He agreed with Mr. Ago, however, that the Commission should explain its position in the commentary, in order to prevent application of the articles on the basis of false analogies or wrong interpretations.

12. Before it took any decision on the wording of the articles proposed by the Special Rapporteur, on the question whether they were to be merged, and on their position in the draft, the Commission should wait until it had a general conspectus of the draft as a whole.

13. He could not support Mr. Kearney's amendment, which was not justified from the technical point of view. For although no one denied that the host State was entitled to adopt regulations to protect the mission and its members, the host State could not determine, at its own discretion, the sanction for non-compliance with those regulations and claim that such non-compliance relieved it of all responsibility. The sanction depended on international law itself, not on the regulations in question.

14. Mr. ROSENNE said he welcomed Mr. Kearney's explanation as well as the intimation that he did not insist on the language of his proposal, but merely wished to ensure that the problem was adequately dealt with. A case of some relevance in that connexion was the Tellini case, which had been mentioned by the Special Rapporteur during the discussion on article 49.⁵

15. It was essential that the Commission should deal with the problem raised by Mr. Kearney, unless it felt certain that the matter was covered by existing international law. Personally, he was not at all convinced that the provisions of article 60 of the 1969 Vienna Convention on the Law of Treaties covered the whole subject, or indeed that they constituted the only provisions of

³ *Op. cit.*, 1969, vol. II, p. 211.

⁴ See *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 297 (United Nations publication, Sales No.: E.70.V.5).

⁵ See 1098th meeting, para. 99.

that Convention applicable in the matter; article 61, on supervening impossibility of performance, article 62, on fundamental change of circumstances, and perhaps article 73, on cases of State succession, State responsibility and outbreak of hostilities, might also be relevant. In particular, articles 61 and 62 incorporated the concept of suspension of the treaty.

16. The Drafting Committee should carefully examine the words "under the present articles" at the end of the first sentence of articles 49 *bis*, 77 *bis* and 116 *bis*. That wording might be too narrow and the Drafting Committee should consider the possibility of replacing it by a broader description of the obligations of States. The obligations of both the host State and the sending State were not necessarily limited to those set forth in the present draft articles. There could well be other sources of duties for those two States and the balance of their respective obligations could be altered by the operation of other rules of international law.

17. As the discussion proceeded, he was becoming increasingly uneasy about the problem of recognition, because it was a problem that the Commission had not studied at all. On State responsibility, the Commission had before it the report and draft articles submitted by the Special Rapporteur on that topic,⁶ but on recognition it had nothing, and it should hesitate to lay down any substantive rule.

18. He would be in favour of including in the Commission's report on its present session an intimation to the General Assembly that the Commission was aware of the problem of recognition but had not been able to reach any conclusion on it, since it had not studied the subject.

19. Mr. USTOR said that the problem with which Mr. Kearney's amendment attempted to deal was a general problem rather than one closely connected with articles 49 *bis*, 77 *bis* and 116 *bis*. It might arise in connexion with the exercise of any of the rights which States could derive from the present draft articles. A problem such as that connected with the display of the flag, in the case mentioned by Mr. Kearney, could be settled by applying the general rules of international law rather than any particular rules on the lines proposed by Mr. Kearney.

20. The general rule to be applied in considering the rights set forth in the present draft articles was that all rights must be exercised in good faith, with due regard for the interests of others and in a spirit of co-operation and mutual understanding. If it were desired to refer to that rule, it would be appropriate to do so in a preamble, but not in the draft articles.

21. Mr. USHAKOV said he wished to make a few remarks on the amendment proposed by Mr. Kearney, in the light of the explanation he had given of its purpose.

22. He did not agree with Mr. Ago's view that the point raised by Mr. Kearney came under the law of treaties, in particular under article 60 of the Vienna Convention on

the Law of Treaties.⁷ What was in issue was a breach by the sending State, not of rules of international law, but of regulations adopted by the host State under its internal law.

23. That was the point which made Mr. Kearney's proposal unacceptable. To provide that the host State could, unilaterally and of its own volition, cease to consider itself bound by certain provisions of the draft articles and impose its own rules on the sending State amounted to providing precisely the reverse of what was stated in article 49 *bis*, which stipulated that exceptional situations did not affect the obligations of either the host State or the sending State under the articles.

24. Not only was such a derogation not justified, but the way in which it was expressed gave the host State practically a free hand. Yet it was, on the contrary, in exceptional situations that the host State must take all necessary steps to guarantee the sending State the enjoyment of all the rights to which it was entitled under the articles. To give the host State the right to take, when necessary, whatever steps it considered appropriate would jeopardize the whole convention. It would be a different matter if the host State, by negotiation, suggested or recommended to the permanent mission safety measures which the mission remained free to accept or reject.

25. He was all in favour of safeguarding the legitimate interests of the host State, provided it was done in a reasonable way, having due regard to good will and good faith. The Commission should not go beyond what was proposed in article 49 *bis*, which the Drafting Committee should examine very carefully with a view to producing a generally acceptable article.

26. Mr. EUSTATHIADES said he thought it was becoming more and more necessary for the Commission to take a position on the question of armed conflict, at least in a very detailed commentary. It could not draft an article, since that would mean examining the effects of the situation for a permanent mission from the time it was established until its functions came to an end. A rule of that sort would be far too detailed, for it would have to cover not only a conflict between the host State and the sending State, but also wider conflicts involving several States members of the organization, since the existence of a state of war between some of the members of an international organization set up by a collective treaty was no bar to the treaty's continued existence, though it might affect the treaty's application. But since the subject had been dealt with in other conventions, the Commission should explain its silence.

27. Some members thought Mr. Kearney's proposal raised a general question that went beyond the exceptional situations dealt with in article 49 *bis*. But even supposing that was so, the idea underlying the proposal could still be retained in a convention of the kind which the Commission was drafting. For no one denied that the host State must, in general, take the measures necessary to enable it to fulfil its obligations to the sending State, and its duty to do so appeared even more imperative in the exceptional situations covered by article 49 *bis*,

⁶ A/CN.4/246 and Add.1 and 2.

⁷ See previous meeting, para. 60.

which might logically be held to call for stronger safeguards.

28. Mr. Kearney had therefore taken article 49 *bis* as the occasion for making a clear statement of the host State's obligation in that regard; but there was nothing to prevent the Commission from establishing, first, the host State's general obligation to take measures to ensure the protection of the permanent mission and, secondly, the sending State's obligation to comply with them in its own interest, particularly in the exceptional circumstances covered by article 49 *bis*.

29. He had tried to show that it should be possible to reach agreement on a principle which, though general, was nevertheless particularly pertinent to article 49 *bis*.

30. Mr. AGO said that, after hearing Mr. Kearney's explanations, he thought his proposal would be unacceptable if, as Mr. Ushakov believed, it amounted to providing that in certain exceptional situations the host State could consider itself relieved of some of its obligations under the convention and adopt regulations which infringed the privileges and immunities of the sending State. That would, of course, deprive the convention in general, and article 49 *bis* in particular, of all meaning.

31. Mr. Kearney's intention, however, seemed to be rather to enable the host State to propose to the sending State certain procedures for applying the rules of the convention, which would be settled by agreement in the interests of the permanent mission. If that was so, the Drafting Committee ought to be able to find a form of words which would meet both Mr. Kearney's legitimate concern and the Commission's desire not to impair the basic provisions of article 49 *bis*.

32. Mr. EL-ERIAN (Special Rapporteur) said that the constructive and comprehensive discussion on his working paper had been in the best traditions of the Commission; it had covered many theoretical questions as well as such matters as the relationship of the provisions of his proposed new articles with the general principles of international law and the Vienna Convention on the Law of Treaties.

33. The comments made during the discussion could be divided into three groups. The first related to the basic features of the three proposed new articles and to what they should or should not contain. The second related to the material to be included in the commentary, which in the present instance had a particularly important function. The third related to drafting questions and the relationship of articles 77 *bis* and 116 *bis* with article 49 *bis*.

34. There had been general agreement that no attempt should be made to deal with the possible effect of armed conflict on the representation of States in international organizations. It had also been generally agreed that the commentary should reflect the importance which the Commission attached to that question. The commentary would stress that the Commission had thoroughly examined the question, but had decided not to include any provision on it in the draft articles, and would then give the reasons for that decision. Those reasons were connected with the variety of situations involved and

with the Commission's policy, as shown in its earlier drafts, especially its 1956 draft articles on the law of the sea.⁸

35. The question of civil war had been mentioned; he construed that concept as being covered by "armed conflict".

36. There had been general approval of his proposals for references in the draft articles to the question of recognition and non-recognition, though some misgivings had been expressed because recognition appeared on the Commission's list of topics for codification.⁹ He believed that the position on that question differed from that relating to armed conflict, in particular because the law on recognition and non-recognition had developed considerably in the past twenty years.

37. The Drafting Committee would consider Mr. Ushakov's suggestion that reference be made to rights as well as to obligations. He himself had placed the emphasis on obligations because most of the provisions of the draft dealt with the obligations of States but, of course, every obligation had a right as its counterpart.

38. He agreed with the suggestion that the provisions of each of the new draft articles should be divided into three separate paragraphs.

39. He did not consider it necessary to incorporate in article 49 *bis* the amendment proposed by Mr. Kearney, because the matter was already covered by general international law. Moreover, under article 45, paragraph 1, the permanent representative and the members of the permanent mission were required to respect the laws and regulations of the host State; any failure to co-operate in measures of protection taken in their own interest would give rise to the application of the right of estoppel or of the doctrine of *faute commune*.

40. The Drafting Committee should consider the other proposal made by Mr. Kearney, to amend the second sentence of article 49 *bis* by inserting the words "nor any action taken pursuant to the provisions of these articles"¹⁰—a proposal on which there had not been much comment during the discussion.

41. The Drafting Committee should also consider the suggestion by Mr. Ushakov that some adjustment should be made to the text of article 116 *bis* to take into account certain differences between delegations to organs and conferences on the one hand and permanent missions on the other.

42. The question whether the three new articles should be merged, or whether perhaps only articles 49 *bis* and 77 *bis* should be merged, would be examined when the Commission had completed its work on the draft as a whole; for the time being, the three new draft articles would be treated as separate provisions.

⁸ See *Yearbook of the International Law Commission, 1956*, vol. II, pp. 256 *et seq.*

⁹ *Op. cit.*, 1949, vol. II, p. 281.

¹⁰ See previous meeting, para. 19.

43. The CHAIRMAN suggested that articles 49 *bis*, 77 *bis* and 116 *bis* be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹¹

ARTICLE 50

44. The CHAIRMAN invited the Special Rapporteur to introduce article 50.

45.

Article 50

Consultations between the sending State, the host State and the organization

If any question arises between a sending State and the host State concerning the application of the present articles, consultations between the host State, the sending State and the Organization shall be held upon the request of either State or the Organization itself.

46. Mr. EL-ERIAN (Special Rapporteur) said that a number of observations had been made on article 50 in the Sixth Committee, some of which were reflected in the comments of governments (A/CN.4/241/Add.3). He had not considered the elaborate machinery for consultation proposed by the Government of Switzerland as appropriate for the purpose and had concluded that article 50 should be retained in its original form.

47. Mr. TAMMES said he had been particularly struck by the comment of the International Labour Office (A/CN.4/239, section D.2), which was known for its sensitiveness to legal questions. It expressed the fear that an obligation would be imposed on the organization to "provide for the diplomatic protection" of the sending State and to "play the role of a conciliator, perhaps even arbitrator," on "problems not directly related to its own interests." The ILO doubted whether "questions relating rather to diplomatic usage and the comity of nations" could "usefully be made the subject of intervention by the organization."

48. The distinction between problems concerning which the organization could play a conciliatory role and problems which lay outside its purview seemed to have been in the mind of the Special Rapporteur when he had drafted the original text of article 50 in 1969. Paragraph 1 of that article, then article 49, had read: "Consultations shall be held between the sending State, the host State and the Organization on any question arising out of the application of the present articles. Such consultations shall in particular be held as regards the application of articles 10, 16, 43, 44, 45 and 46." Paragraph 2 had then stated that "The preceding paragraph is without prejudice to provisions concerning settlement of disputes contained in the present articles or other international agreements in force between States or between States and international organizations or to any relevant rules of the Organization."

49. However, what had been carefully thought out in an atmosphere of intellectual serenity had undergone many changes since 1969. In his opinion, the opening phrase of article 50 tended to detract from the original idea that the consultations were primarily designed for protection of the proper functioning of the organization. It gave the impression of applying to all kinds of disputes between the sending State and the host State, and made no distinction between the direct and indirect interests of the organization. He hoped that the Drafting Committee would consider whether it was possible to restore the original balance of the article.

50. Mr. USHAKOV said he did not wish to revert to the substance of article 50, but to express his opinion on some of the comments by governments and the secretariats of international organizations.

51. He agreed with the reason put forward by the Special Rapporteur for not adopting the suggestion that the article should begin with the words "If any question arises among a sending State, the host State and the Organization. . . ." (A/CN.4/241/Add.3). The organization was interested in the proper functioning of permanent missions and was obliged to assist them, in accordance with article 22. But if any question arose between the organization and one of its member States, that was of no concern to the host State and the question should not be settled by tripartite consultations.

52. In practice, the proposal to institute tripartite consultation machinery would lead to the establishment of as many conciliation commissions as there were members of the organization, since each commission would include one representative of a sending State. Moreover, such a provision had no place in a draft convention, since no plenipotentiary conference could impose on organizations the obligation to set up such commissions.

53. With regard to the comments in the Sixth Committee that article 50 "might prejudice the reply to the question which organ of the organization would be responsible for ensuring respect for the privileges and immunities granted," and that "the secretariat of the organization concerned might find itself invested with authority that could not rightly be acquired except in virtue of the organization's constitutional instruments," the Special Rapporteur had replied that what had to be taken into account was not only the organization's constitutional instrument, but also its other relevant rules, and that in the absence of any relevant provision the consultation would have to be entrusted to the secretariat. The Legal Counsel of the United Nations had expressed the same view. He (Mr. Ushakov), however, did not share that view. No rule could be imposed on an organization as to the organ empowered to represent it for the purposes of article 50. The question had to be settled in accordance with the constitutional instruments or relevant rules of the organization. The Commission should therefore refrain from taking a position on the matter.

54. In its commentary to article 50, the Commission had stated that it had "reserved the possibility of including at the end of the draft articles a provision concerning

¹¹ For resumption of the discussion see 1119th meeting, para. 25.

the settlement of disputes which might arise from the application of the articles".¹³ The settlement of disputes was an entirely separate question, however, and much more complex than that of relations between States and international organizations; it was even more complicated where international organizations were involved. In view of the short time available to the Commission, it would be preferable to leave that question to the General Assembly or to the plenipotentiary conference that might be convened.

55. Mr. EL-ERIAN (Special Rapporteur) said he agreed with Mr. Ushakov that the Commission should not attempt to deal with the question of the settlement of disputes. In principle, it should state the substantive rules of law and leave it to the conference that would finalize the draft articles to provide the appropriate machinery for conciliation. As he had stated in paragraph 16 of his observations on article 50 (A/CN.4/241/Add.3), if the Commission decided that the draft should include provisions on the settlement of disputes, he would prepare a text for its consideration, though personally he was not in favour of including such provisions.

56. On the question of the organ competent to conduct consultations on behalf of the organization, he thought that that should be left to the organization itself to determine under its own rules. If no relevant rule existed, he assumed that the secretariat, as a continuing body, would be the most appropriate organ.

57. Mr. KEARNEY said he thought the draft articles should provide some machinery for the settlement of disputes; article 50, however, was sadly inadequate for that purpose. It was not only exceptional situations that might give rise to disputes; the whole series of draft articles raised a number of problems that would call for settlement.

58. For example, article 3 stated that "The application of the present articles is without prejudice to any relevant rules of the Organization"; but what were the "relevant" rules and who would decide that question? Article 10 stated that "the sending State may freely appoint the members of the permanent mission"; but if it appointed a person who had previously been convicted of a serious criminal offence, would that be an abuse of its right of appointment and who would decide that question? Article 16 stated that "The size of the permanent mission shall not exceed what is reasonable and normal"; but at what point could it be said to exceed what was "reasonable and normal"? Article 26 provided that the permanent mission should be "exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission... other than such as represent payment for specific services rendered"; could the permanent mission be charged for such specific services as fire or police protection? Article 27 stated that "The archives and documents of the permanent mission shall be inviolable at any time and wherever they may be"; did that mean

that if those documents were accidentally lost and subsequently found by the authorities of the host State, the latter would be prevented from examining them to establish their identity? Similar questions could be asked about many other articles and they would be of as much concern to the sending State as to the host State.

59. He agreed with Mr. Ushakov that if the host State was guilty of unreasonable behaviour it would be difficult for the sending State to protect itself because, in the absence of any machinery for conciliation, the question would be decided in the courts of the host State. Of course, if the host State did adopt an unreasonable attitude there were certain possibilities open to sending States, such as moving the headquarters of the organization. On the whole, however, he did not believe that host States had acted unreasonably in the past, although at times they might appear to sending States to be rather narrow-minded in certain particulars.

60. It had been said that, because of the shortage of time and because the settlement of disputes constituted a separate issue in international law, the Commission should not attempt to deal with that matter in the present articles. The difficulty was that some existing agreements did contain provisions concerning the settlement of disputes, so that if the Commission's draft omitted any such provisions it might not be considered satisfactory. For example, section 30 of the Convention on the Privileges and Immunities of the United Nations provided that: "All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court."¹³ Similar provisions were to be found in section 21 of the Headquarters Agreement between the United Nations and the United States of America.¹⁴

61. As far as he was aware, no recourse had ever been had to those provisions, a fact which in itself showed the effectiveness of having suitable machinery available for the settlement of disputes. Differences of opinion had existed at certain times, but the problems had always been solved without resorting to arbitration or to the International Court of Justice, whereas in the absence of those provisions one side or the other might have been more intransigent.

62. Nevertheless, the Headquarters Agreement was defective in one respect, namely, that it failed to take account of the interests of the sending State directly concerned by providing for its participation in the arbitral procedures contemplated. It should also be borne in mind that any decision taken, in accordance with any dispute settlement machinery, with regard to one sending State would be of interest to all sending States.

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

¹³ United Nations, *Treaty Series*, vol. 1, p. 30.

¹⁴ *Op. cit.*, vol. 11, p. 30.

63. He had no specific suggestions to make concerning the Commission's approach to that problem. The Swiss proposal (A/CN.4/239, section C.II) was defective inasmuch as it failed to take the interests of all sending States into consideration. Such existing instruments as the Vienna conventions on diplomatic and consular relations and the Convention on Special Missions concerned bilateral diplomacy and could not be relied on as precedents in multi-lateral relations. The Commission should make a serious effort to find some reasonable addition to article 50 with respect to the settlement of disputes that were not resolved by consultations.

64. Mr. AGO said that, without going into the substance of the matter, he wished to ask the Special Rapporteur three questions concerning the text of article 50.

65. Some of the comments, in particular those of the International Labour Office (A/CN.4/239, section D.2) showed that international organizations were not much inclined to participate in tripartite consultations. They were not always interested in the disputes which might arise between the host State and a sending State and did not always wish to take a position on them. Was article 50 to be regarded as imposing an obligation on the organizations to participate in the consultations?

66. So far, tripartite consultations had been contemplated. In the case of a dispute in a city which was host to several international organizations, which of them would take part in the consultations? There could not be consultations involving several organizations. That point should be clarified, at least in the commentary to the article.

67. So far as the settlement of disputes was concerned, certain States were bound by treaty to submit their disputes to conciliation or arbitration commissions; would those commissions be competent to deal with disputes between those States in their respective capacities as host State and sending State to an international organization? If so, should it not be expressly stated that the competence of those commissions was not affected by the provision of article 50?

68. Mr. EL-ERIAN (Special Rapporteur) replying to Mr. Ago's first question, said he had not envisaged any rigid machinery that would impose an obligation on the organization, but rather a flexible arrangement to deal with practical, everyday problems. What had to be asserted was the principle of consultation as a remedy for grievances between the sending State and the host State. The United Nations, for example, had the Informal Joint Committee on Host Country Relations, which met regularly.

69. In reply to the second question, he suggested that if a permanent mission was accredited to a number of international organizations, it might be advisable to have some sort of inter-agency committee to regulate their mutual problems.

70. As to the third question, the organization's role in the settlement of disputes would ultimately depend on the recommendations adopted by the conference. What he had in mind, however, was action to be taken by the

organization to prevent everyday problems from developing into disputes. In any case, the organization should have some clearly defined role to play, since a situation might arise in which no diplomatic relations existed between the sending State and the host State. Article 50 would, of course, be without prejudice to any of the conciliation commissions established by the Swiss Government to which Mr. Ago had referred.

The meeting rose at 1.5 p.m.

1101st MEETING

Monday, 17 May 1971, at 3.5 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Ramangasoavina, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 3; A/CN.4/L.162/Rev.1)

[Item 1 of the agenda]

(continued)

ARTICLE 50 (Consultations between the sending State, the host State and the Organization) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 50.

2. Mr. YASSEEN said that article 50 was very useful and should be retained, but it should be made clear exactly what its purpose was, because the observations submitted by governments and secretariats of international organizations had gone too far.

3. The essential purpose of the article was to provide a very broad and very flexible procedure for examining the difficulties which might arise in the application of the future convention. The Commission had not intended to establish an organ, institution, court or conciliation commission, but simply to say that, when the host State and the sending State were unable to reach agreement on a disputed issue, the organization could be invited to take part in tripartite consultations with a view to finding a solution.

4. It would be wrong, however, to extend the scope of the article—as one government had proposed—to cover

questions which might arise between the host State and the organization, since it was difficult to see how a sending State could intervene in a matter which concerned only the organization and the host State. The main purpose of article 50 was to smooth out difficulties between the host State and a sending State, and the participation of the organization in the consultations would make them more effective.

5. Some international organizations had questioned even the principle of intervention by the organization. He could not agree with them, since the effective application of a convention providing for the granting of privileges, immunities and facilities to representatives of States to enable them to perform their functions in the organization also concerned the organization itself, which could not, in that connexion, be regarded as a third party in the proper sense of the term; its intervention could only be helpful.

6. Understood in that way, article 50 was in harmony with certain methods which already existed or could be established in the future. Since 1966 there had been in New York a Joint Committee on Host Country Relations; an informal body set up with the agreement of the Secretary-General by various groups of countries represented in the United Nations, it consisted of fifteen representatives of sending States, a representative of the host State and a representative of the Secretary-General. Its task was to examine difficulties relating to the status of permanent missions to the United Nations. It had already settled its procedure, and its work was examined by the Fifth Committee of the General Assembly. Such an arrangement came within the scope of article 50, which might later lead to other arrangements of the same kind, depending on circumstances and requirements. The permanent missions to the international organizations at Geneva were at present trying to set up a similar committee of twenty-seven members, with a representative of the host State and a representative of the Secretary-General, to examine difficulties arising between the permanent missions and the host State. Thus there could be no doubt about the value of article 50, which might encourage action with a view to the satisfactory application of the Convention.

7. Mr. RAMANGASOAVINA said that article 50 was useful. Whenever the Commission had thought about the difficulties of application to which the first forty-nine articles might give rise, it had always agreed that article 50 would provide means of reaching an understanding. But the article certainly raised a number of questions.

8. First, what was its exact scope? The Special Rapporteur said that it provided a flexible procedure for settling day-to-day problems, which depended on the goodwill of the parties and on the organization. The organ responsible for the tripartite consultations would have to solve problems concerning the application of the convention, and, consequently, problems of interpretation; so its task would not be easy.

9. Secondly, how were the consultations to be conducted? Would the three parties have to meet or would

the consultations be conducted in writing—in other words, through the diplomatic channel? In the latter case, would they be conducted through the normal diplomatic channel, that was to say through the diplomatic mission of the sending State in the host State if there was one or, if there was not, through the Ministry of Foreign Affairs? Or would they be conducted in parallel and, if the host State was not recognized by the sending State, or *vice versa*, through the organization? In principle, it would be for the head of the permanent mission to take action, but it would inevitably be necessary to resort to the diplomatic channel if he himself was the person involved.

10. Another question was what rule would be applicable and what would be the competence of the *ad hoc* organ responsible for the consultations. It was not enough to provide for a flexible procedure, for if it was a question of recalling the head of a permanent mission or waiving immunities, for example, it would be necessary to know what rule was applicable. Moreover, since there was no question of arbitration or jurisdiction, the result of the consultations could only be an opinion without binding force for the parties. There again, it was necessary to decide what value should attach to the agreement resulting from the consultations. If the agreement was binding and was executed by the parties, would it have the authority of *res judicata* and would it establish a precedent? If, on the other hand, it was just an agreement based on good faith, it could only have the value of a mere diplomatic arrangement. Moreover, the settlement of differences on matters such as waiver of immunities or protection of the legitimate interests of a national of the host State involved legal elements which did not come into play in a diplomatic *démarche*.

11. Lastly, provision should be made for other means of settlement in the event of the consultations reaching a stalemate.

12. All the questions he had raised would have to be answered. Article 50 was a convenient, but provisional instrument, and its machinery would have to be improved later. Perhaps it would be possible to follow the course adopted with the Vienna Conventions on diplomatic and consular relations, and add to the draft articles a protocol on the compulsory settlement of disputes.

13. Mr. SETTE CÂMARA said he noted that article 50 had been placed provisionally at the end of section 4 of Part II, pending a decision on its final position.¹

14. The article provided a simple and useful device for opening consultations between the sending State, the host State and the organization if a question should arise concerning the application of the articles. Such a provision was necessary because of the absence of any rules such as those in bilateral diplomacy concerning *agrément* and declaration as *persona non grata*.

15. If the Commission decided to include special provisions on the settlement of disputes, however, he had doubts about the role of the organization. First, who

¹ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 221, footnote 44.

would represent the organization in the settlement of disputes? The secretariat would seem to be the most appropriate body, because of its continuity of function, though he questioned whether it would be entitled to appear as a negotiating party on an equal footing with States. The extraordinary powers of the secretariat in that case would seem to emanate from article 3, concerning the relationship between the present articles and the relevant rules of international organizations.³

16. The Government of Switzerland considered such an arrangement unsatisfactory and had proposed an elaborate system consisting of a conciliation commission composed of three members, whose decisions would be taken by majority vote (A/CN.4/239, section C.II). He found that proposal unrealistic, since he did not see how the organization could be permitted to vote on the same footing as States.

17. The International Labour Office (ILO) had expressed the opinion that "it would be very difficult for an organization to play the role of conciliator, perhaps even arbitrator, in connexion with problems not directly related to its own interests, such as respect for exemption from customs duties or the extent and content of immunity from jurisdiction" (*ibid.*, section D.2). The Special Rapporteur had been unable to agree with that contention and had cited the obligations imposed on the organization by article 24 to assist the sending State, its permanent mission and the members of the mission "in securing the enjoyment of the privileges and immunities provided for by the present articles" (A/CN.4/241/Add.3, para. 11 under article 50).

18. He did not oppose the retention of article 50, though he did not think it contributed much towards solving problems which would normally be solved by common sense in the light of everyday practice. If the Commission decided that some stronger text was needed, it would have to resort to specific provisions like those of the Optional Protocols to the Vienna Convention on diplomatic and consular relations and the Conventions on the Law of the Sea.³

19. Mr. CASTRÉN said he agreed with the Special Rapporteur and other members of the Commission that article 50 was useful and that the Commission should not let itself be influenced by the negative attitude of the ILO.

20. The text of the article, which had been drafted after long discussions, could be retained as it stood. It was not necessary to specify what organ of the organization would take part in the consultations: that would depend on the relevant rules of the organization concerned. And at the beginning of the article it was better to mention only questions which might arise between a sending State and the host State, and not to refer to the organization as well, in order to prevent misinterpretation. For if the organization was a party to the dispute, it was self-evident that the consultations would be held, in the first

place between the parties concerned and if no agreement was reached, the matter would be settled by the competent organ of the organization in accordance with its rules.

21. For the settlement of disputes between a sending State and the host State, however, special machinery should be provided. He agreed with other members of the Commission that the provisions of article 50 did not go far enough. The conciliation machinery proposed by the Swiss Government might usefully supplement the conciliation procedure, though it needed further study.

22. Unlike the Special Rapporteur, he could see no harm in the organization's playing, not a decisive role, as the Special Rapporteur put it, but a preponderant role in most cases of conciliation. The organization, in any event, represented the impartial element and had to safeguard the general interest. Nor could he see why a conciliation procedure should involve the prestige of the members of the organization or the host State. The conciliation commission would only be able to make recommendations, which would not be binding on the parties.

23. Moreover, acceptance of the Swiss proposal would not preclude the possibility of embodying in the draft articles a general provision on the settlement of disputes arising from the application or interpretation of all the articles, for example, by recourse to arbitration, which was already provided for in some conventions concerning organizations of a universal character. He did not think that, as had been suggested, the question should be left in abeyance until the plenipotentiary conference which would eventually consider the draft articles. The Commission should make a proposal, or several proposals, forthwith.

24. Mr. ROSENNE said he had the same general attitude of reserve towards article 50 as he had adopted with respect to its predecessor, article 49, in 1969. He saw no reason to assume that the organization would always be a party in the difficulties contemplated in article 50, and the Commission would do well to heed the words of caution spoken by the ILO. On the other hand, he did not think the Commission need concern itself with the question of how or by whom the organization would be represented, since each organization would decide the most appropriate procedure to follow in the circumstances of each case.

25. The problem confronting the Commission was two-fold: first, there was the need for machinery to ensure the smooth application of the articles and, secondly, there was the need for machinery to settle disputes once they had arisen. The Convention on the Privileges and Immunities of the United Nations⁴ and the Headquarters Agreement⁵ dealt with the latter problem, but practice had shown the necessity of including provisions dealing with both.

26. Article 50 was satisfactory as far as it went, but it dealt only with the first aspect of the matter and was

³ *Op. cit.*, 1968, vol. II, p. 197.

³ United Nations, *Treaty Series*, vol. 500, p. 242, vol. 596, p. 488 and vol. 450, p. 170.

⁴ *Op. cit.*, vol. 1, p. 30.

⁵ *Op. cit.*, vol. 11, p. 30.

totally inadequate as a solution of the problem as a whole. The present situation was reminiscent of that which had confronted the international community at the end of the first session of the Vienna Conference on the Law of Treaties with respect to draft article 62.⁶ That article, too, had been found satisfactory up to a point, but had proved inadequate as a solution of the problem as a whole.

27. Ever since 1949, the Commission had regularly considered whether it was necessary to include provisions concerning the settlement of disputes as an integral part of its drafts. In 1953 it had included such provisions in its draft conventions on the elimination and reduction of future statelessness,⁷ and in 1956 it has included them in its draft articles on the conservation of the living resources of the high seas and on the continental shelf.⁸ Similar provisions had been included, in 1958, in its draft articles on diplomatic intercourse and immunities.⁹

28. The "Survey of international law" prepared by the Secretary-General contained a section on dispute settlement provisions in drafts prepared by the Commission, which included the following passage: "The conclusion may be advanced from the above chronology that the Commission has not in general been concerned, when elaborating texts setting out substantive rules and principles, with determining the method of implementation of those rules and principles, or with the procedure to be followed for resolving differences arising from the interpretation and application of the substantive provisions—with one exception. That exception arises when the procedure is seen as inextricably entwined with, or as logically arising from, the substantive rules and principles, or, in the Commission's words, 'as an integral part' of the codified law."¹⁰ That was the problem which faced the Commission today. He could only conclude that what was needed was something like paragraph 2 of the Special Rapporteur's original article 49¹¹ or the amendment proposed by Mr. Tammes in 1969, which had read: "If such consultations fail to achieve a result satisfactory to the parties concerned, the matter shall be submitted to an impartial procedure which shall be established within the Organization."¹²

29. It was necessary to provide for the situation that would arise if the first phase of the negotiations ended in a deadlock, which might happen, for example, if the sending State proved unwilling to recall a member of its permanent mission, as it could be required to do under article 45. The Drafting Committee's suggestion, at the

1027th meeting, of a reference to articles 3, 4 and 5 was not a sufficient answer. He did not think that that was a matter which the Commission could leave entirely to the future diplomatic conference. He therefore proposed that the Drafting Committee be asked to complete article 50 and to produce a text which might be based on the annex to the Vienna Convention on the Law of Treaties.

30. Mr. ELIAS said that opinion in the Commission seemed to be divided between those who considered article 50 unnecessary because it dealt with something which was already obvious, and those who thought that it was not strong enough. The Government of Switzerland had proposed the establishment of a conciliation commission composed of one representative of the organization, one representative of the sending State and one representative of the host State. Some speakers, however, had said that such an arrangement was bound to lead to difficulties because it gave undue importance to the role of the organization.

31. The Special Rapporteur wished to keep article 50 unchanged, although in paragraph 16 of his observations on it (A/CN.4/241/Add.3) he had considered the possibility that the Commission might ask him to prepare an article on the settlement of disputes. He suggested that the Commission invite the Special Rapporteur to prepare such a text for its consideration. In the meantime, the Commission should keep article 50 in abeyance and proceed to consider articles 51 to 116. After it had considered the whole draft, including the articles relating to permanent observer missions and to delegations to organs and conferences, it would be in a better position to decide on some appropriate machinery for the settlement of disputes.

32. Mr. USHAKOV said that at its twenty-first session the Commission had decided to make the scope of article 50 general, so that it should also apply to the parts of the draft relating to permanent observer missions and to delegations to organs or conferences. Hence it was not quite correct to consider the article purely from the standpoint of permanent missions to international organizations. For while the principle embodied in it was applicable to permanent observer missions and to delegations to organs, it was not applicable to delegations to conferences—even conferences convened by an international organization or under its auspices—since once it had been convened, a conference was a sovereign body. Moreover, since article 50 was to be applicable to the whole of the draft, the Commission might perhaps be better advised to wait until it had examined the whole draft before considering that article.

33. Those considerations apart, article 50 as such raised a whole range of questions which it would be difficult for the Commission to settle or even to consider without the participation of the organization concerned—for example, the appointment of the organization's representative in the consultations and the procedure to be followed in the consultations, both in cases where the sending State had diplomatic representation in the host State and in cases where it had not—all of them questions which went beyond the scope of the draft articles and

⁶ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 81 (United Nations publication, Sales No.: E.70.V.5).

⁷ See *Yearbook of the International Law Commission, 1953*, vol. II, p. 227, article 10.

⁸ *Op. cit.*, 1956, vol. II, p. 263, articles 57 to 59, and p. 264, article 73.

⁹ *Op. cit.*, 1958, vol. II, p. 105, article 45.

¹⁰ A/CN.4/245, para. 144.

¹¹ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 20.

¹² *Op. cit.*, 1969, vol. I, p. 195, para. 7.

even beyond the competence of the plenipotentiary conference.

34. On the other hand, article 50 also raised questions which could and should be settled by the Commission, if only in the commentary. It had been asked whether it should not be provided that article 50 prevailed over any procedure which might already exist between the host State and the sending State, such as that of a conciliation commission. But that question did not arise, because, as the article provided, consultations were held only upon the request of the host State, the sending State or the organization itself, and if States preferred to resort to some other procedure they would not request that consultations be held.

35. It had also been asked which organization would be represented at the consultations if a permanent mission was accredited to several organizations. The answer might be that the question would probably be settled in practice by the agreements on simultaneous representation concluded between organizations having their headquarters in the same city, but the Commission ought at least to show that it had considered the question.

36. Another question which should be considered was who would represent the sending States in the tripartite consultations when a dispute concerned all the States members of an organization. That was perhaps the most important of the situations that could arise, and the Commission should consider it, no less than the other questions he had raised, if only to give the Drafting Committee a basis for discussion.

37. At the previous meeting, Mr. Kearney had asked who would decide questions of the interpretation and application of the articles. That was a general question which applied to all international instruments, not merely those prepared by the Commission. In international law there was not, as there was in internal law, any tribunal responsible for regulating relations between subjects of law. It was States themselves which decided, by agreement, on the interpretation and application of international rules. To provide for a special tribunal vested with powers of final decision would be tantamount to setting up a world government or a world supreme court.

38. Mr. CASTAÑEDA said that there was no justification for the doubts expressed by the ILO (A/CN.4/239, section D.2). In particular, it was quite inappropriate to refer to article 50 as imposing on organizations "the obligation to provide for the diplomatic protection, as it were, of the sending State". It was equally inaccurate to speak of the organization as playing "the role of conciliator, perhaps even arbitrator", in connexion with problems involving the sending State and the host State. Those problems were of direct concern to the organization and it was therefore appropriate that it should play a part in overcoming the difficulties involved.

39. As to the machinery for the settlement of disputes, the conciliation commission proposed by the Swiss Government was really an arbitral tribunal, since it would have the power to take decisions by a majority vote. Moreover, since the two members of the commis-

sion who represented the sending State and the host State were bound to differ, the Secretary-General of the organization would find himself in the invidious position of acting as umpire. His position would be particularly unfortunate if the host State and the sending State were great Powers, in the relations between which the Secretary-General was called upon to perform delicate functions connected with the maintenance of world peace and security.

40. It should be recognized that the type of dispute under consideration was not suitable for settlement by adjudication or compulsory arbitration. It was true that the Commission had included provisions for the compulsory settlement of disputes in many of its drafts, but the conferences of plenipotentiaries had usually decided not to include them in the codification conventions. They had usually made compulsory jurisdiction or arbitration the subject of a separate optional protocol. Only in two exceptional cases had such provisions been included in a codification convention itself, and those exceptions could be easily explained.

41. The first exception was the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, articles 9 to 11 of which made provision for the compulsory settlement of disputes by a special commission.¹³ The First United Nations Conference on the Law of the Sea had adopted that system because in that particular Convention it had created, for the benefit of the coastal State, a unilateral right which did not previously exist in international law. No similar provision had been included in the other three Conventions on the Law of the Sea, the compulsory settlement of disputes being provided for in an Optional Protocol.¹⁴

42. The other exception was article 66 of the 1969 Vienna Convention on the Law of Treaties and the annex to that Convention.¹⁵ Article 66 provided for the jurisdiction of the International Court of Justice in disputes concerning the application or the interpretation of article 53 or 64 of the Convention, in other words, the provisions on *ius cogens*. It further laid down that the conciliation procedure specified in the annex to the Convention was applicable to disputes concerning the application or the interpretation of any of the other articles in Part V of the Convention, dealing with invalidity, termination and suspension of the operation of treaties.

43. The present case was totally different from those two exceptional situations. The question of the settlement of disputes was not in any way bound up with the substantive rules on permanent missions. Those rules had been applied for twenty-five years without any need for a procedure for the compulsory settlement of disputes. In fact, the realistic and practical system of consultations proposed by the Special Rapporteur in article 50 constituted no more than the codification of the flexible

¹³ United Nations, *Treaty Series*, vol. 559, p. 292.

¹⁴ *Op. cit.*, vol. 450, p. 170.

¹⁵ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, pp. 298 and 301 (United Nations publication, Sales No.: E.70.V.5).

system which had been used in practice to overcome difficulties in the application of the substantive rules applicable to permanent missions.

44. Mr. ALCÍVAR said he could not agree with the suggestion by the ILO that the differences which might arise between the host State and the sending State regarding the privileges and immunities of permanent missions touched "solely on the relations between two States" and had "nothing to do with the organizations". In fact, there were no direct relations between the host State and the sending State; relations between them existed only through the organization.

45. It was the duty of the organization to maintain the privileges and immunities of permanent representatives of permanent missions. For that purpose, consultations on the lines indicated in article 50 were constantly taking place. The informal committee mentioned by Mr. Yassen had had to deal with a great many cases, particularly cases connected with the City of New York. Of course, the question arose what would happen if the consultations ended in a deadlock. In that connexion, he did not favour the Swiss proposal for what was in effect an arbitral tribunal, because it impinged on matters connected with the application of Chapter VI of the United Nations Charter. The Swiss Government even went so far as to mention the International Court of Justice. It was worth noting that the international community had not received proposals for compulsory adjudication favourably and had, in particular, rejected an attempt to include a provision on the compulsory jurisdiction of the International Court of Justice in the 1969 Convention on Special Missions.

46. He had some doubts about the provisions of article 50, which were of a general character. In particular, the question of conferences would have to be considered very carefully; a conference could sometimes be regarded as an organ of the organization which had convened it, but it was sometimes a separate entity or organization.

47. Another question arising out of article 50 which required careful consideration was that raised by Mr. Ago concerning the case in which the host State and the sending State had an arbitration treaty in force between them.¹⁶ The two States could, of course, agree to apply that treaty to a dispute arising between them in their capacities of host State and sending State; but he was not at all sure whether one of them could invoke the arbitration treaty against the other in respect of such a dispute.

48. Mr. CASTRÉN said that in his view the Swiss Government's proposal was definitely to establish a conciliation procedure, not an arbitration procedure. That was clear both from the use of the word "conciliation" and from the text of paragraph 5, which read: "The Commission shall take its decisions by majority vote; it may make recommendations to the parties" (A/CN.4/239, section C.II). The Commission could at most make recommendations based on decisions. But the substance

of those decisions could not have binding force for the parties.

49. Sir Humphrey WALDOCK said that article 50 was intended only as a modest contribution to the resolution of certain difficulties, not as a procedure for the settlement of international disputes. It recognized that procedures of consultation were followed in many organizations as a means of ironing out differences between a sending State and the host State. It established as a principle that if, in the case of such a difference, the good offices of the secretariat or any other appropriate organ were invoked, that act could not be complained of and still less treated as an unfriendly act.

50. Of course, where a difficulty resulted from serious differences between States, the consultations provided for in article 50 might prove inconclusive. In that event, the resources of diplomacy were infinite. There was, for example, the possibility of good offices by other States, or of raising the question in the organization. He himself favoured third party settlement, which did not, however, necessarily mean judicial settlement.

51. In any case, he fully subscribed to the view expressed by Mr. Ago that article 50 did not exclude other forms of settlement by which the two States concerned might otherwise be bound. It would be most unfortunate if any other interpretation were to be placed on the provisions of the article. Its purpose was merely to state that, in principle, it was desirable that difficulties of the kind envisaged should be settled within the organization by means of consultations. It should also be remembered that some of the points in dispute might be potentially of interest to all States members of the organization. Even so, means of settlement which existed for the disputing States other than that provided in article 50 should not be ruled out, as the settlement of international disputes was something always to be promoted.

52. The precise formulation of article 50 and the precise scope of its operation were matters which should be examined more closely towards the end of the work on the whole draft. Perhaps the Drafting Committee would not wish to settle the text of article 50 until it had examined all the draft articles. In particular, the question of conferences would have to be carefully considered; in some cases, the secretariat of a conference was that of the organization which had convened it, but in others the conference had a secretariat of its own.

53. The case of a problem arising between a sending State and the host State to a number of organizations would also have to be examined. No formula had so far been suggested to deal with that case, which could involve several organizations in a single dispute.

54. On the whole, the provisions of article 50 seemed appropriate for dealing with the problems under consideration, without prejudice to the possibility of including in the draft further provisions to deal with those problems in the event of a deadlock in the consultation. In any event, the role of the secretariat under article 50 would only be helping in the negotiations, giving explanations and making suggestions. In its observations, the

¹⁶ See previous meeting, para. 67.

ILO appeared to underestimate the prudence of the secretariats of international organizations.

55. Mr. KEARNEY said that, in considering the question of the settlement of disputes, the Commission was not working in a vacuum. The Headquarters Agreement of the United Nations provided for arbitration of disputes and reference to the International Court of Justice,¹⁷ while the 1946 Convention on the Privileges and Immunities of the United Nations provided for the jurisdiction of the International Court of Justice.¹⁸ Since some existing conventions already contained provisions on arbitration and adjudication, the Commission would have to take a position on the question.

56. A final decision on article 50 should be postponed until the Commission had completed its work on the remainder of the draft articles, but he would suggest that the Commission invite the Special Rapporteur to prepare a clause on the settlement of disputes so as to have before it a concrete proposal on which it could work.

57. The CHAIRMAN suggested that the Commission should turn to item 7 of its agenda and resume consideration of article 50 at the next meeting.

It was so agreed.

Review of the Commission's long-term programme of work

(A/CN.4/245)

[Item 7 of the agenda]

58. The CHAIRMAN invited the Secretary to the Commission to make a statement on the Secretariat Working Paper entitled "Survey of international law" (A/CN.4/245), the original English version of which had just been distributed.

59. Mr. MOVCHAN (Secretary to the Commission) said that, since reference had been made earlier in the meeting to the Secretary-General's "Survey of international law", he wished to explain that it was a working paper prepared by the Codification Division in response to a request made by the Commission at its previous session in connexion with its expressed intention of "bringing up to date in 1971 its long-term programme of work".¹⁹ That intention had been approved by the General Assembly in operative paragraph 3 of its resolution 2634 (XXV) of 12 November 1970.

60. It was worth noting that the present Survey was only the second of its kind in the history of the Commission and indeed of the United Nations. The first had been prepared in 1948 and was entitled "Survey of International Law in relation to the work of Codification of the International Law Commission".²⁰ There were,

however, significant points of difference between the two surveys. In the first place—and without going into other features already explained in detail in the preface and introduction to the present Survey—it should be noted that the 1948 Survey had been written before the Commission had begun its work, in order to facilitate the commencement of that work. The Survey now submitted, after twenty-two years of the Commission's activities and experience, reflected the Commission's work and, more generally, the progress made since 1948, mainly within the framework of the United Nations, with the progressive development of international law and its codification, and the considerable changes which had occurred in the international community during the intervening period.

61. During that period, States had increasingly come to recognize the need to encourage the progressive development of international law and its codification, and had acknowledged more and more widely the importance of the work of the Commission and of the General Assembly in that field. Many factors were involved. First and foremost, States had understood the basic connexion between the maintenance of international peace and security and the development of international law. Then, the interdependence of States had increased in recent years. Scientific and economic progress had also played their part. Finally, a great number of new States had gained independence and the membership of the United Nations had more than doubled since the signature of the Charter at San Francisco in 1945.

62. All those factors had complicated the work of the Commission, as the United Nations body mainly concerned with the codification of international law as a whole. Similarly, the task of the Secretariat in preparing the present Survey had been more difficult than in 1948; one reason was that many other United Nations bodies were now concerned with the development of specific branches of international law.

63. Another important difference between the two surveys was that, in the preparation of the 1948 Survey, the Secretariat had had the assistance of an outside expert, Professor, later Sir Hersch, Lauterpacht. The present Survey, however, had been prepared exclusively by the Codification Division, whose members had done their best to provide a useful working instrument, bearing in mind the importance of the Commission's task and its practical purpose.

64. Lastly, he wished to assure the members of the Commission that the French, Russian and Spanish versions of the Survey were already in process of preparation, though because of the pressure of work on the translation services they would not be ready until the end, or at the earliest the middle, of June.

65. The Legal Counsel was very much interested in attending the Commission's debate on the review of its long-term programme of work, but would not be able to come to Geneva until the first half of July. The last month of the present session might thus perhaps be the most appropriate time for consideration of that item by the Commission.

¹⁷ United Nations, *Treaty Series*, vol. 11, p. 30, section 21.

¹⁸ *Op. cit.*, vol. 1, p. 30, section 30.

¹⁹ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, para. 87.

²⁰ Reissued in 1949 as document A/CN.4/1/Rev.1 (United Nations publication, Sales No.: 48.V.I(1)).

66. Mr. ROSENNE, after thanking the Secretary for his introductory statement, said that the review of the long-term programme of work was one of the most important tasks now facing the Commission, since it involved the planning of the Commission's work for the next twenty-five years. He was therefore very much concerned that only the English version of the Survey should be available at present and that the French, Russian and Spanish versions should not be expected to be distributed until only a few days before the arrival of the Legal Counsel in Geneva. Perhaps the Chairman could bring his influence to bear on the appropriate authorities to ensure that the other language versions of the Survey should reach members in good time before the Commission took up item 7 of its agenda.

The meeting rose at 6 p.m.

1102nd MEETING

Tuesday, 18 May 1971, at 10.5 a.m.

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 4; A/CN.4/L.162/Rev.1; A/CN.4/L.166)

[Item 1 of the agenda]

(resumed from the previous meeting)

ARTICLE 50 (Consultations between the sending State, the host State and the Organization) *(resumed from the previous meeting)*

1. The CHAIRMAN invited the Commission to resume consideration of article 50, on consultations between the sending State, the host State and the Organization.
2. Mr. AGO said he noted that members were generally agreed that article 50 should be placed later in the draft, and that the wording should be reviewed when all the articles had been considered.
3. The machinery proposed was very modest; it was not even conciliation machinery, since only consultations were provided for. Although the article represented a

step forward in comparison with the 1961 Vienna Convention on Diplomatic Relations, which contained no such provision, it should not be forgotten that in case of difficulties in the application of the rules governing bilateral diplomatic relations, consultations between the sending State and the receiving State took place without any need for special provisions on the subject. On the other hand, an express provision was needed in the present case to bring the organization itself to join the sending State and the host State in consultations concerning a difficulty between those two States.

4. The machinery proposed could raise a number of delicate problems, if only in regard to its relationship with the procedures already existing between the host State and the sending State for the settlement of their disputes. It seemed to be generally accepted that existing procedures should take precedence over the provisions of article 50, but it should be made clear that a State could not frustrate the special procedure established for its relations with another State by recourse to article 50. Although it might be thought that that was self-evident, it should be mentioned in the commentary to the article.

5. Some difficulties might arise in the operation of the machinery where there were several international organizations in the same city. As Mr. Yasseen had suggested, the organizations might agree to set up a kind of joint committee,¹ which would not only enable them to select their representatives, but would also prevent the adoption of different positions.

6. As Mr. Ushakov had pointed out, it was rare for a dispute to arise between the host State and one sending State. The host State might become involved in a dispute with several, or all the sending States; or again, when a difference arose between the host State and one sending State, another sending State might become interested in the settlement of the dispute and wish to intervene in the procedure. There might be some kind of body for co-operation between permanent missions, which could inform the host State of the point of view of all the sending States and which would be the counterpart, as it were, to the diplomatic corps in bilateral diplomacy.

7. Difficulties might also arise in the absence of diplomatic relations between the host State and the sending State. That exceptional situation should not, of course, prevent consultations, but it was not certain that they would always be possible in practice.

8. Other questions relating to the operation of the proposed machinery might arise during the consideration of subsequent articles, so the Drafting Committee should leave article 50 aside for the time being.

9. Mr. USTOR said that, like other members, he approved of the substantive rules in article 50, which codified existing practice. The Drafting Committee might try to formulate wording to deal with the cases mentioned by Mr. Ago, but it might reach the conclusion that it was not possible to cover all situations and therefore leave the text as it stood. It should be remembered that

¹ See previous meeting, para. 6.

the Commission was endeavouring to legislate for a great variety of organizations ranging from the United Nations itself to entities like the International Bureau of Weights and Measures in Paris, which had a much more modest structure.

10. He did not think it would be advisable for the Commission to undertake the formulation of an article, or a series of articles, on compulsory third party settlement of disputes. The precedents showed that such an undertaking had not previously yielded positive results, for States had proved unwilling to include compulsory settlement clauses in general multilateral treaties. Articles 65 and 66 of the 1969 Vienna Convention on the Law of Treaties² were a special case warranted by the particular circumstances of the adoption of the Convention.

11. At the previous meeting, Mr. Kearney had drawn attention to the clauses on the settlement of disputes included in the United Nations Headquarters Agreement and in the 1946 Convention on the Privileges and Immunities of the United Nations,³ but article 50 would not replace those arrangements. Articles 3 and 4 of the draft⁴ would ensure the survival of the clauses.

12. Mr. EUSTATHIADES said that in itself article 50 did not raise any fundamental problems which would call for extensive redrafting, but there were some points which needed to be covered in greater detail. For example, the possibility of a dispute between several sending States should be covered by redrafting the beginning of the article to read: "If any question arises between one or more sending States and the host State...". It was not enough just to mention that possibility in the commentary.

13. The essential point was to define the relationships between article 50 and other existing modes of settlement, or modes of settlement which might be established under articles 4 and 5 or provided for in the draft convention. The proposed machinery was modest, but that was no reason for abandoning it. Its merit was that it enabled the organization to play a role, which was not necessarily that of umpire.

14. The consultations provided for in article 50 might be supplemented by conciliation or arbitration procedure, also to be provided for in the draft. He agreed with Mr. Kearney and Mr. Elias that the Commission could resume consideration of the question when it had an over-all view of the draft and knew how article 50 would be related to a possible article 50 *bis* on the settlement of disputes. In any case, those two articles should not radically change the relations between the host State and the sending State under a bilateral agreement concerning a mode of settlement; but it remained to be seen whether they might not give rise to difficulties, in particular

because article 50 accorded a special place to the organization, which also had an undeniable interest in the settlement.

15. There were other questions which would have to be studied later, such as the intervention of third States in the conciliation procedure and the need to adapt article 50 to each of the three parts of the draft. As to the organ responsible for representing the organization in the consultations, it seemed that it would generally be the secretariat, though Mr. Yasseen had mentioned a case, which might recur, in which a committee had been set up.

16. The principle of consultations should therefore be retained, subject to certain adaptations, but the Commission should clarify its relationship with other modes of settlement which, as Sir Humphrey Waldock had observed, were not excluded by article 50,⁵ that article being in itself a step in the right direction. The Commission should not take a final decision, however, until it had before it a draft text on the settlement of disputes.

17. The CHAIRMAN suggested that article 50 be referred to the Drafting Committee with the intimation that the Commission was almost unanimously in favour of retaining it, but that other related questions might arise during the consideration of subsequent articles. The Drafting Committee could then defer consideration of the article. If there were no objections, he would take it that the Commission agreed to that suggestion.

*It was so agreed.**

18. The CHAIRMAN said he noted that opinion in the Commission regarding other methods of settling disputes was not unanimous. As no specific proposal had been made on legal rather than practical modes of settlement, he suggested that the Special Rapporteur be asked to prepare a draft "provision concerning the settlement of disputes which might arise from the application of the articles", as envisaged by the Commission in its commentary to article 50.⁷

19. Mr. USHAKOV said he was not opposed to that suggestion, but he wondered whether the Commission was not taking a difficult course. He thought it would be wiser to ask the Special Rapporteur to draft a simple working paper which would make it easier to tackle the problem and to engage in informal consultations.

20. Mr. ELIAS said that he saw no reason why the Special Rapporteur should not be asked to prepare a working paper on the subject including a draft article, on the model of his working paper on the possible effects of exceptional situations (A/CN.4/L.166).

21. The CHAIRMAN said that the Special Rapporteur would be requested to prepare such a working paper.

² *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 298 (United Nations publication, Sales No.: E.70.V.5).

³ See previous meeting, para. 55.

⁴ See *Yearbook of the International Law Commission, 1968*, vol. II, pp. 197 and 198.

⁵ See previous meeting, para. 51.

⁶ For resumption of the discussion see 1115th meeting, para. 59.

⁷ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 222, para. 5.

PART III. *Permanent observer missions to international organizations*

ARTICLE 52

22. He invited the Commission to consider Part III of the draft, on permanent observer missions to international organizations, starting with article 52, on the establishment of permanent observer missions. Article 51, on the use of terms, would be examined at the end, but members would be free to refer, during the discussion, to any relevant definitions, such as that of a "permanent observer mission" in sub-paragraph (a).

23.

Article 52

Establishment of permanent observer missions

Non-member States may, in accordance with the rules or practice of the Organization, establish permanent observer missions for the performance of the functions set forth in article 53.

24. Mr. YASSEEN said that the article proposed constituted a happy medium between the extremist positions taken by certain governments and international organizations in their observations. It recognized the right to establish permanent observer missions, provided that their establishment was in accordance with the rules or practice of the organization. That condition was both necessary and sufficient. It was necessary because, once the permanent observer mission had been established, the organization would have to recognize it; otherwise, there would be no link between them. It was sufficient because, since there was no rule of *jus cogens* compelling an organization to agree to the establishment of permanent observer missions, the matter must be left to the rules or practice of the organization. If the article laid down conditions other than compliance with the rules or practice of the organization, it would be departing from reality.

25. One government, in its observations (A/CN.4/240 and addenda), had indeed taken the view that the establishment of a permanent observer mission should be subject to the "agreement" of the organization, which would be superfluous where such agreement was not required by the rules or practice of the organization. It had also been proposed that the agreement of the host State should be required. He was strongly opposed to that idea, for if a State agreed to have an international organization on its territory it must respect the rules and practice of the organization; it could not be given a kind of veto.

26. Mr. ELIAS suggested that it might be appropriate if, before examining the individual articles one by one, the Commission were to discuss the general philosophy of articles 51 to 77. Agreement on the underlying assumptions concerning the whole of Part III would be of assistance to the Commission in its consideration of individual articles.

27. In particular, it would be useful for the Commission to decide whether it wished to place permanent observer missions on a par with permanent missions. If it did, the articles on permanent missions could be taken as a basis for those on permanent observer missions; if it did not, it should consider to what extent it wished to curtail

the privileges and immunities to be granted to permanent observers and members of permanent observer missions.

28. However, if members preferred to begin work on Part III with the consideration of the individual articles he would have no objection to that course.

29. The CHAIRMAN invited the Commission to proceed with its consideration of Part III, article by article, bearing in mind the important point mentioned by Mr. Elias.

30. Mr. CASTRÉN said he understood Mr. Elias to be in favour of a preliminary general debate on the principles governing Part III of the draft. In 1970, the Commission had considered whether permanent observer missions should be assimilated in certain respects to permanent missions and had decided, by a substantial majority, that they should be.⁸ The Sixth Committee had reached the same conclusion, but some governments had taken the opposite view. That being so, he thought the Commission should now proceed to consider Part III article by article.

31. Mr. TAMMES said he would confine himself to article 52 at present, and would put forward his general comments during the discussion of other articles in Part III.

32. He proposed that article 52 be amended by replacing the words "in accordance with the rules or practice of the Organization" by the words "in so far as this is provided for in the relevant rules of the Organization". A similar change of language had been proposed for article 6 (Establishment of permanent missions), but the Commission had considered the formula unduly rigid in the light of the practice of the organizations. The comments by the organizations themselves showed that their practice with regard to permanent observer missions was very diverse and ranged from non-existence to a selective approach. His proposed amendment would have the advantage of meeting certain objections which had been made to the present text of article 52.

33. First, it would remove the objection that certain organizations, such as the ILO, IAEA, UPU and ITU, had no rules on the subject of permanent observer missions and that it would consequently be ambiguous to say that permanent observer missions could be established "in accordance with the rules . . . of the Organization". The formula "in so far as this is provided for in the relevant rules of the Organization" covered that situation, because it could be interpreted to mean that such missions might be established if there was nothing to the contrary in the rules of the organization concerned.

34. The second advantage was that it would introduce the element of the consent of the organization, in response to a desire expressed both in the Commission and in the comments of delegations in the Sixth Committee and of governments in their written observations. The present text, which allowed the establishment of permanent observer missions "in accordance with the rules or practice of the Organization", could raise constitu-

⁸ Op. cit., 1970, vol. II, document A/8010/Rev.1, para. 19.

tional problems for the organizations, which an instrument external to the organization should avoid by all possible means.

35. A third advantage of his proposed amendment was that if an organization had a rule providing for the establishment of permanent observer missions, the consent of the host State would be assured, since the host State, as a member of the organization, would have agreed to the rule in question. On the other hand, if no such rule existed, a host State could not be held to be committed to admitting a permanent observer mission into its territory. He did not wish to over-emphasize the problem of the consent of the host State, but he thought it could be solved by a positive reference in article 52 to the rules in force in the organization.

36. Mr. USHAKOV said that the observations of governments and international organizations showed that two problems caused them concern.

37. First, some of them wondered whether any non-member State could impose its permanent observer mission on an organization. The same concern had been expressed in the Commission itself, and had led to the addition of the words "in accordance with the rules or practice of the Organization". He personally had always thought that a State could not establish a permanent observer mission against the wishes of an organization. But in view of article 3 of the draft, the proviso "in accordance with the rules or practice of the Organization" seemed to be superfluous. Moreover the Commission had specified in its commentary to article 3 that the term "relevant rules of the Organization" covered the practice prevailing in the organization.⁹

38. Secondly, some members of the Sixth Committee and a few governments had expressed the view that the present wording of article 52 opened the way for discrimination between States, and that it should be made absolutely clear that the rules or practice applied in an organization must not be tainted with any kind of discrimination whatsoever. Those comments should normally lead the Commission to insert the words "and without any discrimination" after the word "Organization".

39. However, he thought it would be enough to delete the phrase "in accordance with the rules or practice of the Organization", thereby bringing article 52 into line with article 6, on the establishment of permanent missions.

40. Mr. KEARNEY said that his views on the present series of articles remained the same as those he had expressed at the previous session.¹⁰ He thought the Commission had adopted a number of false premises with respect to the character of permanent observer missions by referring to their representative capacity and equating them in that respect with permanent missions, which, in turn, it had already equated with diplomatic missions. The result, in his opinion, was an over-elaborate series of

articles on permanent observer missions, which was in need of drastic pruning.

41. With regard to article 52, he could not agree with Mr. Yasseen that the host State had no real interest in the establishment of permanent observer missions. On the contrary, it was really necessary for the host State to know whether an alleged permanent observer mission was what it purported to be and whether the organization had accepted it as such. Only when it had an answer to those questions could the host State know whether it was obliged to grant privileges and immunities to the permanent observer mission.

42. Mr. Tammes had analysed the ambiguity in article 52 very clearly. The difficulty in that article was due to the fact that the words "in accordance with the rules or practice of the Organization" left it completely unclear whether a permanent observer mission could be established or not. "Practice" in many organizations was decidedly limited; on what basis, then, could they decide whether a permanent observer mission should be admitted? The Commission should try to tighten up the present language of article 52 and establish some test to determine whether or not a permanent observer mission was legitimately established. In any case, that question was one which should be decided by the organization and not by the host State.

43. The Government of Switzerland had proposed that the words "in accordance with the rules or practice of the Organization" be replaced by the words "with the agreement of the Organization and in accordance with its rules or practice" (A/CN.4/240, section C). That amendment would certainly eliminate the ambiguity and make it clear that the permanent observer mission had, in fact, been accepted by the organization. It was a thoroughly reasonable proposal and one that would meet the concern expressed by a number of States and organizations.

44. The amendment proposed by Mr. Tammes was not, in his opinion, as clear as the Swiss proposal, but he suggested that both be referred to the Drafting Committee for further consideration.

45. Mr. USTOR said he had already proposed, earlier in the session, that the articles on permanent missions and those on permanent observer missions should be amalgamated.¹¹ If article 6 on the establishment of permanent missions was compared with article 52 on the establishment of permanent observer missions, it could be seen at once that there was a striking discrepancy between them. Article 6 merely stated that "Member States may establish permanent missions to the Organization for the performance of the functions set forth in article 7 of the present articles", whereas article 52 included a reference to the "rules or practice of the Organization". For purely logical reasons it would seem undesirable that the future convention should contain such different drafting as was to be found in articles 6 and 52.

46. He therefore proposed that the phrase "in accordance with the rules or practice of the Organization", in

⁹ Op. cit., 1968, vol. II, p. 198, para. 5.

¹⁰ Op. cit., 1970, vol. I, p. 46, para. 7 *et seq.*

¹¹ See 1089th meeting, para. 25.

article 52, be deleted. Alternatively, he would have no objection if the Drafting Committee decided to accept Mr. Ushakov's proposal and include a clause on non-discrimination, a principle which was undeniably a cornerstone of contemporary international law.

47. Mr. BARTOŠ said that the rules governing the establishment of permanent observer missions by non-member States should be based on two principles: universality and justification of participation in the organization's work. If it was accepted that international organizations were of a universal character and if the organization with which a non-member State wished to establish an observer mission was in fact universal, there was nothing to prevent that State from doing so. But if the organization was not open to all States, the position would be different, depending on whether the reasons for limitation were objective or subjective.

48. If the limitations on membership were objective, the question arose whether States which did not meet the requirements for membership of the organization were qualified to send a permanent observer mission to it. The principle of universality could be limited in that respect either by the technical or by the confidential nature of the organization's work. For instance, the only States which could become members of the Inter-governmental Maritime Consultative Organization were those directly concerned with maritime shipping, and there seemed no good reason why non-qualified States should be associated with their deliberations; and a great deal of the work of financial institutions such as the International Bank and the International Monetary Fund was not public and was sometimes confidential even with respect to some of their member States, as in the case of experts' reports on applications for loans, which were not communicated to the applicant State.

49. The Commission should therefore consider two questions: should the establishment of permanent observer missions be authorized and, if so, on what conditions? The Special Rapporteur had answered the first question in the affirmative and the second by proposing that the criteria should be the rules or practice of the organization.

50. He himself thought it dangerous to leave the conditions limiting the right to establish a permanent observer mission quite vague and simply rely on the rules or practice of the organization—a convenient formulation which satisfied the conscience of jurists and allowed them to accept anything subject to that reservation. The rules and practice of an organization might be very arbitrary and vary from one organization to another, whereas what the Commission wished to clear up, and must clear up, in article 52, was the question whether non-member States could or could not establish permanent observer missions.

51. If article 52 was concerned with the procedure for establishing permanent observer missions, it was right to take the rules or practice of the organization as the criteria. But if it was concerned with the principle of establishing such missions, should the Commission allow that principle to be governed by rules which might con-

flict with the principle of universality? If the principle of universality was accepted, it must be applied as fully to the requirements for becoming a member as to those for becoming an observer.

52. On the other hand, if the principle of universality was discarded on the strength of the purposes of the organization, the question arose how far a non-member State could successfully plead its interest in the organization's work and whether, in order to establish an observer mission, it must satisfy the same requirements as member States. It was sometimes difficult for a State to prove that its interest was well-founded, and some organizations or organs—the International Narcotics Control Board, for example—were reluctant to allow third States which did not satisfy the conditions for membership to attend their deliberations. The Commission had not gone far enough into the question of the conflict between the principle of universality and the principle of the functional nature of organizations.

53. He was not criticizing the wording of article 52, but he wondered whether the phrase "in accordance with the rules or practice of the Organization" meant that non-member States could establish permanent observer missions if the organization permitted them to do so, or that it was for the organization to lay down the conditions governing the establishment of permanent observer missions. Again, according to article 53 one of the functions of a permanent observer mission was "ascertaining activities... in the Organization and reporting thereon to the Government of the sending State". Depending on the organization, was the mission to report only on its non-confidential activities or on all its activities? The Commission had overlooked that point because it believed that international organizations should be of a universal character and that their proceedings should be made public, but members of the Commission were well aware that the real situation was quite different and that it was necessary to distinguish between organizations.

54. Those were a few points which the Commission should consider before it approved article 52.

55. Mr. CASTRÉN said that article 52 should be retained as it stood. At first reading, several members had been dissatisfied with the text then proposed by the Special Rapporteur, according to which any non-member State could establish a permanent observer mission unconditionally, and after long discussion the Drafting Committee had settled on the present text, which the Special Rapporteur was recommending to the Commission for approval.¹² That text established an acceptable balance, and it would be unwise to try to amend it now, except possibly the drafting. Several governments and organizations had proposed drastic changes, but it could easily be seen that many of them conflicted with each other, so it would hardly be possible to find wording that satisfied everyone. On the other hand, the present text might satisfy a majority.

¹² See *Yearbook of the International Law Commission, 1970*, vol. I, pp. 9 *et seq.*, 22 *et seq.*, 104 and 105.

56. The Drafting Committee should consider carefully the amendment proposed by Mr. Tammes, which was more precise than the phrase it was to replace, and unlike that phrase, did not refer to the procedure for establishing permanent observer missions.

57. Mr. Ushakov had suggested that there might perhaps be no need to include the phrase "in accordance with the rules or practice of the Organization", since article 3 already provided that the application of the articles was "without prejudice to any relevant rules of the Organization". The Commission had not yet considered article 3 at second reading, however, and it had already been proposed that what was said in the commentary about the relevant rules of the organization should be transferred to the text of the article and that the organization's practice should also be mentioned there.

58. He did not think it necessary to refer to non-discrimination in article 52, as Mr. Ushakov and Mr. Ustor had requested, since the point was already covered by article 75.

59. Mr. ROSENNE said that on the whole he agreed with the Special Rapporteur's comments on article 52 (A/CN.4/241/Add.4), subject to its re-examination by the Drafting Committee.

60. He suggested, however, that the Drafting Committee consider carefully the interrelationship between article 7 (a), article 51 (a) and article 53. Article 7 (a) stated that the functions of a permanent mission consisted *inter alia* in representing the sending State "in" the organization. Article 51 (a) used the words "to an international organization", while article 53 referred to the permanent observer mission as representing the sending State "at" the organization. The exact distinction between those different prepositions should be made clear.

61. Mr. ALCÍVAR said he was concerned about the possibility of violation of the principle of universality. The functions of permanent observer missions were wider in scope than those of permanent missions and there should be greater freedom for non-members to establish them. As Mr. Bartoš had said, the principle of universality might be subject to limitations: it might be limited by subjective considerations or by the imposition of a mechanical majority vote. He therefore proposed that the phrase "in accordance with the rules or practice of the Organization" be deleted and that appropriate wording be inserted to make it clear that there must be no discrimination against non-member States.

62. Mr. EUSTATHIADES said he was in favour of retaining the words "in accordance with the rules or practice of the Organization", which were the result of a compromise, but it remained to be seen whether the text with that wording did not imply that it referred to the procedure for establishing, not the right to establish, a permanent observer mission. Mr. Tammes had tried to remove that ambiguity by the amendment he had proposed. He himself endorsed Mr. Castrén's remarks on the subject. The Drafting Committee might perhaps be

able to find a formula which covered both the right to establish a permanent observer mission and the procedure for establishing it.

63. There was another point to be noted. If the rules or practice of an organization were not opposed to the establishment of permanent missions, any State which requested permission would be able to establish one. But if the rules of an organization did not authorize the establishment of permanent observer missions and there was no precedent in its practice, how was the bar to be lifted? That point should be clarified, at least in the commentary.

64. Sir Humphrey WALDOCK said that at first he had viewed article 52 from the same angle as Mr. Yasseen, but Mr. Eustathiades had convinced him that there were other problems, connected with other articles, which would have to be taken into consideration. He would therefore wait until the Drafting Committee had produced a text before commenting on the article.

65. The CHAIRMAN suggested that article 52 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹³

The meeting rose at 1 p.m.

¹³ For resumption of the discussion see 1116th meeting, para. 8.

1103rd MEETING

Wednesday, 19 May 1971, at 10.5 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. Ramangasoavina, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 4; A/CN.4/L.162/Rev.1; A/CN.4/L.166)

[Item 1 of the agenda]

(continued)

ARTICLE 53

1. The CHAIRMAN invited the Commission to consider article 53 in the light of the Special Rapporteur's sixth report (A/CN.4/241/Add.4).

2.

*Article 53**Functions of a permanent observer mission*

The functions of a permanent observer mission consist *inter alia* in maintaining liaison and promoting co-operation between the sending State and the Organization, ascertaining activities and developments in the Organization and reporting thereon to the Government of the sending State, negotiating with the Organization when required and representing the sending State at the Organization.

3. Mr. RAMANGASOAVINA said that article 53 was the key article of Part III of the draft. Before considering that article and the succeeding articles, the Commission should decide whether it would be preferable to merge them with the corresponding articles on permanent missions or to retain them as separate articles.

4. No one denied that it was necessary for an international organization of a universal character to encourage the participation of all States, whether they were members or not, but as there were differences between the functions of a permanent mission and those of an observer mission, the question arose whether it was possible simply to place the two types of representation on the same footing. The Sixth Committee and the General Assembly had been in favour of doing so.

5. Once that principle was accepted, repetitions were inevitable, since all the articles referring to situations in which there was no difference in function more or less reproduced the corresponding articles on permanent missions or referred back to them. That applied, in particular, to article 53, which was the counterpart of article 7,¹ on the functions of a permanent mission. The only difference between those two articles was the order in which the functions were set out; the function of representation was mentioned in article 53 nevertheless, and once it was recognized that a permanent observer mission represented the sending State, it had all the attributes of a normal permanent mission.

6. It was clearly understood that the draft did not refer to observers representing non-member States who attended meetings of organs of the organization without voting rights, but were authorized to take part in the discussions. The Commission had thus gone quite a long way in placing permanent observer missions on the same footing as permanent missions, as recommended by the Sixth Committee.

7. But the question then arose whether it was really necessary to draft all those articles and whether it would not have been better to limit them to a few provisions dealing only with those points on which there was a difference between permanent observer missions and permanent missions, thus avoiding unnecessary repetition.

8. Mr. KEARNEY said that if Mr. Ramangasoavina was correct in thinking there was a general consensus that permanent observer missions should be treated in substantially the same way as permanent missions, he

could agree that the relevant articles should be amalgamated, but he was not sure that such a consensus did, in fact, exist. The Special Rapporteur's summary of the debate in the Sixth Committee appeared to show considerable differences of opinion, and most governments which had submitted comments had indicated doubts as to whether a permanent observer mission's functions should include "negotiating with the Organization when required and representing the sending State at the Organization". (A/CN.4/241/Add.4).

9. As had been previously pointed out, the representation provided by a permanent observer mission seemed to be of quite a different character from that provided by a permanent mission. If the Commission was to pay more than lip service to the functional theory, it would be difficult to conclude that a permanent observer mission should enjoy the same privileges and immunities as a permanent mission because of its representative character. There were all sorts of government officials, trade missions and scientific study groups who could be said to represent their governments but were not granted diplomatic privileges and immunities. It would seem strange, therefore, that permanent observer missions, which represented their governments in no greater degree, and probably to a much lesser degree inasmuch as their activities were passive rather than active, should be given a more substantial status on the basis of the representational theory.

10. The original confusion had probably been caused by the use of the word "representation", which had different meanings when applied to permanent missions and to permanent observer missions. In the latter case it really meant representation for purposes of observation. He therefore proposed that the word "representing" in article 53 be either deleted or clarified.

11. Mr. ELIAS said that the debate had not encouraged him to accept Mr. Castrén's view that the whole issue of permanent missions had already been settled. He himself had certainly not had that impression when he had represented the Commission before the Sixth Committee in 1970. He feared that if the Commission, in spite of the known objections of a number of governments, still wished to assimilate permanent observer missions to permanent missions, it would make little progress, since the same fundamental issue arose in connexion with almost every article.

12. He agreed with the view that the Commission should make more use of cross-references in its drafting. On the other hand, if it decided that permanent observer missions should be entitled to all privileges and immunities, cross-references would not be necessary; once the basic issue had been settled, all the privileges and immunities could be summarized in one article.

13. The session was already well advanced and the Commission was not yet half-way through the Special Rapporteur's draft. He hoped that it would give serious consideration to some more effective way of organizing its work.

14. Mr. USHAKOV said he saw no reason why the Commission should again engage in a general discussion

¹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 200.

of the principle of permanent observer missions. It had already discussed that question at length at its previous session and had reached a decision both on that question and on the form which the relevant draft articles should take. The Commission had unanimously recognized that, although there were differences between the purposes and functions of diplomatic missions, permanent missions to organizations, special missions of the same State and observer missions, they all had the same representative character, because they all represented the sending State. It followed that they could be placed on the same footing so far as privileges and immunities were concerned.

15. That principle having been agreed, the Special Rapporteur had proposed, at the previous session, only a few provisions referring to the corresponding articles on permanent missions, and it was he (Mr. Ushakov) who had requested that as many articles should be prepared as were necessary to bring out the differences in purpose and function between the two types of mission.² The Commission had already decided to proceed in that way, the articles were before it, and it should now examine the practical aspects of those articles instead of wasting time questioning the principle again.

16. Sir Humphrey WALDOCK said he agreed with much that had been said by Mr. Kearney and Mr. Ushakov. To his mind, the question of the representative character of the mission did not really arise, since the notion of representation was inherent in all missions.

17. He did not think it possible, however, to separate the concept of representation from that of function. Once it was admitted that the concept of function had an important role to play in determining privileges and immunities in diplomatic law, it was necessary to take into account the particular function of the permanent observer mission.

18. He agreed with Mr. Ushakov, however, that it would be better to go through the draft article by article before considering whether it could be shortened.

19. Mr. AGO said it was unthinkable that a mission, sent by a State, should not represent that State. That would be a contradiction in terms. On the other hand, there were differences between the purposes of the representation. The principle was clear and Mr. Ushakov had been quite right to urge the Commission not to waste time discussing it.

20. At the previous session he himself had been the first to suggest that the number of articles on permanent observer missions might be reduced and that the Commission should endeavour, wherever possible, not to amalgamate those articles with the corresponding provisions on permanent missions, but to make cross-references to those provisions whenever the rules were the same.

21. Articles would be drafted expressly whenever it was advisable to make a distinction between a permanent

mission and a permanent observer mission, so as not to create the impression that the two types of mission could be assimilated to each other in all respects. They did not in fact have the same functions vis-à-vis the organization, since a State which had not signed the constituent instrument of the organization did not have the same position, or the same obligations and rights vis-à-vis the organization as a member State. Consequently, great caution was indicated when defining the position of observer missions and their functions in relation to the organization. For example, it should be made quite clear in article 53 that the permanent observer mission represented the State "to" (*auprès de*) the organization, and that, in the French version, its function was not "*s'informer dans l'Organisation des activités*", but "*s'informer des activités qui ont lieu dans l'Organisation*."

22. Mr. ROSENNE said that much of his difficulty with article 53 arose from the last few words, taken in the context of the draft articles as a whole. Much seemed to depend on slight differences in the prepositions used in the English version, which presented problems when translated into French. The Drafting Committee had made changes in article 7, where the same problems had arisen, and it might be able to find some more appropriate formulation for article 53.

23. The Commission itself should first look at all the articles and then give the Drafting Committee a directive to reproduce the substance of them in as few articles as possible, as Mr. Ago had suggested. That procedure should not, however, involve any fusion of the articles, since that might lead to misconceptions concerning the functions themselves. The main difficulty was that things were never so clear-cut as they looked on paper; permanent observer missions might not be quite so much outside the activities of the organization as might appear on the surface.

24. Mr. USTOR said it should not be forgotten that permanent observer missions were also diplomatic missions in the sense that they established relations between two subjects of international law, the sending State and the organization; in that respect they differed from the trade missions and scientific study groups referred to by Mr. Kearney, which did not have any diplomatic character.

25. Article 53 should be based on two elements, the representative character of the permanent observer mission and functional necessity. The Commission should first consider the representative character of the observer mission and then decide whether its different functions warranted any treatment different from that given to permanent missions. He himself would be reluctant to be more severe to permanent observer missions merely because they represented States that were not members of the organization.

26. In paragraph 14 of his observations on the article (A/CN.4/241/Add.4), the Special Rapporteur had expressed the view that the drafting suggestion by the Government of Switzerland, mentioned in paragraph 7, concerned observer delegations, a matter which the Commission, at its twenty-second session, had considered that

² Op. cit., 1970, vol. I, p. 114.

it should not take up "at this time".³ He wondered whether the words "at this time" referred specifically to the Commission's last session, or whether they meant that the Commission had considered that it should not take up that subject in the present draft. There would be a certain lack of symmetry in the draft articles if they failed to include provisions concerning observer delegations. He suggested that the Special Rapporteur be asked to prepare a working paper on temporary observers.

27. Mr. USHAKOV said he agreed with Mr. Ustor. The Special Rapporteur should be asked to draft articles on observer delegations to organs and conferences.

28. Mr. EUSTATHIADES said that Mr. Elias' suggestion was very useful. Contrary to what some appeared to think, it was not a question of whether the Commission should or should not consider article by article the part of the draft relating to permanent observer missions, but of deciding in advance whether to repeat the provisions which were the same as those of the corresponding articles on permanent missions or simply to refer to those articles.

29. The Commission should not assimilate the two types of mission too closely to each other. There must be clear agreement as to their functions. As Mr. Kearney had said, the functions of an observer mission were passive; it rarely had to negotiate with the organization or represent the sending State in an organ, and the functions of maintaining liaison between the sending State and the organization and ascertaining activities in the organization and reporting thereon to its government were performed discreetly, so to speak. That was a far cry from the extensive activities of a permanent representative and it was questionable whether the same privileges and immunities were justified. The Commission would be well advised to bear that in mind when considering the articles on permanent observer missions.

30. Mr. ALBÓNICO said he was surprised that there should be any doubt about the representative character of a permanent observer mission, since article 51, subparagraph (a), which had already been accepted by the Commission, stated that a permanent observer mission was "a mission of representative and permanent character sent to an international organization by a State not member of that organization".

31. Article 53 did not list all the functions of a permanent observer mission, but did refer explicitly to that of "representing the sending State at the Organization". Without prejudice to any improvements that might be made by the Drafting Committee, he could not conceive of a permanent observer mission which would not have a representative character.

32. The CHAIRMAN, speaking as a member of the Commission, said he thought the Commission must decide how far observer missions could be assimilated to permanent missions by considering the provisions on permanent observer missions article by article.

33. Speaking as Chairman, he noted that the majority of the Commission considered that it should continue to examine the draft article by article, and that all agreed that the work must be speeded up. If there were no objection, he would take it that the Commission wished to continue its examination of the draft article by article.

It was so agreed.

34. Mr. CASTRÉN said he approved of the substance of article 53.

35. With regard to the drafting, the subtle difference between the prepositions "at", "to" and "in" had already been discussed at length, but since the Swiss Government had stated in its observations (A/CN.4/240, section C) that it invariably used the words "*auprès de*", those words should be used in the French version of article 53, despite the explanation given by the Commission in paragraph (2) of its commentary⁴ to justify the use of the word "à".

36. Article 53 would be more explicit if it were set out in the same way as article 7, its counterpart for permanent missions, listing each function of the mission in a separate sub-paragraph.

37. Mr. AGO said he had no objection to the substance of article 53, but he thought the drafting should be drastically changed.

38. First, the functions of a permanent observer mission should be listed in order of importance, which they were not in the present text. Secondly, if they were grouped together, it should be possible to obtain a satisfactory text in three phrases. The function of representation, which was really only the basis of the others, would come first and the liaison between the sending State and the organization would be mentioned in the same phrase; it would be well to say, as had been proposed for article 7, "providing representation of the sending State to the Organization" and "maintaining liaison with it". Then would come the essential function of obtaining information and communicating it to the sending State, and finally, preceded by the words "when required", co-operation with the organization and the function of negotiating with it.

39. He agreed with Mr. Ustor that the draft would not be complete without articles on observer delegations to organs and conferences.

40. Mr. RAMANGASOAVINA said he entirely agreed with Mr. Ago. There was no reason why the wording of article 53 should not be modelled on that of article 7.

41. Mr. KEARNEY referring to the possible rearrangement of article 53, said that to the best of his recollection, the reason why the clauses concerning negotiation and representation had been paced last had been to bring out the distinction between those functions of permanent observer missions and the functions of permanent missions. The negotiating and representative functions of a permanent observer mission were extremely limited; the difference between them and those of a permanent mis-

³ Op. cit., 1970, vol. II, document A/8010/Rev.1, para. 14.

⁴ *Ibid.*, chapter II, section B.

sion had been further emphasized by the somewhat tenuous device of using different prepositions before the words "the Organization".

42. He noted that Mr. Ago now wished the representative function of the permanent observer mission to appear first in article 53; did that mean that he considered it the most important function?

43. Mr. USHAKOV said that the previous year he had spoken in favour of an article drafted on the lines of article 7.⁵ The similarity in form would have brought out better the differences between the functions of a permanent mission and those of a permanent observer mission. In its present form article 53 was not divided into sub-paragraphs like article 7, but consisted of a single sentence.

44. One of the differences between the two articles which should be brought out clearly was that between the phrases "representing the sending State in the Organization", used in article 7, and "representing the sending State at the Organization", used in article 53. The preposition "in" had been rendered by the words "*auprès de*" in French and the preposition "at" by "à", which did not convey the same idea as "at". The English words had their equivalents in Russian, but it was almost impossible to render them exactly in French or Spanish, so that it might be necessary to recast the wording of article 53. Another difference between article 53 and article 7 was that the phrase "carrying on negotiations with or in the Organization" had been replaced by "negotiating with the Organization when required".

45. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to refer article 53 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁶

ARTICLE 54

46. The CHAIRMAN invited the Commission to consider article 54 on multiple accreditation.

47.

Article 54

Accreditation to two or more international organizations or assignment to two or more permanent observer mission.

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

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

⁵ See *Yearbook of the International Law Commission, 1970*, vol. I, p. 28.

⁶ For resumption of the discussion see 1116th meeting, para. 58.

48. Mr. USHAKOV said he wished to make a comment which related only to drafting. The Drafting Committee had been requested to amend the wording of article 8,⁷ the provision in Part II of the draft corresponding to article 54. The text of article 54 should therefore be amended consequentially.

49. Mr. ROSENNE said that in principle Mr. Ushakov's comment was of general application. The Drafting Committee should automatically take into account, in considering every article of Part III, any remarks made during the earlier discussions on the corresponding article in Part II.

50. There was no necessity for members to repeat all their earlier remarks. Discussion should however be opened on each individual article of Part III in turn, in order to allow members to add anything they wished to their remarks during the previous discussion.

51. Mr. USTOR said that the problems of the possible fusion of articles and of drafting by reference would arise in connexion with many of the articles in Part III. For example, article 9, on accreditation, assignment, or appointment of a member of a permanent mission to other functions, might be framed so as to cover both permanent missions and permanent observer missions.

52. Sir Humphrey WALDOCK said that the question of drafting some articles common to the various parts of the draft could be left for the Drafting Committee to deal with at a later stage.

53. The CHAIRMAN suggested that article 54 be referred to the Drafting Committee for consideration in the light of the discussion; the Drafting Committee would have full freedom to revise the article and, in particular, would take into account the new wording it had itself adopted for article 8, the corresponding provision in Part II.

*It was so agreed.*⁸

ARTICLE 55

54. The CHAIRMAN invited the Commission to consider article 55, on the appointment of the members of the permanent observer mission.

55.

Article 55

Appointment of the members of the permanent observer mission

Subject to the provisions of articles 56 and 60, the sending State may freely appoint the members of the permanent observer mission.

56. Mr. USTOR said that article 55 corresponded to article 10 in Part II. Before article 55, it was necessary to introduce an article on the accreditation, assignment or appointment of a member of a permanent observer mission to other functions, corresponding to article 9 in Part II. Alternatively, the Drafting Committee could

⁷ See 1090th meeting.

⁸ For resumption of the discussion see 1118th meeting, para. 30.

consider the possibility of making the provisions of article 9 more general so as to cover both permanent missions and permanent observer missions.

57. Mr. EUSTATHIADES observed that some governments and some members of the Commission believed that article 55 raised the same problem as article 10. When article 10 had been discussed, he and Mr. Nagenra Singh had both suggested that the Drafting Committee should insert in it an express reference to article 50.⁹ In its observations on article 55 the Government of Switzerland had stated that "The host State should be empowered to formulate objections to the presence of a given individual in its territory as a member of an observer mission" (A/CN.4/240, section C). Since the analogy between article 10 and article 55 was complete, the Drafting Committee should consider whether article 50 ought not to be referred to in article 55 as well.

58. Mr. CASTRÉN, referring to Mr. Ustor's suggestion that the Drafting Committee should be left to decide whether a provision corresponding to article 9 should be inserted, reminded the Commission that it had decided at the previous session that that was unnecessary.¹⁰ But perhaps the Drafting Committee might nonetheless consider the matter and state its views. With regard to the wording, it should of course take into consideration the changes made in the corresponding article.

59. Mr. ROSENNE said he agreed that it was necessary to include in Part III a provision on the lines of article 9. The Drafting Committee might consider the suggestion he had made during the Commission's discussion on article 52 *bis* at the twenty-second session.¹¹

60. Mr. KEARNEY said he agreed with Mr. Eustathiades that article 55 raised the same problem as article 10, namely, that of the abuse of the right of free selection. It was necessary to deal with that problem in conjunction with the provisions on consultations and with any clause on the settlement of disputes which the Commission might adopt.

61. The CHAIRMAN suggested that article 55 be referred to the Drafting Committee for consideration in the light of the discussion; the Drafting Committee would also consider the idea of introducing into Part III an article corresponding to article 9.

*It was so agreed.*¹²

ARTICLE 56

62. The CHAIRMAN invited the Commission to consider article 56, on the nationality of the members of the permanent observer mission.

⁹ See 1090th meeting, paras. 73 and 90.

¹⁰ See *Yearbook of the International Law Commission, 1970*, vol. I, pp. 37-39.

¹¹ *Ibid.*, p. 106, para. 6.

¹² For resumption of the discussion see 1118th meeting, para. 43.

63.

Article 56

Nationality of the members of the permanent observer mission

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

64. Mr. USHAKOV said that, from the point of view of drafting, it was unnecessary to repeat the words "permanent observer mission" in many of the titles of the articles in Part III; they should be replaced by the word "mission". The same should be done in many of the titles in Part II.

65. Mr. ROSENNE said that Mr. Ushakov's suggestion should only be considered when the Commission had the whole draft before it.

66. The CHAIRMAN suggested that article 56 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹³

ARTICLE 57

67. The CHAIRMAN invited the Commission to consider article 57, on the credentials of the permanent observer. The only change suggested by the Special Rapporteur was that the words "non-member State" in paragraph 2 should be replaced by "sending State" (A/CN.4/241/Add.4).

68.

Article 57

Credentials of the permanent observer

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

2. A non-member State may specify in the credentials submitted in accordance with paragraph 1 of this article that its permanent observer shall represent it as an observer in one or more organs of the Organization when such representation is permitted.

69. Mr. KEARNEY said that the language of paragraph 1 should be amended so as to draw a distinction between the permanent observer and the permanent representative. The statement that the credentials "shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs" was more suitable for an ambassador. He suggested that it be replaced by wording to the effect that the credentials must be issued by the Government of the sending State.

70. Mr. YASSEEN said he was in favour of retaining the article as it stood, but pointed out that, in the cor-

¹³ For resumption of the discussion see 1118th meeting, para. 45.

responding article on permanent missions, the Drafting Committee had been asked to replace the words "or by another competent minister" by the words "or by another competent authority".¹⁴

71. Mr. USHAKOV said that he was not in favour of that change, as it was contrary to the general opinion of the Drafting Committee.

72. The term "A non-member State", in paragraph 2, might simply be replaced by "The sending State". The word "permitted", which concluded that paragraph, was inelegant; "admitted" might be better.

73. Mr. BARTOŠ said that he agreed with Mr. Yasseen, and could not accept Mr. Ushakov's view, even though he had invoked the authority of the Drafting Committee. In trying to improve the drafting of article 57 the Committee had used an unfortunate expression. The credentials of a permanent observer might derive not from a ministerial instrument, but from an instrument issued by some other organ, particularly a collegiate body.

74. The CHAIRMAN suggested that article 57 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁵

ARTICLE 58

75. The CHAIRMAN invited the Commission to consider article 58, on full powers to represent the State in the conclusion of treaties. The Special Rapporteur had suggested that the title of the article be amended to read "Representation of States in the conclusion of treaties with international organizations" (A/CN.4/241/Add.4).

76.

Article 58

Full powers to represent the State in the conclusion of treaties

1. A permanent observer in virtue of his functions and without having to produce full powers is considered as representing his State for the purpose of adopting the text of a treaty between that State and the international organization to which he is accredited.

2. A permanent observer is not considered in virtue of his functions as representing his State for the purpose of signing a treaty (whether in full or *ad referendum*) between that State and the international organization to which he is accredited unless it appears from the circumstances that the intention of the Parties was to dispense with full powers.

77. Mr. ROSENNE said that when the Commission had discussed the corresponding article 14 in Part II,¹⁶ it had reached certain conclusions; he assumed that the Drafting Committee would take those conclusions into account in considering article 58. The article was one of those which could be merged into a single provision for

the whole draft without prejudice to the standing of the various types of mission.

78. Mr. USHAKOV said he doubted whether the word "accredited", at the end of paragraph 1, which was taken from the corresponding provision of article 14, applied to a permanent observer in the same way as to the permanent representative of a member State. The Drafting Committee should study that problem.

79. Mr. AGO said that that point certainly deserved further consideration. Personally, he even went so far as to doubt the need for article 58. Was it really necessary to specify that a permanent observer did not have to produce full powers to adopt the text of a treaty? The size and importance of observer missions varied a great deal. If a State only sent a single observer, it might not wish him to be able to go so far as to adopt the text of a treaty without having to produce full powers.

80. Mr. YASSEEN said he agreed with Mr. Ago. He had hesitated to propose the deletion of the article only because such proposals were not usually made at second reading. But he thought article 58 went too far in permitting an observer to adopt the text of a treaty without producing full powers.

81. Mr. BARTOŠ said that he too supported Mr. Ago's view. In the case dealt with in article 58, the head of a permanent observer mission was acting like any other person whose country was not a member of the organization. He might be an *ad hoc* representative who must produce full powers and could not adopt any and every text of a treaty.

82. Mr. USHAKOV said he was in favour of retaining article 58, which derived logically from the preceding article. Article 57 specified the various sources of the powers of a permanent observer, who was authorized not only to negotiate with the organization, but also to adopt the text of a treaty. True, a permanent observer was seldom called upon in practice both to negotiate and to adopt the text of a treaty, but it had happened.

83. Mr. BARTOŠ said that the credentials mentioned in article 57 had no direct bearing on the situation dealt with in article 58, since full powers to represent a State in the conclusion of treaties might be given to a person other than the head of an observer mission. A career diplomat was very often specially appointed for the purpose.

84. Mr. CASTRÉN said that he would hesitate to discard article 58; no government or organization had suggested its deletion. As Mr. Ushakov had said, the article was not likely to be much applied in practice, but it could be useful in certain cases. In any event, its deletion would have to be explained in the commentary.

85. Mr. RAMANGASOAVINA said he agreed with Mr. Ushakov and Mr. Castrén. As the Commission had expressly stated that a permanent observer mission was entitled to negotiate with an organization and to represent the sending State at it, the inclusion of a provision such as article 58 was only logical.

86. Mr. AGO said that when the credentials of a permanent observer were issued by the Head of State or the

¹⁴ See 1091st meeting, para. 15.

¹⁵ For resumption of the discussion see 1118th meeting, para. 47.

¹⁶ See 1091st meeting, para. 56 *et seq.*

Minister for Foreign Affairs, it could generally be assumed that he had full powers to conclude treaties. It would be unwise, however, to regard that as an automatic presumption. There could be no harm in deleting article 58, because an observer could always produce his full powers, if he had them.

87. Mr. ELIAS said that article 58 had an organic link with article 57. Consequently, unless the Commission changed its approach to article 57, he would not recommend the deletion of article 58. He urged that the Drafting Committee should retain the substance of article 58, but try to shorten the text.

88. Sir Humphrey WALDOCK said that the deletion of article 58 would not be satisfactory unless the similar provision for permanent missions was also deleted. In the light of the present structure of the draft, it would be strange if the provisions of article 58 were not included.

89. So far as the law of treaties was concerned, the provision on full powers to represent the State in the conclusion of treaties was as necessary for permanent observer missions as it was for permanent missions; its absence would leave a gap in Part III.

90. As to the substance of the provision, it could be argued that the rule in paragraph 1 should be reserved and that the presumption should be that the permanent observer had to produce full powers in order to represent his State for the purpose of adopting the text of a treaty between that State and the international organization. His own preference, was for the rule stated in the present text.

91. Mr. USTOR said he agreed with the previous speaker.

92. The CHAIRMAN suggested that article 58 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁷

The meeting rose at 1 p.m.

¹⁷ For resumption of the discussion see 1119th meeting, para. 5.

1104th MEETING

Friday, 21 May 1971, at 10.5 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Baroš, Mr. Castrén, Mr. Elias, Mr. Ramangasoavina, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 4; A/CN.4/L.162/Rev.1; A/CN.4/L.166)

[Item 1 of the agenda]

(continued)

ARTICLE 59

1. The CHAIRMAN invited the Commission to consider article 59, on the composition of the permanent observer mission, to which the Special Rapporteur had proposed no change.

2.

Article 59

Composition of the permanent observer mission

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

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

3. Mr. ROSENNE said that the provisions of paragraph 2 were out of place in article 59. He suggested that the Drafting Committee should consider making them general provisions applicable to the whole draft; they might perhaps be amalgamated with the provisions of article 9, paragraph 4.¹

4. Mr. SETTE CÂMARA said that the suggestion made by one government that article 59 should include a provision to the effect that the "deputy or associate permanent observer" should enjoy the status of permanent observer when the latter was absent (A/CN.4/240, section B.2) was not consistent with the spirit of the draft or with the relevant provisions of article 51, on the use of terms. The question of substitution was dealt with in article 62, on the *chargé d'affaires*, and there was no reason to deal with it in article 59.

5. Paragraph 2 corresponded to article 9, paragraph 2, of the 1969 Convention on Special Missions,² except that it lacked the concluding words "in addition to the privileges and immunities accorded by the present Convention". Hence diplomatic or consular officers included in a permanent observer mission would have the same privileges and immunities as they had had before joining that mission; that had prompted one government to express itself "satisfied as to the recognition of the differences in privileges and immunities enjoyed by different types of delegates" (*ibid.*).

6. He did not suggest that observers should be placed on the same footing as permanent representatives, but

¹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 202.

² General Assembly resolution 2530 (XXIV), Annex.

their privileges and immunities should not be limited to those of consuls simply because they had previously served in that capacity.

7. Mr. USHAKOV suggested that the drafting Committee should revert to the wording of the Convention on Special Missions.

8. Mr. USTOR said he agreed with Mr. Rosenne that the provisions of paragraph 2 were out of place in article 59; they had little or no connexion with those of paragraph 1 and were in fact general provisions which should apply both to permanent missions and to permanent observer missions. He therefore suggested that they should form a separate article in the general provisions section at the end of the draft, on the lines of article 70 (Exercise of consular functions by diplomatic missions) of the Vienna Convention on Consular Relations.³

9. The CHAIRMAN suggested that article 59 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁴

ARTICLE 60

10. The CHAIRMAN invited the Commission to consider article 60, on the size of the permanent observer mission, to which the Special Rapporteur had proposed no change.

11. *Article 60*

Size of the permanent observer mission

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

12. Mr. YASSEEN said that the wording of article 60 should not be changed, since permanent observer missions were fully comparable to permanent missions so far as size was concerned.

13. The CHAIRMAN said that, in the absence of further comment, he took it that the Commission agreed to refer article 60 to the Drafting Committee, which would take Mr. Yasseen's observation into account.

*It was so agreed.*⁵

ARTICLE 61

14. The CHAIRMAN invited the Commission to consider article 61, on notifications, to which the Special Rapporteur had proposed no change.

15. *Article 61*
Notifications

1. The sending State shall notify the Organization of:
 - (a) the appointment of the members of the permanent observer mission, their position, title and order of preced-

³ United Nations, *Treaty Series*, vol. 596, pp. 316-318.

⁴ For resumption of the discussion see 1119th meeting, para. 8.

⁵ For resumption of the discussion see 1119th meeting, para. 11.

ence, their arrival and final departure or the termination of their functions with the permanent observer mission;

- (b) the arrival and final departure of a person belonging to the family of a member of the permanent observer mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the permanent observer mission;
- (c) the arrival and final departure of persons employed on the private staff of members of the permanent observer mission and the fact that they are leaving that employment;
- (d) the engagement and discharge of persons resident in the host State as members of the permanent observer mission or persons employed on the private staff entitled to privileges and immunities.

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

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

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

16. Mr. USTOR said that both article 60 and article 61 were of the kind which should apply both to permanent missions and to permanent observer missions. The Drafting Committee would no doubt consider how they could be merged with earlier articles so as to shorten the draft.

17. Mr. CASTRÉN pointed out that the Drafting Committee had made some changes in article 17;⁶ those changes would have to be applied to article 61.

18. Mr. AGO, supported by Mr. ELIAS, suggested that, since several articles in Part III were identical with articles in Part II, general cross-references would suffice.

19. The CHAIRMAN suggested that article 61 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁷

ARTICLE 62

20. The CHAIRMAN invited the Commission to consider article 62, on the chargé d'affaires *ad interim*, to which the Special Rapporteur had proposed no change.

21.

Article 62

Chargé d'affaires ad interim

If the post of permanent observer is vacant, or if the permanent observer is unable to perform his functions, a chargé d'affaires *ad interim* may act as head of the permanent observer mission. The name of the chargé d'affaires *ad interim* shall be notified to the Organization either by the permanent observer or, in case he is unable to do so, by the Minister for Foreign Affairs or by another competent minister if that is allowed by the practice followed in the Organization.

22. Mr. YASSEEN observed that article 62 was of the kind to which Mr. Ago's suggestion could well be applied.

⁶ See document A/CN.4/L.168.

⁷ For resumption of the discussion see 1119th meeting, para. 13.

23. Sir Humphrey WALDOCK pointed out that the United Kingdom Government had raised the question of the appropriate title for an acting permanent observer (A/CN.4/240/Add.3, section B.12). The title "chargé d'affaires *ad interim*" seemed excessive when applied to an observer. Article 62 was one in which a concession could well be made to those governments which did not wish permanent observers to be placed on exactly the same footing as permanent representatives.

24. Mr. ROSENNE said that the real object of the criticism voiced by a number of governments was the position with respect to the acting head of a permanent mission, though it also applied to an acting permanent observer. Both the term "acting permanent representative" and the term "chargé d'affaires *ad interim*" were used in New York. In any case, the provisions on permanent observer missions in article 62 should be the same as those adopted for permanent missions in article 18. He suggested that the Drafting Committee should examine the use of terms in both those articles, but should make it clear in the commentary that in both cases it was the institutions and not the title that mattered.

25. The CHAIRMAN suggested that article 62 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.**

QUESTION OF PRECEDENCE

26. Mr. USTOR noted the absence of an article on precedence, which in Part II, dealing with permanent missions, was the subject of article 19. He suggested that, to avoid difficulties of interpretation, article 19 should be made to apply to both permanent missions and permanent observer missions.

27. Sir Humphrey WALDOCK objected that it was not possible to deal with the two types of mission together; a permanent representative represented a member State of the organization, whereas a permanent observer did not.

28. Mr. USTOR said that, even if the two types of mission could not be treated in the same manner, he thought some provision on precedence was needed in Part III.

29. Mr. USHAKOV said that the Commission ought to explain in its commentary why it had not proposed an article on precedence. If it did draft such an article, it would have to regulate precedence not only between observers themselves, but also between observers and permanent representatives, and that was a matter for the rules of the organizations.

30. The CHAIRMAN, speaking as a member of the Commission, said he favoured the idea put forward by Mr. Ushakov. Permanent representatives and permanent observers constituted quite separate categories. In

New York it was customary to give permanent representatives precedence over observers. Precedence between observers was probably determined by alphabetical order, as it was for permanent representatives. If the Commission laid down a rule on the matter, it would also have to deal with the even more delicate question of relations between permanent representatives and members of delegations to the General Assembly. It would therefore be better to rely on the practice of organizations.

31. Mr. YASSEEN said that a practice already existed: permanent representatives took precedence over permanent observers and, within each category, precedence was determined by alphabetical order or by the time and date of the submission of credentials. But there was no need for the Commission to state those rules expressly.

32. Mr. ROSENNE said the discussion had confirmed his view that the problems of precedence were very complex and that the Commission's treatment of them had been inadequate. He therefore suggested that article 19 should be deleted and that the question of precedence for both permanent representatives and permanent observers should be the subject of a general commentary.

33. Mr. AGO observed that, even if the Commission succeeded in formulating rules on precedence between members of permanent missions and members of permanent observer missions, it would then run into enormous difficulties with the same problems for members of permanent missions and members of delegations. It would be better to say nothing and rely on practice.

34. The CHAIRMAN suggested that the question whether an article on precedence should be included in Part III or whether the matter should be dealt with in a commentary, should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.**

ARTICLE 63

35. The CHAIRMAN invited the Commission to consider article 63, on the offices of permanent observer missions, to which the Special Rapporteur had proposed no change.

36.

Article 63

Offices of permanent observer missions

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

2. The sending State may not establish offices of the permanent observer mission in the territory of a State other than the host State, except with the prior consent of such a State.

37. Mr. USHAKOV asked whether the Drafting Committee had deliberately chosen to use the expression "establish offices" (*établir des bureaux*) in article 63,

* For resumption of the discussion see 1119th meeting, para. 15.

* For resumption of the discussion see 1119th meeting, para. 18.

paragraph 1, and article 20, paragraph 1, rather than “establish the office” (*établir le bureau*) or “establish an office” (*établir un bureau*). The wording he preferred was that of article 12 of the Vienna Convention on Diplomatic Relations:¹⁰ “establish offices forming part of the mission”. Those words made it clear that there might be an office in the capital and other offices in other places.

38. Mr. ROSENNE said that Mr. Ushakov’s remark applied only to the French text. So far as the English text was concerned, the Drafting Committee should consider whether the word “offices” was not being used as a collective noun with a singular meaning.

39. Sir Humphrey WALDOCK said that the word “offices”, not “office”, was the appropriate one to use.

40. Mr. ALBÓNICO observed that, *mutatis mutandis*, the provisions of article 63 exactly reproduced those of article 20. He suggested that the Drafting Committee should replace the present text of article 63 by a simple reference to article 20. The same could be done with a number of other articles, thereby shortening the text of the draft.

41. The CHAIRMAN suggested that article 63 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹¹

ARTICLE 64

42. The CHAIRMAN invited the Commission to consider article 64, on the use of the [flag and] emblem. He pointed out that the Special Rapporteur had not proposed any change in the article, but the Commission had to decide whether or not to include the words “flag and”, which appeared in brackets in the title and in paragraph 1.

43.

Article 64

Use of [flag and] emblem

1. The permanent observer mission shall have the right to use the [flag and] emblem of the sending State on its premises.

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

44. Mr. USHAKOV said he noted that the Government of Switzerland considered it natural to grant the mission the right to display the flag of the sending State (A/CN.4/240, section C). In his view, the Drafting Committee should retain the words “flag and” in the title and text of article 64.

45. Mr. SETTE CÂMARA said that he would prefer not merely to include the words “flag and”, but to restore the earlier wording of paragraph 1, which corresponded to that adopted at the twentieth session for

article 21, paragraph 1.¹² The Government of Switzerland, which was host to the largest number of international organizations, accepted it as natural that permanent observers should be placed on an equal footing with diplomatic agents; there was no reason why the Commission should be more restrictive than the country which had the greatest experience in the matter. And since the Commission had not hesitated to concede certain substantial privileges to observers, there was no reason why it should be more restrictive in the minor matter of the use of the flag.

46. Mr. YASSEEN said he agreed with Mr. Sette Câmara that the Commission should not be too restrictive; it had never questioned the representative character of a permanent observer.

47. Sir Humphrey WALDOCK asked whether Mr. Sette Câmara was proposing that the right to use the flag should be extended to the permanent observer’s means of transport.

48. Mr. SETTE CÂMARA said he had referred to the position of the Swiss Government, which placed no restriction on the use of the flag on the observer’s vehicle.

49. Sir Humphrey WALDOCK said he thought it was desirable to make a minor difference between permanent representatives and permanent observers in that respect, by leaving the provisions of article 64 as they stood. It was one thing for the Swiss Government to adopt a liberal attitude and another for the Commission to state a general rule.

50. Mr. AGO said that, to the best of his recollection, article 64 was a compromise reached after long discussion. Since Mr. Kearney, the former Chairman of the Drafting Committee, was absent, it would probably be better to await his return and consult him on that point.

51. Mr. YASSEEN pointed out that permanent representatives in New York and Geneva did not display the flag of the sending State on their transport. Hence the question was not of great practical importance.

52. Mr. ROSENNE said that the operative provision was paragraph 2 of the article, requiring regard for the laws, regulations and usages of the host State. He drew attention to the suggestion, referred to in paragraph (3) of the commentary to article 64,¹³ that the Commission should consider replacing the expression “regulations and usages of the host State” by “regulations and usages in the host State”. That change could help to solve the problem.

53. Mr. CASTRÉN confirmed that it was Mr. Kearney who had suggested that the means of transport should not be mentioned. It would probably be useful to hear his present opinion.

54. Mr. USTOR pointed out that the Government of Switzerland, in its written observations on article 64, had

¹² See *Yearbook of the International Law Commission, 1968*, vol. II, p. 212.

¹³ *Op. cit.*, 1970, vol. II, document A/8010/Rev.1, chapter II, section B.

¹⁰ United Nations, *Treaty Series*, vol. 500, p. 104.

¹¹ For resumption of the discussion see 1119th meeting, para. 21.

maintained that, in view of their similarity to diplomatic missions, observer missions should be granted the right to display the flag of the sending State and that that right should be extended "to the observer's residence and the vehicle he uses" (A/CN.4/240, section C).

55. The CHAIRMAN suggested that article 64 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁴

ARTICLE 65

56. The CHAIRMAN invited the Commission to consider section 2 (Facilities, privileges and immunities of permanent observer missions), beginning with article 65, on general facilities, to which the Special Rapporteur had proposed no change.

57.

Article 65 *General facilities*

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

58. Mr. SETTE CÂMARA observed that, in his introduction to section 2, the Special Rapporteur summarized the conflicting opinions of governments concerning the extension of facilities, privileges and immunities to permanent observers. Some had taken the view that the Commission had struck a proper balance between the preservation of the interests of the host State and the need to protect relations between permanent observer missions and organizations; others had expressed misgivings at the idea of placing permanent observer missions on a virtually equal footing with permanent missions.

59. In considering Part III, section 2, of the draft articles, the Commission would do well to heed the appeal made by Mr. Elias during the examination of article 53,¹⁵ and refrain from theoretical speculation about the representative character of permanent observer missions. But even if it dealt only with practical problems, the Commission would have difficulty in avoiding some kind of assimilation of those missions to permanent missions.

60. Those who had criticized the Commission's position had failed to suggest any other way of deciding what facilities, privileges and immunities should be granted. It was true that one government had suggested that permanent observers should be placed on the same footing as consular officers (A/CN.4/240/Add.3, section B.10), but there did not appear to be any sound legal basis for that suggestion, since neither the functions nor the status of consular officers had anything to do with those of permanent observers. The Government of Switzerland,

in its observations on article 53, likened permanent observer missions to diplomatic missions (A/CN.4/240, section C) and accordingly took a very generous view of their privileges and immunities. Considering Switzerland's authority and experience as a major host State, its attitude was bound to carry considerable weight in practice.

61. The Commission had therefore been right to depart from the very restrictive position described in the Legal Counsel's memorandum quoted in paragraph (1) of the general comments on section 2.¹⁶ In the interests of the progressive development of international law, the Commission could not accept the position of dependence on mere favours in which permanent observers were placed according to that memorandum.

62. He agreed with the Special Rapporteur that the general line taken in the articles should conform to the majority opinion in the Commission, which placed permanent observer missions on an equal footing with permanent missions because of their permanent and representative character. He accordingly supported the substance of article 67 which, by the technique of drafting by reference, extended to permanent observers the privileges and immunities prescribed by articles 25, 26, 27, 29 and 38, paragraph 1 (a).

63. Mr. ALBÓNICO said that in view of the eminently representative character of permanent observer missions, to which the Special Rapporteur referred in his sixth report, he supported article 65 as it stood.

64. Mr. ROSENNE said that the Drafting Committee could greatly reduce the length of section 2 by adopting the technique of drafting by reference.

65. Mr. CASTRÉN said that there was only a slight difference in wording between articles 22 and 65: the words "full facilities" were replaced by "the facilities required". It would be better to choose one form of words or the other, unless the slight difference was intended to mean that the privileges and immunities of permanent observer missions were more restricted.

66. Sir Humphrey WALDOCK said that the Commission had intended to make a slight difference between permanent observer missions and permanent missions. The omission of the word "full" was not of great significance; the real difference between article 22 and article 65 was that the former referred to the facilities "for the performance" of the permanent mission's functions and the latter to the facilities "required for the performance" of the permanent observer mission's functions. For his part, he was reluctant to see the two situations treated identically; the host State needed some measure of protection against inflation of observer status.

67. Mr. YASSEEN said he was not sure that the word "*nécessaires*", in the French text, was an exact translation of "required".

68. Mr. USHAKOV said that the wording of article 65

¹⁴ For resumption of the discussion see 1119th meeting, para. 23.

¹⁵ See previous meeting, para. 11 *et seq.*

¹⁶ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

was more restrictive than that of article 22, in which the word "required" did not appear.

69. Mr. ROSENNE observed that the difference in wording between the first sentence of article 65 and the first sentence of article 22 meant that the second sentence—which was identical in the two articles—had a different effect in each case; for the second sentence referred to "those facilities", namely the facilities mentioned in the first sentence. It was not only a question of protecting the host State; the obligations imposed on the organization were also affected.

70. Sir Humphrey WALDOCK said that the attitude of the Swiss Government was influenced not only by its position as a host State, but also by its great interest in the status of permanent observers, inasmuch as it maintained a permanent observer mission in New York.

71. Mr. AGO said that the Drafting Committee would not overlook the intentional shade of difference in meaning between articles 22 and 65.

72. Mr. ALCÍVAR said that the French text of the first sentence of article 65, with its reference to *les facilités nécessaires*, was preferable to the Spanish text, which spoke of *las facilidades que se requieran*; for although that wording appeared to be closer to the English text, it suggested that the facilities granted should be those actually requested, rather than those which were necessary.

73. Mr. AGO said that the French phrase *les facilités nécessaires* was a correct translation of the English "the facilities required". If the Spanish text suggested something different, it should be brought into conformity with the other two.

74. The CHAIRMAN suggested that article 65 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁷

ARTICLE 66

75. The CHAIRMAN invited the Commission to consider article 66, on accommodation and assistance, to which the Special Rapporteur had proposed no change.

76.

Article 66

Accommodation and assistance

The provision of articles 23 and 24 shall apply also in the case of permanent observer missions.

77. Mr. USHAKOV said that article 66 should not refer to article 23 and article 24 together. Article 23, which concerned accommodation, imposed obligations first on the host State and secondly on the host State and the organization. Article 24, which concerned the thorny problem of privileges and immunities, imposed obligations on the organization only. The content of article 66 should therefore be set out in two separate articles. That was not merely a matter of drafting.

78. The CHAIRMAN suggested that article 66 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁸

ARTICLE 67

79. The CHAIRMAN invited the Commission to consider article 67, on the privileges and immunities of the permanent observer mission; he pointed out that the Special Rapporteur proposed the insertion of a reference to his new article 27 *bis* (A/CN.4/241/Add.4).

80.

Article 67

Privileges and immunities of the permanent observer mission

The provisions of articles 25, 26, 27, 29 and 38, paragraph 1 (a), shall apply also in the case of permanent observer missions.

81. Mr. CASTRÉN observed that the addition of a reference to article 27 *bis*, on entry into the host State, was the only change in article 67 proposed by the Special Rapporteur.

82. Mr. ALBÓNICO said that article 68, on freedom of movement, merely provided that the provisions of article 28 should apply also in the case of permanent observer missions. If a reference to article 28 was inserted in article 67, article 68 could be dispensed with.

83. Mr. SETTE CÂMARA supported that suggestion. The same procedure could be applied to several of the succeeding articles, thus making a substantial reduction in the length of the draft.

84. Sir Humphrey WALDOCK said it was easy to suggest that permanent observers should be granted less freedom of movement than permanent representatives and that article 68 should be amended accordingly. By retaining article 68 as it stood, the Commission would show that it was not convinced by the strong attacks made by certain governments on its principle of assimilating permanent observer missions to permanent missions in certain respects.

85. Mr. AGO said that the Drafting Committee should group cross-references together in a single provision whenever possible, but should produce separate articles wherever there were differences in treatment, however slight, between permanent missions and permanent observer missions.

86. Sir Humphrey WALDOCK said that, at the present stage, the Commission was examining every subject individually to see if there was any justification for drawing a distinction between permanent observer missions and permanent missions. At a later stage, consideration could be given to the amalgamation of certain articles relating to matters in which no distinction was made between the two types of mission.

87. Mr. USTOR said that the Commission ought perhaps to give the Drafting Committee instructions on

¹⁷ For resumption of the discussion see 1122nd meeting, para. 74.

¹⁸ For resumption of the discussion see 1122nd meeting, para. 80.

that important question of drafting. There were three possible courses. The first was to retain the articles in Part III as they stood, although in the Sixth Committee there had been criticism of the length of the draft. The second was to cover in a single article, on the lines of article 67, all the situations in which a permanent observer mission was treated in the same manner as a permanent mission. The third was to combine Part II, section 2, with Part III, section 2, and thus have only one series of articles on the facilities, privileges and immunities of both permanent missions and permanent observer missions.

88. Mr. ROSENNE said it was perhaps too early to make a choice between those three possible courses. The Commission had examined all the substantive provisions of Part III individually at its twenty-second session, and it would now have to do so again in the light of governments' comments and the Special Rapporteur's revised conclusions. Once that process had been completed, it would be for the Drafting Committee to decide the important question of drafting to which Mr. Ustor had referred. He himself preferred the second course of action: that of preparing one or two articles using the technique of drafting by reference.

89. The present procedure was admittedly somewhat tedious, but it was necessary in order to avoid the use of the formula *mutatis mutandis*, which would give rise to even greater difficulties.

90. Mr. AGO said that he too was in favour of the second course suggested by Mr. Ustor. For the sake of clarity, it would be better to cross-reference from one part of the draft to another than to include a series of provisions on privileges and immunities in each of the four parts.

91. The CHAIRMAN suggested that article 67 be referred to the Drafting Committee for consideration in the light of the discussion. The Drafting Committee should also consider the remarks made on the drafting of section 2 as a whole.

*It was so agreed.*¹⁹

ARTICLE 68

92. The CHAIRMAN invited the Commission to consider article 68 on freedom of movement, to which the Special Rapporteur had proposed no change.

93.

Article 68

Freedom of movement

The provisions of article 28 shall apply also in the case of members of the permanent observer mission and members of their families forming part of their respective households.

94. The CHAIRMAN said that, as there were no comments, he took it that the Commission was prepared to refer article 68 to the Drafting Committee.

¹⁹ For resumption of the discussion see 1122nd meeting, para. 86.

*It was so agreed.*²⁰

ARTICLE 69

95. The CHAIRMAN invited the Commission to consider article 69, on personal privileges and immunities, to which the Special Rapporteur had proposed no change.

96.

Article 69

Personal privileges and immunities

1. The provisions of articles 30, 31, 32, 35, 36, 37 and 38, paragraphs 1 (b) and 2, shall apply also in the case of the permanent observer and the members of the diplomatic staff of the permanent observer mission.

2. The provisions of article 40, paragraph 1, shall apply also in the case of members of the family of the permanent observer forming part of his household and the members of the family of a member of the diplomatic staff of the permanent observer mission forming part of his household.

3. The provisions of article 40, paragraph 2, shall apply also in the case of members of the administrative and technical staff of the permanent observer mission, together with members of their families forming part of their respective households.

4. The provisions of article 40, paragraph 3, shall apply also in the case of members of the service staff of the permanent observer mission.

5. The provisions of article 40, paragraph 4, shall apply also in the case of the private staff of members of the permanent observer mission.

97. Mr. USHAKOV observed that paragraph 1 referred direct to the corresponding articles on permanent missions, whereas paragraphs 2 to 5 referred to the corresponding paragraphs of article 40, which in turn referred to the articles mentioned in paragraph 1. Paragraphs 2 to 5 should refer to those articles direct, especially as the corresponding paragraphs of article 40 referred to articles 30 to 38 *en bloc* and, as he had pointed out during the discussion of article 40, articles 33 and 34 were not concerned with personal privileges and immunities.²¹

98. The CHAIRMAN said that, if there were no objections, he would take it that the Commission was prepared to refer article 69 to the Drafting Committee with Mr. Ushakov's comments.

*It was so agreed.*²²

ARTICLE 70

99. The CHAIRMAN invited the Commission to consider article 70. He reminded members that the Special Rapporteur had proposed a drafting change consisting in the insertion of commas before and after the words "and persons on the private staff" (A/CN.4/241/Add.4).

²⁰ For resumption of the discussion see 1123rd meeting, para. 1.

²¹ See 1096th meeting, para. 109.

²² For resumption of the discussion see 1123rd meeting, para. 3.

100.

*Article 70**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 members of the permanent observer mission and persons on the private staff who are nationals of or permanently resident in the host State.

101. Mr. ROSENNE said that of the two drafting suggestions made by the Secretariat of the United Nations (A/CN.4/L.162/Rev.1), he agreed with the Special Rapporteur in preferring the first.

102. The CHAIRMAN suggested that article 70 should be referred to the Drafting Committee with Mr. Rosenne's comment.

*It was so agreed.*²³

ARTICLE 71

103. The CHAIRMAN invited the Commission to consider article 71, on waiver of immunity and settlement of civil claims, to which the Special Rapporteur had proposed no change.

104.

*Article 71**Waiver of immunity and settlement of civil claims*

The provisions of articles 33 and 34 shall apply also in the case of persons enjoying immunity under article 69.

105. Mr. USHAKOV said that in his opinion article 34 should not be mentioned in article 71. Moreover, the provision was an important one, and it would be better to draft a complete article modelled on article 33, rather than rely on cross-reference.

106. Mr. ALBÓNICO said he agreed with Mr. Ushakov. Article 33 applied to persons enjoying immunity under article 40 and not under article 69.

107. Mr. ROSENNE said that the point was essentially one of drafting. Perhaps the provision in question might be generalized, inasmuch as it affected the draft articles as a whole.

108. Sir Humphrey WALDOCK said that article 34 seemed to him to be an article of some importance.

109. Mr. AGO reminded the Commission that its discussion on article 34 had centred mainly on the question whether it could make an article imposing an obligation out of what had been merely a recommendation in the previous conventions.

110. The CHAIRMAN said that, if there were no objections, he would take it that the Commission was prepared to refer article 71 to the Drafting Committee with the observations made.

*It was so agreed.*²⁴

²³ For resumption of the discussion see 1123rd meeting, para. 4.

²⁴ For resumption of the discussion see 1123rd meeting, para. 5.

ARTICLE 72

111. The CHAIRMAN invited the Commission to consider article 72. He drew attention to the drafting change proposed by the Special Rapporteur (A/CN.4/241/Add.4) which consisted in replacing the words "not being nationals" by "who are not nationals".

112.

*Article 72**Exemption from laws concerning acquisition of nationality*

The provisions of article 39 shall apply also in the case of members of the permanent observer mission not being nationals of the host State and members of their families forming part of their household.

113. Mr. YASSEEN said that, for the purposes of article 72, permanent observer missions could be assimilated to permanent missions.

114. Mr. ALBÓNICO said he could accept article 72 on the understanding that *jus soli* would not be applicable to the members of the permanent observer mission, regardless of whether they were members of the diplomatic staff, the administrative and technical staff or the service staff.

115. The CHAIRMAN suggested that article 72 should be referred to the Drafting Committee, with Mr. Albónico's comment.

*It was so agreed.*²⁵

ARTICLE 73

116. The CHAIRMAN invited the Commission to consider article 73, on the duration of privileges and immunities, to which the Special Rapporteur had proposed no change.

117.

*Article 73**Duration of privileges and immunities*

The provisions of article 42 shall apply also in the case of every person entitled to privileges and immunities under the present section.

118. The CHAIRMAN said that, if there were no objections, he would take it that the Commission was prepared to refer article 73 to the Drafting Committee.

*It was so agreed.*²⁶

ARTICLE 74

119. The CHAIRMAN invited the Commission to consider article 74. The Special Rapporteur proposed a drafting change (A/CN.4/241/Add.4) consisting in the insertion of the word "of" before the words "the couriers".

²⁵ For resumption of the discussion see 1123rd meeting, para. 7.

²⁶ For resumption of the discussion see 1123rd meeting, para. 8.

120.

*Article 74**Transit through the territory of a third State*

The provisions of article 43 shall apply also in the case of the members of the permanent observer mission and members of their families, and the couriers, official correspondence, other official communications and bags of the permanent observer mission.

121. The CHAIRMAN said that, if there were no objections, he would take it that the Commission was prepared to refer article 74 to the Drafting Committee.

*It was so agreed.*²⁷

ARTICLE 75

122. The CHAIRMAN invited the Commission to consider article 75, on non-discrimination, to which the Special Rapporteur had proposed no change.

123.

*Article 75**Non-discrimination*

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

124. Mr. YASSEEN said that in his opinion article 75 should be included in the general provisions.

125. The CHAIRMAN observed that that was also the opinion of the Special Rapporteur. He therefore suggested that consideration of article 75 should be deferred.

*It was so agreed.*²⁸

ARTICLE 76

126. The CHAIRMAN invited the Commission to consider article 76, on the conduct of the permanent observer mission and its members, to which the Special Rapporteur had proposed no change.

127.

*Article 76**Conduct of the permanent observer mission and its members*

The provisions of articles 45 and 46 shall apply also in the case of permanent observer missions.

128. Mr. USHAKOV said that the title of article 76, like that of section 3 of Part II, on permanent missions, and section 3 of Part III, on permanent observer missions, was not very apt. It was difficult to see what constituted the conduct of a mission. The Drafting Committee should try to find a better formula.

129. Mr. CASTRÉN said he shared that opinion. It was true that article 45, paragraph 3, to which article 76 referred, was concerned with the use made of the premises of the permanent mission, but even in that case

²⁷ For resumption of the discussion see 1123rd meeting, para. 9.

²⁸ For resumption of the discussion see 1123rd meeting, para. 10.

it was the head of the permanent mission who was responsible, so it was sufficient to speak of the conduct of the persons composing the mission.

130. Mr. ROSENNE said he did not entirely agree with Mr. Castrén. In law, the responsibility in each case rested with the sending State, not with the members of the permanent observer mission.

131. He agreed with Mr. Ushakov's comment on the title of article 76.

132. Paragraph 3 of article 45 seemed out of place in that article and should be a separate article.

133. Mr. AGO said that Mr. Ushakov's comment deserved careful consideration. It was possible that there could be cases of collective conduct, and the Drafting Committee should be careful not to exclude them.

134. Sir Humphrey WALDOCK said he thought the Commission should reserve its position on article 76 until the Drafting Committee had submitted a new text.

135. The CHAIRMAN suggested that article 76 should be referred to the Drafting Committee with the comments made during the discussion.

*It was so agreed.*²⁹

ARTICLE 77

136. The CHAIRMAN invited the Commission to consider article 77, on the end of functions, to which the Special Rapporteur had proposed no change.

137.

*Article 77**End of functions*

The provisions of articles 47, 48 and 49 shall apply also in the case of permanent observer missions.

138. Mr. USHAKOV reminded the Commission that when it had considered article 48 he had intimated that he thought that article unnecessary.³⁰ If the Commission decided to delete article 48, the reference to it in article 77 should also be deleted. It was true that the previous conventions provided that the host State must grant facilities for departure in exceptional cases, for example, when diplomatic relations were broken off, but no comparable situation could arise between sending States and international organizations.

139. The CHAIRMAN suggested that article 77 should be referred to the Drafting Committee.

*It was so agreed.*³¹

The meeting rose at 12.35 p.m.

²⁹ For resumption of the discussion see 1123rd meeting, para. 24.

³⁰ See 1098th meeting, para. 81.

³¹ For resumption of the discussion see 1123rd meeting, para. 26.

1105th MEETING

Monday, 24 May 1971, at 3.10 p.m.

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

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

[Item 1 of the agenda]

(continued)

QUESTION OF TEMPORARY OBSERVERS

1. The CHAIRMAN invited the Commission to comment on Mr. Ustor's proposal that the Special Rapporteur should be asked to prepare a working paper on temporary observers.¹ The Commission need take no final decision on the matter at that stage.
2. Mr. YASSEEN said he feared that action on Mr. Ustor's proposal would lead to serious difficulties. The Commission was engaged in the second reading of the draft articles and had undertaken to put them into final form at the present session. If it tried to draft provisions on temporary observers, it would not have time to consult governments. All things considered, the question raised by Mr. Ustor was a matter of detail which could easily be settled according to the provisions already drawn up by the Commission, the relevant rules of organizations and the rules of procedure of conferences. In any case, the draft could not be criticized as being incomplete because it did not contain express provisions on temporary observers.
3. Mr. CASTRÉN said he appreciated Mr. Yasseen's arguments but thought that the Special Rapporteur should nevertheless be asked to amplify the working paper he had submitted on the subject at the previous session.² Since rules on the subject already existed, it should be relatively easy to extract general principles from them.
4. Mr. BARTOŠ supported Mr. Ustor's proposal. The first point to be decided was whether temporary observers were to be regarded as observers within the meaning of Part III of the draft, or as *ad hoc* delegates of governments, with only limited powers. In the first case, their status could be adequately regulated on the basis of the

articles applicable to permanent observers; in the second case, their status would have to be the subject of special rules.

5. The Commission had been in a similar situation when delimiting the subject-matter of special missions and of permanent missions to international organizations. The Special Rapporteur should therefore be asked to make a careful examination of the status of temporary observers and give his views.

6. Mr. AGO said he shared Mr. Yasseen's concern that the Commission should keep to its time-table, but he thought the draft would be incomplete without articles on temporary observers. If it was to avoid criticism for such an omission, the Commission must consider the subject, even though it would doubtless raise even thornier problems than that of permanent observers.

7. Mr. USHAKOV reminded the Commission that it was the Special Rapporteur himself who had proposed that the question of temporary observers should be dealt with; he would no doubt be willing to re-examine that question in a new working paper. In the light of that paper, the Commission would act as circumstances required. If possible, it would prepare separate articles; otherwise it would have to defer consideration of the question.

8. The CHAIRMAN, speaking as a member of the Commission, observed that the Commission had little time at its disposal, and that it was important to consult governments on the problem of temporary observers. Such consultation was all the more necessary because the problem concerned all States which might convene international conferences, whereas in the case of permanent observers the few States acting as host to international organizations were those most directly concerned. It was to be hoped, therefore, that the discussion would not become confused by matters of detail.

9. Mr. USTOR said he agreed with Mr. Castrén and Mr. Ushakov that, since the Special Rapporteur had already submitted a working paper on the question of temporary observers, it would not be an imposition to ask him to submit a further paper suggesting how the subject could be dealt with at the present stage.

10. Sir Humphrey WALDOCK said that the Commission should do its best to deal with the subject. When it saw the Special Rapporteur's proposals, it might find that they raised problems which should, in principle, be submitted to governments for comment; in that event, the Commission might still complete its work on draft articles on temporary observers, but place them in an annex, thus giving them a different status from the rest of the draft.

11. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to request the Special Rapporteur to prepare a working paper on the question of temporary observers, taking the discussion into account.

*It was so agreed.*³

¹ See 1103rd meeting, para. 26.

² A/CN.4/L.151.

³ For resumption of the discussion see 1121st meeting, para. 65.

PART IV. *Delegations of States
to organs and to conferences*

12. The CHAIRMAN invited the Commission to consider Part IV of the draft, on delegations of States to organs and to conferences. The first article in Part IV was article 78, on the use of terms; he suggested that consideration of that article should be deferred, in conformity with the Commission's decisions on earlier articles on the same subject.

13. Mr. CASTRÉN suggested that consideration of articles 79 and 80 should also be deferred; the provisions of those articles were connected with those of articles 3, 4 and 5, which the Commission had decided to examine later.

14. Mr. SETTE CÂMARA said he agreed with Mr. Castrén, but in the light of the Special Rapporteur's observations on article 79 (A/CN.4/241/Add.5) it seemed necessary to consider how that article was to be combined with article 5 in Part I.

15. Mr. ALCÍVAR said that there was an additional reason for deferring consideration of article 80. Since that article merely rendered the provisions of certain other articles applicable in certain circumstances, it would be preferable not to discuss it until the Commission had dealt with those other articles, namely, articles 81, 83, 86, 88 and 90.

16. The CHAIRMAN noted that there was general agreement to defer consideration of articles 78 to 80.

ARTICLE 81

17. He invited the Commission to consider article 81, to which the Special Rapporteur had proposed no change.

18.

*Article 81
Composition of the delegation*

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

19. Mr. TAMMES said that he wished to make a general remark which was difficult to submit in connexion with any individual article. The Commission had decided to defer consideration of article 78, on the use of terms, but sub-paragraph (b) of that article provided that, for the purposes of Part IV of the draft, a conference meant "a conference of States convened by or under the auspices of an international organization, other than a meeting of an organ".

20. Since article 2, paragraph 1, limited the scope of the draft articles to representatives of States to "international organizations of universal character", it followed that, in the context of the draft as a whole, only conferences connected with a universal organization were covered by the provisions of Part IV. Other conferences, even if they were of a universal character, remained outside the scope of the draft.

21. The Netherlands Government, in its written comments, had given several examples of conferences which, although of a universal character, were not convened by a world-wide organization (A/CN.4/240/Add.3, section B.11, para. 21). It was unsatisfactory that the draft should disregard such conferences and cover only those governed by existing rules which had already been applied for a long time without any difficulty, namely, conferences convened by, or under the auspices of, organizations of a universal character.

22. In his observations on that point (A/CN.4/241/Add.5, para. 7 under article 78), the Special Rapporteur had referred to the working paper he had submitted to the Commission, at its twenty-second session, on temporary observer delegations and conferences not convened by international organizations.⁴ At the end of his working paper, the Special Rapporteur had suggested that:

"As regards conferences not convened by international organizations, the application of the draft articles on representatives of States to international organizations and conferences could be extended to them either by referring to conferences in general in the draft articles and not only to conferences convened by international organizations or by adding at the end of the articles relating to conferences convened by international organizations a provision making them applicable to conferences not convened by international organizations."

Of those two suggestions, he (Mr. Tammes) preferred the second; he thought the introduction of a separate article on the subject at the end of Part IV would make the whole draft as comprehensive as possible.

23. He therefore suggested that the Commission should invite the Special Rapporteur to prepare a draft article on the lines suggested in his working paper. That should not present any great difficulty, since only one article was required and governments had already commented on its subject-matter in connexion with article 78, sub-paragraph (b).

24. Mr. USHAKOV said he agreed with Mr. Tammes in regard to article 78, sub-paragraph (b). At the Commission's twenty-second session he had strongly opposed the idea of dealing in the same provisions both with delegations to organs of international organizations and with delegations to conferences convened by international organizations.⁵ Such an assimilation was entirely artificial and raised many problems, as shown by the Netherlands Government's reaction to article 78, sub-paragraph (b). There were no real links between the organization convening a conference and the conference itself. Once it had opened, a conference was entirely independent, with its own tasks, composition, working methods and rules of procedure. He still considered that the draft should contain separate provisions on delegations to conferences, so that all conferences could be covered, even

⁴ A/CN.4/L.151.

⁵ See *Yearbook of the International Law Commission, 1970*, vol. I, p. 56.

including those which were not convened by international organizations.

25. Sir Humphrey WALDOCK said it was not clear exactly how far the universal character of the organization convening the conference limited the application of the draft. The limitation stated in article 2, paragraph 1, was not repeated in Part IV, nor indeed in Part III, and it would be necessary to clarify whether, in fact, Part IV covered only conferences convened by organizations of a universal character; it would also be necessary to clarify the position in regard to Part III.

26. Mr. SETTE CÂMARA said that the present text of article 81, including the requirement that at least one person must be appointed as representative of the sending State and the faculty of appointing a head of the delegation, was in conformity with international practice. The system in force in the International Labour Organisation was covered, since the text did not lay down any obligation to appoint a head of the delegation.

27. He suggested that article 81 should be referred to the Drafting Committee with a recommendation to consider the editorial change suggested by the United Nations Secretariat (A/CN.4/L.162/Rev.1).

28. Mr. YASSEEN supported that suggestion.

29. Mr. ALCÍVAR pointed out that in United Nations practice a distinction was made between the members of a delegation, who were usually called "delegates", and the permanent representative, who was not always a member of the delegation. He suggested that the Drafting Committee should carefully examine the wording of article 81 in the light of that practice.

30. Mr. ROSENNE said that, in view of the important point raised by Sir Humphrey Waldoock, the Drafting Committee might well consider whether all the articles in Part IV should not constitute a separate set of draft articles. The application of the key articles 3, 4 and 5 to Part IV was made more complicated by the distance separating those articles from Part IV.

31. With regard to the point raised by Mr. Alcívar, he suggested that the Drafting Committee should consider the inclusion of a general reservation on nomenclature. The indication in article 78, on the use of terms, that the meanings therein attached to various terms were given "for the purpose of the present part" might not be sufficient. It would be desirable to state in an article at the end of the draft that the various provisions it contained were without prejudice to the usages of States and of international organizations regarding what they understood by such terms as "delegation" and "mission".

32. Mr. USHAKOV, referring to Sir Humphrey Waldoock's comment, said that article 78 did not specify what kind of organization was meant, because the Commission had assumed that the definition of the term "international organization" given in article 1 applied to the whole draft, including Part IV. Sub-paragraph (a) of article 78 should therefore be understood to refer to an organ of "an international organization of universal character", and sub-paragraph (b) to a conference con-

vened by "an international organization of universal character".

33. Sir Humphrey WALDOCK pointed out that in article 1 the term "international organization" was stated to mean simply an "intergovernmental organization". Since the term was used in Part IV without any qualification, it was not clear whether the provisions of that part applied to all conferences or only to those convened by an organization of a universal character.

34. Mr. USTOR pointed out that in article 78, sub-paragraph (b), a conference was said to mean a "conference of States convened by or under the auspices of an international organization". Nothing was said about whether the organization was of a universal, regional or other character. The Commission should specify whether the articles in Part IV were intended to apply only to conferences convened by organizations of a universal character, or whether they would also apply, for example, to a universal conference convened by a regional organization.

35. Mr. YASSEEN said it was more a matter of the scope of the draft than the wording of the article. The Commission had taken a deliberate decision and should make that plain in the commentary.

36. Mr. USHAKOV said that the Commission had always had organizations of a universal character in view. Article 1 defined an "international organization of universal character", and article 2 applied to the whole draft.

37. The question of the universality of conferences themselves was one the Commission could not settle, for the principle of universality raised political issues, whether the conferences were convened by international organizations or not. He himself supported the principle of universality, but he doubted whether all the members were of the same opinion. The Special Rapporteur should try to find a solution of the problem.

38. Mr. BARTOŠ observed that the question at issue was important from the standpoint of the codification of international law. Although he was a firm supporter of the principle of universality, he realized that it did not always prevail in practice. Some people, while professing to favour the principle, claimed that certain States were not worthy to participate in international legal cooperation. The Commission had already declared itself in favour of the principle of universality, but had been able to leave it to the General Assembly and the major codification conferences to settle the matter in practice. In his view the Commission should not rely on the political conditions of the day; it was required lay down real legal rules on the subject. If it was to do that, the principle of universality must reflect reality. The Commission should state plainly that, in its opinion, the principle could not be applied unless it was accompanied by legal rules.

39. Mr. AGO said that the Commission should not complicate the question. The draft articles dealt with relations between States and international organizations. The Commission had confined itself to international organizations with universal responsibility. Such organ-

izations could have organs which were or were not universal. For instance, the Economic Commission for Europe was a regional organ of an organization with universal responsibility. The meetings of such an organ were covered by the draft articles. Similarly, conferences convened by international organizations could be universal or regional. If they were convened by international organizations of a universal character, they came within the scope of the draft articles. But it would be wrong to go so far as to say that the Commission had in mind only delegations to organs or conferences of a universal character. It might perhaps have been better, as Mr. Ushakov maintained, not to deal with delegations to conferences in Part IV.

40. The Drafting Committee should carefully examine the questions of terminology raised by Mr. Alcívar and Mr. Rosenne. The term "permanent representative" was very ambiguous, as the term "permanent delegate" was also used with reference to certain organs of international organizations. The meaning of those terms should be specified in the commentary or in an article.

41. Mr. YASSEEN said that the difference in wording was intentional. An organ or a conference was not necessarily universal, and it sometimes happened that an organization with universal responsibility convened a conference concerned with only one region or continent; there did not appear to be any reason why the rule should not apply in such cases. The difference in drafting therefore reflected a different solution, and the text should be clarified in order to prevent any misunderstanding.

42. Mr. ELIAS said that the point raised by Mr. Tammes had been well taken; both Sir Humphrey Waldock and Mr. Ushakov had clarified it in different ways. It was only proper that the Commission should define its terms from the beginning, so that the discussion could take place within a common frame of reference. However, as Mr. Ushakov had emphasized, all members agreed that they were dealing with international organizations of a universal character; if the present formulation was not clear, the Commission itself, and not the Drafting Committee, should clarify the text so that no ambiguity remained. He hoped that, in doing so, it would not again become involved in the controversy about universality which had forced it to vote on the principle in its discussion of the law of treaties in 1963, and which had taken up more than five weeks of the Vienna Conference.⁶ At that time, the question had been dealt with partly in the final clauses of the Vienna Convention on the Law of Treaties and partly in a resolution. It had divided the General Assembly ever since. The Commission should bear in mind that the main body of opinion in the United Nations would in all probability still be opposed to any over-idealistic solution. He urged the Commission to proceed with the discussion of article 81 without further consideration of the question of universality, which could be taken up in due course in connexion with articles 3, 4 and 5.

⁶ See *United Nations Conference on the Law of Treaties, Official Records, Second session*, discussion on article 5bis, p. 229 *et seq.* (United Nations publication, Sales No.: E.70.V.6).

43. Mr. NAGENDRA SINGH said that the observations of Member States on article 81 clearly seemed to justify its retention, while the observation made by the International Labour Office had been correctly answered by the Special Rapporteur (A/CN.4/241/Add.5). As to the universal character of conferences, it should be remembered that a conference might be regional in scope, but be convened under the auspices of an international organization of a universal character. From a regulatory point of view article 81 might not be of great importance, but since it had been drafted by the Commission and had already met with some degree of approval he thought it should be retained.

44. Mr. ROSENNE said that, in the light of some of the remarks which had been made, he felt bound to remind the Commission that the present articles had to be drafted in terms of privileges and immunities and not in terms of participation in conferences. From the point of view of privileges and immunities, the determining factor was not the composition or size of the delegation, but the character of the organization to which the organ belonged, or which convened the conference. In the United Nations a difficult problem sometimes arose when a Member was not a full participant in the meeting of a particular organ or conference, but was entitled to send observers to that meeting who could speak with the permission of the Chairman or President. It should be made clear that in such cases a State which was not a member of the organization would be in a slightly different position from a member with respect to the sending of observers.

45. Sir Humphrey WALDOCK said he had assumed that the Commission had already taken a definite decision to confine its work to organizations of a universal character. There might be a risk of inconsistency and lack of co-ordination if conferences and organs were dealt with in the same part of the draft articles. However, that seemed to be primarily a question of drafting, and he thought that article 81, in which he found no special difficulty, should be referred to the Drafting Committee.

46. The CHAIRMAN suggested that article 81 be referred to the Drafting Committee with the request that it should bear in mind the views expressed about the general character of the draft articles.

It was so agreed.⁷

ARTICLE 82

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

48.

Article 82

Size of the delegation

The size of a delegation to an organ or to a conference shall not exceed what is reasonable or normal, having regard to the functions of the organ or, as the case may be, the tasks of the

⁷ For resumption of the discussion see 1123rd meeting, para. 28.

conference, as well as the needs of the particular delegation and the circumstances and conditions in the host State.

49. Mr. CASTRÉN reminded the Commission that when it had considered article 82 at first reading it had, for the reasons given by the Government of Finland in its written observations (A/CN.4/240/Add.2, section B.8), expressed some doubts about the need for a provision of that kind. The problem which really arose in practice was that of too small delegations.

50. Article 82 was worded in very general and even vague terms which might lead to abuses by the host State. For by invoking article 82 it could make the sending State limit the size of its delegation, to the detriment of that State's interests and of the work of the organ or conference.

51. Mr. SETTE CÂMARA said that article 82 corresponded to article 16, on the size of the permanent mission, but that it differed from article 11 of the Vienna Convention on Diplomatic Relations⁸ in that it did not empower the host State to "require that the size of the mission be kept within limits considered by it to be reasonable and normal". Any dispute as to what was "reasonable and normal", therefore, would presumably be subject to the provisions of article 50. He supported the Special Rapporteur's suggestion that article 82 should be kept as it stood.

52. Sir Humphrey WALDOCK pointed out that there was a certain protection in the rule that article 82 must be applied without discrimination with respect to the requirements imposed by the host State on participating States.

53. The CHAIRMAN suggested that article 82 should be referred to the Drafting Committee with the comments made during the discussion.

It was so agreed.⁹

ARTICLE 83

54. The CHAIRMAN invited the Commission to consider article 83, for which the Special Rapporteur had proposed two alternative texts.

55.

Article 83

Principle of single representation

A delegation to an organ or to a conference may represent only one State.

ALTERNATIVE A

As a rule, a delegation to an organ or to a conference may represent only one State.

ALTERNATIVE B

A delegation to an organ or to a conference may represent only one State, unless the rules and practice of the organ or conference otherwise provide.

56. Mr. YASSEEN observed that article 83 had attracted comments by a fairly large number of governments and by delegations to the Sixth Committee, not only from countries of the Third World, but also from certain developed countries. The trend of the progressive development of international law was to facilitate access to international conferences, and it would be desirable to authorize the representation of several States by a single delegation, not only for practical and financial reasons, but also because multiple representation might be a manifestation of solidarity or an expression of concordant views.

57. The alternatives proposed by the Special Rapporteur were both unsatisfactory. The first, in spite of the opening words, was not a rule. The second gave the impression that the principle was single representation. In fact, the representation of several States by a single delegation was not contrary to any fundamental principle of general international law and did not conflict with the principle of sovereignty of States. That possibility should therefore be confirmed in the principle to be laid down in article 83.

58. Mr. REUTER said he agreed with Mr. Yasseen. The Commission should adopt as flexible a position as possible and, with that in mind, re-examine alternatives A and B proposed by the Special Rapporteur. Of the two versions, both of which would require amendment by the Drafting Committee, alternative B seemed to provide the better starting point.

59. The Commission should consider whether it was correct to say that a delegation might represent several States, and whether it would not be more accurate to say that the same persons might be appointed to form the delegation of one State or of another State. He had no views on the form of words the Commission should adopt. The first question it should decide was whether it wished to say that the same persons could be given two different mandates. If, on the contrary, they were to form one and the same delegation, that should be expressed more fully.

60. Mr. ROSENNE said that, if it was necessary to regulate the principle of single representation in a draft article, he would prefer it to be modelled on the Special Rapporteur's alternative B. However, since article 83 was referred to in article 80, there might be drafting complications. He was not convinced that the article was necessary; if it was considered necessary, it should be made clear whether the term "delegation" referred only to the delegation as such or included the members composing the delegation. In the latter case it was always possible that the individual members might not have identical instructions. Their representative function comprised two different functions: that of speaking and that of voting. The Commission should therefore incorporate in its commentary the numerous practical illustrations which had been furnished by the Special Rapporteur and by governments.

61. Mr. BARTOŠ said he was opposed to the representation of several States by a single delegation, which was sometimes contrary to the principle of sovereignty;

⁸ United Nations, *Treaty Series*, vol. 500, p. 102.

⁹ For resumption of the discussion see 1123rd meeting, para. 62.

but the Commission had to take account of the facts, including the fact that collective representation existed.

62. Mr. Reuter's idea was more logical, but it was not in conformity with practice, which was to confer full powers on a delegation as such and not on the persons composing it, in order to avoid the difficulties which might arise from changes in the membership of the delegation. Multiple representation dated back to the nineteenth century and could be a manifestation of solidarity between two States. It was practised today by certain States of the Third World, which saw in such representation, apart from its financial advantages, a means of fighting regional imperialism.

63. The powers were certainly conferred on a delegation and not on persons, as was shown by the example of Luxembourg, which traditionally entrusted its representation to Belgian and Netherlands diplomacy irrespective of changes of ambassador. Multiple representation might thus reflect the idea of a diplomatic, consular or other alliance; but it must be noted that that institution, on which the States of the Third World had placed great hopes, also aroused strong opposition. The Latin American countries, for example, had never accepted the idea of being represented by another State.

64. Consequently, in the light of realities and of present practice, the Commission could either abandon the principle of single representation, or accept the rules formulated by the Special Rapporteur and mention in the commentary both the advantages of multiple representation and the difficulties it raised, in particular, the question whether the powers should be conferred on a person or on a delegation as such.

65. Mr. USHAKOV said that the new alternatives proposed by the Special Rapporteur were unsatisfactory. In alternative A, the original wording was merely preceded by the words "As a rule", which added nothing. In alternative B, the principle stated was made subject to the rules and practice of the organ or conference. That condition was strange, to say the least, for a conference could not have any practice, or rules either for that matter. It could have rules of procedure, but there was no need to mention them in article 83 because they were already mentioned in article 80. Furthermore, it was not clear what was meant by the rules of the organ. If it was the rules of the organization that were meant, that reference was also unnecessary in view of the provisions of article 3.

66. Since the additions made by the Special Rapporteur in both alternative A and alternative B were redundant, the Commission was left with the text of the article adopted at first reading, which he supported.

67. Mr. SETTE CÂMARA said that, although the principle of single representation stated in article 83 was supported by some practice, it was far from being a general rule of international law. There was obviously a need for some provision which would permit dual representation under certain conditions. At a time when the United Nations was faced with the proliferation of micro-States and when the Secretary-General himself had referred to the possibility of associations of States, it

would ill become the Commission to place undue emphasis on the principle of single representation. In view of the impressive number of precedents for dual and multiple representation cited by the Special Rapporteur, it would seem that article 83 was emerging as a residuary rule which should be retained. He preferred the Special Rapporteur's alternative B as being more explicit; but whatever text was adopted its residual character should be made clear.

The meeting rose at 6 p.m.

1106th MEETING

Tuesday, 25 May 1971, at 10.30 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castrén, Mr. Elias, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

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

[Item 1 of the agenda]

(continued)

ARTICLE 83 (Principle of single representation) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 83 on the principle of single representation.

2. Mr. ELIAS said that article 83 was one of the shortest of the draft articles and one of the most difficult to put into an acceptable form. At its last session the Commission, as indicated in the commentary, had reached two different conclusions: first, that it should review the article at the second reading in the light of the observations of governments and international organizations; secondly, that the situations envisaged were so varied that it should not propose a general rule, but should leave the matter to the rules and practices of the various international organizations.¹

3. In its written observations the Government of the Netherlands had drawn attention to the fairly large and

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

representative number of international organizations which permitted multiple representation (A/CN.4/240/Add.3, section B.11), while the Government of New Zealand had explained the treaty arrangement under which it was permitted to represent the Government of Western Samoa (A/CN.4/240, section B.4). The written observations of the Government of Switzerland (*ibid.*, section C.) provided a reminder that the problem of multiple representation was not confined to new States; there might well be other cases, besides that of Liechtenstein, in which an old, but small State preferred to be represented by a larger State.

4. Instances of dual or multiple representation had occurred at the Vienna Conference on the Law of Treaties. At many meetings during that Conference, the Ivory Coast had also represented Dahomey and in some cases Upper Volta. The Central African Republic had been represented sometimes by Cameroon and sometimes by Gabon. Of course, multiple representation had its disadvantages, in that it was open to abuse for the purpose of securing votes.

5. Mr. ROSENNE had drawn attention to a further consideration: whether members of a delegation to a conference were entitled both to speak and to vote, or only to speak.

6. Having regard to articles 3, 4 and 5, he did not think that article 83 in its present form was adequate as a general residuary rule. He found both the alternatives proposed by the Special Rapporteur unacceptable and was inclined to favour the suggestions of such governments as those of Switzerland and Canada, which considered that if article 83 was to be retained at all, it should contain a second paragraph expressing the idea that a delegation to an organ or a conference might represent more than one State. He could also agree with those who thought that article 83 should be deleted.

7. Mr. ALBÓNICO said that, at the first reading, opinion on article 83 had been divided: some members, like himself, had favoured its deletion, while others had thought that it should be retained. Neither the principle of single representation nor that of multiple representation could be said to be an established rule of international law.

8. It was easy to see that the application of the principle of multiple representation might have disadvantages if it enabled any one State to use the votes of others to further its own exclusive political or economic interests. On the other hand, in certain cases the application of that principle might contribute to the progressive development of international law. For example, a group of countries might have an identity of interests, like the five South American countries which were parties to the Andean Sub-regional Integration Agreement and were represented by one delegation to the Economic Commission for Latin America, or the Member States of the European Economic Community. In such cases as those, however, the identity of interests meant that the representation was really single.

9. He could not accept either of the Special Rapporteur's alternatives and thought that article 83 should

be retained as it stood. If the Commission nevertheless decided to accept some form of multiple representation, it should be based on a real harmony or community of interests, and the possibility of transferring votes should be limited to a maximum of two additional votes. Moreover, no delegation should be allowed to represent a State which was not a member of the organ or participant in the conference concerned.

10. Mr. CASTRÉN said that the question raised by Mr. Reuter, as to whether a person who was a member of the delegation of one State could represent another State in an organ or at a conference, had already been considered at the twenty-second session, when the Commission had come to the conclusion reported in paragraph (2) of the commentary to article 83.² Hence, there was nothing to be gained by re-opening the question, especially as the Special Rapporteur too had discarded his first idea about it.

11. With regard to the question of single or multiple representation, he agreed with other members of the Commission that neither the text approved at the last session nor the alternatives proposed by the Special Rapporteur were satisfactory. As Mr. Ushakov had remarked, the only difference between alternative A and the former text was the addition of the words "As a rule", which implied the existence of certain exceptions, but did not specify them. Alternative B, though also open to criticism, was preferable.

12. In their observations, several governments and organizations had requested that the text should be amended so as to permit multiple representation. As Mr. Elias had pointed out, there were already several instances in which small States or States belonging to the same group, such as the Benelux States and the Scandinavian and Nordic States, had sent joint delegations to meetings of organs of international organizations or to international conferences on economic matters. It was hard to see why that form of representation should be condemned. Neither practical reasons nor considerations of principle justified its prohibition; on the contrary, they militated in favour of its acceptance.

13. The Special Rapporteur's changes in the 1970 text did not go far enough to meet the justified requests of governments and international organizations. He therefore proposed that alternative B be redrafted in positive terms. It might read:

"A delegation to an organ or to a conference may represent two or more States unless the rules and practice of the organ or conference provide otherwise."

The title would have to be amended accordingly.

14. If the Commission could not accept such a radical change, he proposed that the article should be deleted and the matter left to be settled by practice, as it had been in the past.

15. Mr. ALCÍVAR said he had grave doubts about the alternatives proposed by the Special Rapporteur for dealing with the problem of multiple representation: trying to solve the problem in that way would only create

² *Ibid.*

more problems. As Mr. Reuter had pointed out, much would depend on whether the concept of a "delegation to an organ or to a conference" included the individuals composing the delegation. Mr. Rosenne had drawn attention to the difference between delegations which only had the right to speak at a conference and those which also had the right to vote. Again, as Mr. Albónico had pointed out, multiple representation might present political problems.

16. He found it difficult to accept the principle of multiple representation as a general rule, though he could agree that provision might be made for it as an exception, in order to take into account the needs of both developed and developing countries. Much would depend on the type of conference concerned, and on whether a particular group of countries, such as the Andean group referred to by Mr. Albónico, could be represented at it by one delegation. He was therefore inclined to think that article 83 should be deleted and that the Commission should leave it to the conferences and organs themselves to develop some rule of positive law through practice.

17. Mr. USTOR said it was an overriding principle in all diplomatic relations that the members of a mission of any sort should, in principle, be nationals of the sending State. That principle was embodied in article 8 of the Vienna Convention on Diplomatic Relations,³ article 10 of the Convention on Special Missions⁴ and articles 11 and 85 of the present draft. By implication, therefore, it would appear that every mission should serve only one State; but that was a general rule to which some exceptions should be admitted, as authorized by article 6 of the Vienna Convention on Diplomatic Relations and by article 5 on the Convention on Special Missions. Article 6 of the Vienna Convention on Diplomatic Relations provided that:

"Two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State."

18. The Commission had not seen fit to include such a provision in its draft articles on permanent missions, because in practice there had been no case of two States employing the same permanent representative. As a concession, however, some such provision might be included for both permanent missions and permanent observer missions, in order to meet the needs of such developing countries as might wish to resort to multiple representation for reasons of convenience or economy. The Commission should therefore decide whether or not to provide for that possibility, either in the article itself or in the commentary. In any case it should take a uniform position in all four parts of the draft articles.

19. Sir Humphrey WALDOCK said that, when article 83 had been discussed at the last session, he had been in favour of the idea that one delegation could represent more than one State. He still believed that that principle would be of value and that the Com-

mission should not discourage it by adopting a negative article. The principle of multiple representation would be particularly helpful to developing States, but it would also help others, for the multiplicity of international conferences today faced all States with a staffing problem.

20. If a rule was to be adopted, he would prefer a positive to a negative one, though he was not entirely convinced of the need to have any rule at all. He agreed with Mr. Ustor that, if such a rule were adopted, it should be uniform in all parts of the draft articles.

21. Mr. TAMMES said he could not accept either of the alternatives proposed by the Special Rapporteur. After listening to all the arguments, he was convinced that article 83 should be deleted and that the question of single or multiple representation should be left to the rules and practice of the organ or conference concerned. He did not think that organs or conferences were in need of any uniform recommendation on how to organize their work most efficiently; moreover, article 83 did not lay down any principle which was essential for the application of the articles on privileges and immunities.

22. Mr. USHAKOV said that there was, of course, nothing to prevent the Commission from reversing its decision, but he could not endorse a reversal which led it to say that a principle it had confirmed in a draft article a year previously no longer existed in international law. The principle that every State must be represented by its own delegation did exist. It was possible to derogate from that principle, but the exceptions depended solely on the relevant rules of the organization, not on the Commission's preference. Indeed, the Commission had recognized that fact by adopting article 3, which made the application of the draft articles subject to the relevant rules of the organization. At a conference, the rules of procedure alone could authorize multiple representation, and the Commission had so provided in article 80.

23. For those reasons he believed that it would be wrong for the Commission to reconsider the principle of article 83 and to go back on its decision by deleting the article or radically changing its substance.

24. Mr. CASTRÉN pointed out that the Commission had not approved article 83 unanimously. As could be seen from paragraph (1) of the commentary, only a majority of the Commission had supported it; other members had expressed reservations. The Commission had approved the article provisionally and decided to review the matter at the second reading in the light of the observations it received.

25. Mr. ROSENNE thanked Mr. Ustor for calling attention to article 85, which was not mentioned in article 80, on conference rules of procedure. He suggested that the Drafting Committee should consider whether article 85 should be mentioned in article 80; that would be particularly important if the Committee decided to recommend the deletion of article 83.

26. Mr. Ustor had also rightly pointed out the need for uniform treatment of the question throughout the

³ United Nations, *Treaty Series*, vol. 500, p. 100.

⁴ General Assembly resolution 2530 (XXIV), Annex.

draft articles. But it was to be hoped that the Commission would not overburden the draft by inserting provisions similar to article 83 in all the parts.

27. He agreed with previous speakers that article 83 was a residuary rule; it did not involve a question of principle.

28. The CHAIRMAN suggested that article 83 should be referred to the Drafting Committee with the comments made during the discussion.

*It was so agreed.*⁵

ARTICLE 84

29. The CHAIRMAN invited the Commission to consider article 84, to which the Special Rapporteur had proposed no change.

30.

Article 84

Appointment of the members of the delegation

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

31. Mr. SETTE CÂMARA supported the Special Rapporteur's proposal to retain the present text of article 84. The adverse comments made by the Government of the Netherlands, the Government of Switzerland and the International Labour Office had been adequately disposed of by the Special Rapporteur in his observations on article 10 (A/CN.4/241/Add.2) and article 55 (A/CN.4/241/Add.4). The whole philosophy of the draft articles went against giving to the host State powers equivalent to the requirement of *agrément* in bilateral diplomatic relations. He therefore suggested that article 84 should be referred to the Drafting Committee as it stood.

32. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 84 to the Drafting Committee.

*It was so agreed.*⁶

ARTICLE 85

33. The CHAIRMAN invited the Commission to consider article 85, on the nationality of the members of the delegation.

34.

Article 85

Nationality of the members of the delegation

The representatives and members of the diplomatic staff of a delegation to an organ or to a conference should in principle be of the nationality of the sending State. They may not be appointed from among persons having the nationality of the host State, except with the consent of that State which may be withdrawn at any time.

35. The CHAIRMAN drew attention to the amended

text proposed by the Special Rapporteur for the second sentence, which read: "They may not be appointed from among persons having the nationality of the host State, if the host State objects, which it may do at any time."

36. Mr. SETTE CÂMARA noted that, in view of the highly technical character of certain organs and conferences, the Special Rapporteur was in favour of preserving the fullest possible freedom of appointment. He had therefore rejected the Canadian Government's suggestion that persons having permanent residence in the host State should be equated with nationals of the host State (A/CN.4/240, section B.2). The proposed new text did not make the prior consent of the host State a requirement but, instead, conferred upon that State the power to object to an appointment at any time. He supported the more liberal approach adopted by the Special Rapporteur.

37. Mr. USHAKOV observed that, in its present form, the article stipulated that members of the delegation could not be appointed from among persons having the nationality of the host State, "except with the consent of that State", which implied that the sending State must apply for such consent in advance. The Special Rapporteur's new text did not mention the necessity for such an application.

38. Mr. ROSENNE said that the question raised by Mr. Ushakov was a rather delicate one and depended on the final wording adopted for article 50 on consultations. For his part, he would be content to let the Drafting Committee examine the different versions proposed for article 85; he reserved his position until the Committee had reported on the article.

39. Sir Humphrey WALDOCK said he was inclined to agree with Mr. Ushakov. The new rule proposed by the Special Rapporteur might not work in practice. It would be awkward if an appointment were made and an objection was raised to it when the Conference was already under way. The rule stated in the text adopted at the twenty-second session was much more workable and corresponded to the more traditional way of expressing the principle involved.

40. Mr. REUTER said he thought that, if the wording proposed by the Special Rapporteur was adopted, it would be necessary to insert the words "having been previously informed" between the words "if the host State" and the word "objects"; that would have the effect of creating an obligation for the sending State to notify the host State. There would then be little difference in meaning between the two texts under consideration.

41. Mr. CASTRÉN said he shared the view expressed by Mr. Sette Câmara, but recognized that Mr. Reuter's suggestion might allay certain misgivings. With his amendment, the Special Rapporteur's new text would give the host State sufficient protection.

42. Mr. ROSENNE said that the suggested insertion of a rather vague reference to an obligation to notify the host State in advance raised certain delicate questions of principle in regard to the provisions on notification. The idea of direct bilateral relations between the host

⁵ For resumption of the discussion see 1124th meeting, para. 19.

⁶ For resumption of the discussion see 1124th meeting, para. 32.

State and the sending State was not part of the general scheme of the draft articles. If Mr. Reuter's suggestion were referred to the Drafting Committee, the Committee should take care to view it in the general context of the draft, which placed the emphasis on direct relations between the sending State and the organization, not between the sending State and the host State.

43. The CHAIRMAN suggested that article 85 should be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.⁷

ARTICLE 86

44. The CHAIRMAN invited the Commission to consider article 86, on the acting head of the delegation.

45.

Article 86

Acting head of the delegation

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

2. If a delegation does not have another representative available to serve as acting head, another person may be designated as in paragraph 1 of this article. In such case credentials must be issued and transmitted in accordance with article 87.

46. The CHAIRMAN drew attention to the two drafting amendments proposed by the Special Rapporteur, which consisted in replacing the words "in case he is unable", in the first sentence of paragraph 1, by "if he is unable", and inserting the word "provided" before "in paragraph 1", in the first sentence of paragraph 2.

47. Mr. ALBÓNICO observed that the acting head of a delegation was normally designated by the sending State. Designation by the head of the delegation constituted the exception to that rule; the first sentence of paragraph 1 should be reworded accordingly.

48. Mr. USHAKOV said there was some inconsistency between articles 81 and 86. Article 81 provided that the sending State might appoint a head of the delegation, and article 86 referred to the case in which that head of delegation was absent or unable to perform his functions. Hence article 86 could be applied only when a head of delegation had been appointed in accordance with article 81. The Drafting Committee should perhaps make article 86 begin with the words "Subject to the provisions of article 81".

49. The CHAIRMAN suggested that article 86 should be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.⁸

⁷ For resumption of the discussion see 1124th meeting, para. 41.

⁸ For resumption of the discussion see 1124th meeting, para. 42.

ARTICLE 87

50. The CHAIRMAN invited the Commission to consider article 87, to which the Special Rapporteur had proposed no change.

51.

Article 87

Credentials of representatives

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

2. The credentials of a representative in the delegation to a conference shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent authority if that is allowed in relation to the conference in question, and shall be transmitted to the conference.

52. Mr. USHAKOV said that article 87 also raised a question of concordance with article 81. Article 81 provided that a delegation "shall consist of one or more representatives of the sending State", whereas article 87 gave the impression that there was only one representative. That point should also be considered by the Drafting Committee.

53. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 87 to the Drafting Committee.

It was so agreed.⁹

ARTICLE 88

54. The CHAIRMAN invited the Commission to consider article 88, to which the Special Rapporteur had proposed no change.

55.

Article 88

Full powers to represent the State in the conclusion of treaties

1. Heads of State, Heads of Government and Ministers for Foreign Affairs, in virtue of their functions and without having to produce full powers, are considered as representing their State for the purpose of performing all acts relating to the conclusion of a treaty in a conference or in an organ.

2. A representative to an organ or in a delegation to a conference, in virtue of his functions and without having to produce full powers, is considered as representing his State for the purpose of adopting the text of a treaty in that organ or conference.

3. A representative to an organ or in a delegation to a conference is not considered in virtue of his functions as representing his State for the purpose of signing a treaty (whether in full or *ad referendum*) concluded in that organ or conference unless it appears from the circumstances that the intention of the Parties was to dispense with full powers.

⁹ For resumption of the discussion see 1124th meeting, para. 48.

56. Mr. ROSENNE pointed out that the draft contained three articles on the same subject. The first was article 14, which had been drafted in 1968 by Sir Humphrey Waldock, the former Special Rapporteur on the law of treaties.¹⁰ He suggested that the Commission should invite Sir Humphrey to examine articles 14, 58 and 88 in the light of the 1969 Vienna Convention on the Law of Treaties and of the comments of governments on those three articles. The possibility of merging the three articles into one would no doubt also be considered.

57. Sir Humphrey WALDOCK said that he understood the comments made by certain governments as indicating that the question of full powers to represent the State in the conclusion of treaties might perhaps belong to the topic of treaties concluded between States and international organizations or between two or more international organizations. That was one reason why it had been suggested that the subject should be left outside the scope of the present draft articles.

58. If the Commission decided to deal with the subject, it would have to do so separately in each part of the draft. It could then consider whether all those provisions could be merged into one article. If the Commission so desired, he was prepared to contribute to that work.

59. Mr. USHAKOV observed that article 88 raised certain questions of substance. Paragraph 1 reproduced the relevant wording of article 7, paragraph 2, of the Vienna Convention on the Law of Treaties,¹¹ with the addition of the words "in a conference or in an organ". That addition was pointless since the powers in question could be exercised in general under the Convention on the Law of Treaties.

60. Paragraphs 2 and 3 of article 88 related to the powers of a "representative to an organ or in a delegation to a conference", and article 81 provided that "A delegation to an organ or to a conference shall consist of one or more representatives of the sending State". Consequently, where the delegation consisted of several representatives, the question arose whether each of them, or only one of them, should be regarded as representing the sending State for the purposes of article 88, paragraph 2. Perhaps the answer to that question could be found in the Convention on the Law of Treaties.

61. For the reason he had stated in connexion with paragraph 1, he doubted whether the words "in that organ or conference", at the end of paragraph 2, served any useful purpose.

62. Mr. YASSEEN said that the further the discussion proceeded, the stronger was his impression that article 88 was unnecessary. In that article, the Commission could confine itself to providing for treaties between the organization and the sending State. The conclusion of all other treaties was governed by the law of treaties or other

branches of law. In attempting to formulate detailed provisions, the Commission ran the risk of being in conflict with the Vienna Convention on the Law of Treaties.

63. Mr. CASTRÉN said he agreed with Mr. Yasseen. The Drafting Committee should at least consider the possibility of deleting paragraph 3, which the Netherlands Government considered redundant (A/CN.4/240/Add.3, section B.11).

64. Where a delegation consisted of more than one representative, it would appear that each of them could represent the sending State unless it decided otherwise.

65. Sir Humphrey WALDOCK suggested that article 88 should be referred to the Drafting Committee with the request that the Committee should consider whether such an article was appropriate for the draft or whether its subject-matter should be left to the law of treaties or to the topic of treaties concluded between States and international organizations or between two or more international organizations.

66. The CHAIRMAN said that if there was no objection he would take it that the Commission agreed to that suggestion.

*It was so agreed.*¹²

ARTICLE 89

67. The CHAIRMAN invited the Commission to consider article 89, to which the Special Rapporteur had proposed no change.

68.

Article 89

Notifications

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

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

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

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

(d) the engagement and discharge of persons resident in the host State as members of the delegation or persons employed on the private staff entitled to privileges and immunities;

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

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

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

¹⁰ See *Yearbook of the International Law Commission, 1968*, vol. 1, p. 236, para. 53 *et seq.*

¹¹ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 290 (United Nations publication, Sales No.: E.70.V.5).

¹² For resumption of the discussion see 1125th meeting, para. 4.

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

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

69. Mr. ROSENNE, supported by Mr. USHAKOV, suggested that the Drafting Committee should carefully examine the words "shall notify . . . the conference", in the opening sentence of paragraph 1, which he believed to be incorrect.

70. Mr. USTOR drew attention to the comments of the International Labour Office on the very detailed provisions of article 89 (A/CN.4/240, section D.2). Most members of the Commission had participated in international conferences and would no doubt agree that governments rarely made all the notifications specified in the draft article. When a delegation arrived at a conference, it usually completed a form indicating the hotels at which its various members and the members of their families, if any, were staying. It was not customary to notify either the organization or the conference of the departure of delegates, much less of that of members of their families. He suggested that the Drafting Committee should be asked to consider the possibility of shortening or simplifying the text of article 89.

71. Sir Humphrey WALDOCK said that the text of article 89 should not be unduly reduced, since it was one of the few articles which contained provisions for the protection of the host State.

72. Mr. BARTOŠ said that from a purely theoretical point of view Mr. Ustor's observations were justified. Experience had shown, however, that the completion of a purely administrative form was not enough to overcome the difficulties created by certain delegations; proper notifications, as detailed as possible, should be required. Sometimes, those notifications should even be made before the members of the delegations arrived. Difficulties could arise when members of delegations or, *a fortiori*, members of their families, travelled outside the meeting-place of the conference. The notifications also enabled the organization or conference to make arrangements to provide delegations with accommodation or local staff.

73. Consequently, the Drafting Committee should put article 89 into more general terms, though still allowing the conference secretariat or the Ministry of Foreign Affairs of the host State to request such information as it considered necessary in accordance with its practice. Of course, the nature and amount of the information required varied widely from one case to another; sometimes it might be sufficient for delegations to complete a registration form.

74. The CHAIRMAN suggested that article 89 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹³

¹³ For resumption of the discussion see 1125th meeting, para. 8.

ARTICLE 90

75. The CHAIRMAN invited the Commission to consider article 90 on precedence.

76.

Article 90

Precedence

Precedence among delegations to an organ or to a conference shall be determined by the alphabetical order used in the host State.

77. He drew attention to the amendment proposed by the Special Rapporteur, which consisted in replacing the words "used in the host State" by the words "used in the Organization".

78. Mr. USHAKOV said he failed to see the purpose of article 90. He did not understand how precedence among delegations differed from precedence among States, since delegations represented States. Furthermore, if precedence was to be determined by the alphabetical order used in the organization, as proposed by the Special Rapporteur, it was inappropriate to speak of precedence in an organ of that organization; what was really involved was precedence in the organization itself. Lastly, he wondered whether there could be any question of precedence in very small organs consisting of, say, only three members.

79. Mr. USTOR said that problem could be solved by making use of the wording which the Drafting Committee had adopted for article 19, to the effect that precedence should be determined by the alphabetical order of member States used in the organization. He accordingly suggested that article 90 should be reworded to read:

"Precedence among heads of delegations to an organ or to a conference shall be determined by the alphabetical order of the names of member States used in the Organization."

80. Mr. USHAKOV said that that wording would present a problem in cases where no head of delegation was appointed.

81. Mr. ROSENNE associated himself with Mr. Ushakov's remarks. It would be necessary to determine whether article 90 should deal with precedence among delegations or among individuals. It covered a different case from that dealt with in article 19. For his part, he would suggest that the Commission should either adopt the article in the form suggested by the Special Rapporteur or delete it altogether, leaving the matter to be governed by the rules and practice of the organization concerned.

82. The CHAIRMAN, speaking as a member of the Commission, observed that, in view of the practice followed in New York, article 19 was concerned not so much with individual precedence among permanent representatives as with precedence among permanent representations. The Drafting Committee should consider whether article 90 should not be interpreted in the same sense.

83. Sir Humphrey WALDOCK asked whether it was feasible for the Drafting Committee to prepare a single article on precedence applicable to the whole draft, so as to cover all situations.

84. The CHAIRMAN suggested that article 90 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁴

Organization of work

85. The CHAIRMAN said that the officers of the Commission recommended that a working group be set up to prepare, on the basis of the texts approved by the Commission, a set of consolidated draft articles on relations between States and international organizations. The officers proposed that the working group should consist of Mr. Kearney, as chairman, Mr. Ago, Mr. Ushakov and Sir Humphrey Waldoock.

It was so agreed.

The meeting rose at 1 p.m.

¹⁴ For resumption of the discussion see 1125th meeting, para. 16.

1107th MEETING

Wednesday, 26 May 1971, at 9.30 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Baroš, Mr. Castrén, Mr. Elias, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

Relations between States and international organizations

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

[Item 1 of the agenda]

(resumed from the previous meeting)

ARTICLE 91

1. The CHAIRMAN invited the Commission to consider section 2, on facilities, privileges and immunities of delegations, beginning with article 91, to which the Special Rapporteur had proposed no change.

2.

Article 91

Status of the Head of State and persons of high rank

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

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

3. Mr. SETTE CÂMARA pointed out that article 91 was identical *mutatis mutandis* with article 21 of the 1969 Convention on Special Missions.¹ In view of that precedent he did not oppose retention of the article in its present form, though he recognized that there were some grounds for the criticisms advanced against it. If the additional facilities, privileges and immunities referred to were based on general international law, they did not require an express provision in the draft articles.

4. There appeared to be a discrepancy between the position of the Head of State and that of such other high-ranking authorities as the Head of Government. Paragraph 1 specified that the special privileges and immunities concerned were those accorded to Head of State "on an official visit", but no such restriction was made in paragraph 2. The implication was that the persons referred to in paragraph 2 would enjoy special privileges even if not on an official visit.

5. However, article 91 was not restrictive in spirit; the purpose of paragraph 1 was to secure for the Head of State all the special treatment to which he would be entitled on an official visit. On that understanding, he accepted the Special Rapporteur's proposal that the article be retained as it stood (A/CN.4/241/Add.6).

6. Mr. ALBÓNICO said that, although article 91 was based on the corresponding provision of the Convention on Special Missions, it did not add anything to the principle already recognized by international law. He doubted whether it was desirable to retain the article.

7. Mr. ROSENNE said that, although it was fairly common for a Head of State to visit United Nations Headquarters for a few days, it would be most unusual for one to serve as the head of a delegation to a conference or to an organ of any organization of the type to which the present draft related.

8. Mr. TESLENKO (Deputy Secretary of the Commission) said that, at the commemorative twenty-fifth session of the General Assembly, several delegations had been led by Heads of State. In United Nations practice a distinction was made between that situation and an official visit by a Head of State. When a Head of State led his delegation, he sat with it and spoke in his normal turn like any other representative. But when a Head

¹ General Assembly resolution 2530 (XXIV), Annex.

of State paid an official visit to the United Nations, he was given special precedence; he was the only speaker at the meeting and had a special seat.

9. Mr. ROSENNE said that that information confirmed his opinion that the provisions of paragraph 1, concerning the Head of State, were not needed in the draft. A State had, in any case, a duty under general international law to grant certain privileges to a visiting Head of State. Moreover, the attendance of Heads of State with the delegations of their countries was a very exceptional occurrence; the fact that it had taken place for one week in twenty-five years at a commemorative session did not justify the inclusion of a rule on the subject in the draft articles, especially as the provisions of paragraph 1 did not dispose of the problem completely.

10. Mr. USHAKOV said that there were three separate cases to consider. First, if a Head of State, a Head of Government or even a Minister for Foreign Affairs went to the host State on an official visit, that State must accord him the facilities, privileges and immunities referred to in article 91. Secondly, if such a person went to an organization, he had no direct relations with the host State and that State was not required to accord him those facilities, privileges and immunities. Thirdly, if a State in whose territory a conference was held invited such a person, while he was leading a delegation, to pay an official visit in his capacity as Head of State, Head of Government or Minister for Foreign Affairs, that State was bound by the terms of article 91. But it was only in that exceptional third case that article 91 would apply, and its utility was doubtful. The Drafting Committee should consider that question.

11. Sir Humphrey WALDOCK said that, in their observations, some governments had assumed that the provisions of article 91 were in accordance with the accepted rules of general international law. The Government of the United Kingdom, on the other hand, had indicated that it agreed to those provisions only with regard to the Head of State and his suite, and not with regard to other dignitaries (A/CN.4/240/Add.3, section B.12).

12. For his part, he doubted whether the provisions of paragraph 1 would give rise to any serious difficulty. The case they covered was perhaps rare, but, when it arose, the facilities referred to in the paragraph should be provided. A historic case had been the occasion at the League of Nations when the Emperor of Ethiopia had headed his country's delegation.

13. Mr. ELIAS supported the retention of article 91 on the understanding that the Drafting Committee would give further thought to the wording. From his own country's experience he could say that, when the Head of State attended a meeting of the Organization of African Unity or the United Nations, he was provided with a memorandum of instructions like any other head of delegation and, on his return, submitted a report.

14. Mr. Nagendra SINGH agreed with Mr. Elias. He saw no reason to delete article 91, which contained useful provisions for application on those occasions when a Head of State led a delegation.

15. Mr. REUTER said he thought the Drafting Committee should re-examine the text of the article. Each of the two paragraphs in fact provided for two separate sets of facilities, privileges and immunities at once. But the enjoyment of two régimes of that kind had never been regarded as entailing the loss of one of them. If the principle was accepted, the text of article 91 should be entirely recast in more general terms.

16. Mr. USTOR said that the Drafting Committee should give careful consideration to Mr. Reuter's suggestion that article 91 should take the form of a rule expressed in more general terms.

17. The general rule applicable was that if a person had two functions—in the present case those of Head of State and head of a delegation—the larger privileges and immunities, enjoyed by virtue of the more important function, would not be lost because of the lesser function. The same principle was embodied in article 59, paragraph 2, of the draft, which provided that, when a diplomatic agent was included in a permanent observer mission, his diplomatic privileges and immunities were not affected, and in article 9, paragraph 2, of the Convention on Special Missions.

18. The concluding words of paragraph 1, "on an official visit", should be deleted.

19. Sir Humphrey WALDOCK said that the Drafting Committee should bear in mind that the provisions of article 91 were based on article 21 of the Convention on Special Missions. If the Committee altered the text, the departure from that model might give rise to difficulties of interpretation.

20. Mr. CASTRÉN said that if the article was retained, it would not create any difficulties and could cover some exceptional situations. Since governments considered that the privileges and immunities referred to in the article were recognized by international law, they were not opposed to granting them. He agreed with Sir Humphrey Waldoack that the wording of article 91 should not be changed.

21. Mr. USHAKOV observed that the Commission should not lose sight of the difference between article 91 and its model, namely, that delegations were sent to a conference or to an organ, whereas special missions were sent to a State.

22. The CHAIRMAN suggested that article 91 should be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.²

ARTICLE 92

23. The CHAIRMAN invited the Commission to consider article 92, to which the Special Rapporteur had proposed no change.

² For resumption of the discussion see 1125th meeting, para. 18.

24.

*Article 92**General facilities, assistance by the Organization and inviolability of archives and documents*

The provisions of articles 22, 24 and 27 shall apply also in the case of a delegation to an organ or to a conference.

25. Sir Humphrey WALDOCK said that, before dealing with article 92 and the following articles, the Commission would do well to examine the general question of the level of privileges and immunities to be extended to delegations. The Special Rapporteur, in his sixth report, had introduced Part IV, section 2, with a summary of the general comments of governments and secretariats of international organizations (A/CN.4/241/Add.6), which amounted to a strong attack on the position taken by the Commission throughout that section. The Commission should not appear simply to disregard the criticism, but should justify its position if it decided to maintain the line taken in the previous report.

26. Mr. USHAKOV said he was not in favour of a general debate on the foundation of the privileges and immunities of delegations of States to organs and conferences. It would be better to consider, article by article, whether such delegations had characteristics which called for different wording from that of the corresponding articles in other parts of the draft.

27. It was unfortunate that article 92 should refer to three articles as heterogeneous as articles 22, 24 and 27.

28. Article 22 specified that the organization must assist the permanent mission in obtaining the facilities which the host State must accord it. Certainly that provision could also apply to delegations to an organ of an organization; on the other hand, the organization was hardly in a position to assist delegations to a conference in obtaining facilities from the host State. For example the United Nations, with its Headquarters in North America, would find it hard to fulfil that obligation when a conference met in another continent. Those considerations confirmed that the Commission would have done better not to deal with delegations to organs and delegations to conferences at the same time.

29. Article 24 concerned assistance by the organization in respect of privileges and immunities. In the case of delegations to organs, the organization could very well render assistance; but where conferences were concerned, it was rather the conference itself which should assist delegations, for once the organization had convened the conference, it became, as it were a third party.

30. Article 27 provided for inviolability of the archives and documents of the permanent mission. Rather than refer back to that article, it would be better to draft a separate, though identical, article on delegations.

31. The CHAIRMAN invited members of the Commission to say whether or not they thought the Commission should take up the general question raised by Sir Humphrey Waldock.

32. Mr. ALBÓNICO considered it essential for the Commission to settle that question before taking up the

various articles in section 2. He was very impressed by the volume of criticism which governments had expressed.

33. Mr. ROSENNE said he doubted whether the Commission could have a useful discussion on that question at the present stage. The bulk of the governments' comments had been made in connexion with various matters of detail. Some of their criticisms were valid, but could be taken into account only in connexion with individual articles. When the Commission had completed its consideration of the various articles in section 2, and possibly amended some of them to meet those criticisms, it would be in a better position to deal with the general question raised by Sir Humphrey Waldock.

34. Sir Humphrey WALDOCK said that, in view of the formidable attack made by governments and organizations on the Commission's general approach to the privileges and immunities of delegations, he thought the Commission should consider carefully whether it wished to persist in that approach. The view had been put forward that the privileges and immunities in question were not only excessive, but contrary to existing law. It had been pointed out that the 1946 Convention on the Privileges and Immunities of the United Nations³ and other existing instruments had been applied satisfactorily for many years and that the system proposed in the 1970 draft went much further than those instruments.

35. The Special Rapporteur had taken the view, which the Commission had endorsed at the previous session, that the law of international organizations had developed over the past twenty-five years and that practice today was not as strict as the 1946 Convention would indicate. An attempt had therefore been made in the draft articles to co-ordinate the law and bring it into line with the existing practice, which seemed to justify a proposal to have a more uniform system.

36. If the Commission were now simply to brush aside the governments' adverse comments on the 1970 draft without explanation, that would not facilitate acceptance of the proposed convention.

37. Mr. CASTRÉN said that about ten governments had adversely criticized the Commission's approach to the question of the facilities, privileges and immunities of delegations. The Special Rapporteur had replied to those criticisms by referring to paragraph 16 of the Commission's general comments on Part IV, section 2.⁴ In reply to the observations made by organizations, the Special Rapporteur had pointed out that the provisions of articles 3 and 4 were intended to apply generally to Part IV of the draft (A/CN.4/241/Add.6). The Commission should explain in its new commentary that it had carefully considered the observations made but, for certain reasons, had maintained its position.

38. It would be useless to open a general discussion at that stage. As Mr. Rosenne had suggested, the Commission could always take up the problem as a whole after it had examined the individual articles in section 2.

³ United Nations, *Treaty Series*, vol. 1, p. 16.

⁴ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

39. Mr. ELIAS said that the Commission had accepted his suggestion that it should consider the general philosophy of the articles in Part III,⁵ and that had done much to facilitate its task. In view of the cogent criticisms made by governments of Part IV, section 2, the Commission should consider carefully whether it wished to maintain its position, and, if so, should state its reasons for doing so. The bulk of the provisions in the Commission's draft articles on the law of treaties had been accepted by the Vienna Conference precisely because the Commission had taken the comments of governments into account in deciding on the final text of those draft articles.

40. He could not agree that the Commission should first examine section 2 article by article; for if it subsequently discussed its general approach and reached different conclusions, it would have to go through all the articles again and redraft them in the light of those conclusions. The proposal was not that the Commission should reopen its general discussion on the privileges and immunities of delegations, but merely that it should take a clear position in the light of the governments' comments on section 2, and say whether it agreed with the Special Rapporteur and wished to maintain the same general approach.

41. Mr. AGO said that the Commission should not engage in a long general debate at that stage, but should take the comments of governments and organizations into account while examining the individual articles. As Mr. Rosenne had suggested, a general approach might emerge from that examination.

42. For his part, he was in favour of cross-references from one part of the draft to another, where the entities concerned were fully comparable; permanent missions and permanent observer missions were fully comparable in many cases, but permanent missions and delegations were not. In article 92 the reference to articles 22, 24 and 27 was quite out of place, because it gave the impression that delegations were subordinate to permanent missions. Moreover, as Mr. Ushakov had pointed out, it was important, in the case of delegations, to specify who was responsible for fulfilling the obligations set out in those three articles.

43. Mr. KEARNEY said that, as Mr. Elias had pointed out, the acceptability of the draft was the heart of the whole problem. The Commission's work on the draft articles would not bear fruit and, indeed, its standing would be impaired, if the articles did not prove generally acceptable.

44. With regard to the general problem whether delegations to conferences could be equated to special missions, he drew attention to article 2 of the 1969 Convention on Special Missions, which made the consent of the receiving State a requirement for the dispatch of a special mission. A rule of that kind might be wholly inapplicable to a conference convened by, or held under the auspices of, an international organization. The consent given by the host State to the holding of the conference would be

the relevant consideration in that case. Much would, of course, depend on the definition of a conference, and article 78, sub-paragraph (b), was not of much assistance in that respect. There were, in any case, very considerable differences between, on the one hand, bilateral diplomacy—to which special missions generally belonged—and, on the other, conferences and sessions of organs.

45. It was to be hoped that, in considering the individual articles, the Commission would make an effort to adjust their provisions so as to meet the concern expressed by governments in their comments.

46. Mr. USHAKOV observed that the governments and organizations which criticized the whole basis of the draft articles did not propose any concrete alternatives. The Commission could not engage in a purely theoretical discussion during the second reading.

47. Mr. ROSENNE acknowledged that it was essential, not only in order to ensure the acceptability of the draft but also in order to maintain the Commission's standing, that its report should put forward convincing arguments in reply to the criticisms voiced by government organizations. In his earlier statement, he had merely expressed the belief that it would be easier to prepare the relevant part of the report after the Commission had examined those criticisms in detail in connexion with each of the articles. Mr. Ushakov's valid criticism of article 92 as a piece of legal drafting provided a good example of the method of work he was recommending.

48. The situation which the Commission now faced reminded him of the situation during the second reading of the draft articles on the law of treaties, when government criticism had reopened discussion on the major issue of whether the work should take the form of a draft convention or an expository code. The Commission had been able to give cogent reasons for adhering to its earlier decision in favour of a draft convention, but had only done so after going through the whole draft article by article.

49. Sir Humphrey WALDOCK pointed out that many of the critical governments had not made any detailed suggestions in connexion with individual articles; they had simply urged that the Commission should take as its models, not the 1969 Convention on Special Missions, but rather the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.⁶ He believed that those Conventions and similar instruments represented the existing law and that the Commission should not have disregarded them.

50. The Special Rapporteur and the Commission had taken the view that the system embodied in those instruments no longer fully reflected the practice which had emerged following the great expansion of international organizations. For his part, he was in favour of restricting privileges and immunities in accordance with the principle of functional necessity. He recognized, however,

⁵ See 1102nd meeting, para. 26 *et seq.*

⁶ United Nations, *Treaty Series*, vol. 33, p. 262.

that it was difficult to give concrete expression to that principle owing, in particular, to the interaction between the representative character of delegations and the functions they performed.

51. It was vitally necessary to state the legal justification for the Commission's position; that had not yet been done, either in the introduction or in the commentaries to the articles.

52. The CHAIRMAN said he inferred from the discussion that the Commission should continue to examine the draft article by article, bearing in mind the observations of governments and organizations, which it should try to answer with sound legal arguments. In drafting its replies, the Commission could perhaps be guided by the spirit which had informed the whole discussion. It would thus be able to maintain its good repute, and its draft would be more likely to satisfy a large number of States.

It was so agreed.

53. Mr. CASTRÉN said that admittedly both the title and the text of article 92 were rather heterogeneous. Other articles in Part IV, such as article 104, suffered from the same defect; but their purpose was to reduce the total number of articles, as desired by many governments.

54. Despite its defective drafting, article 92 could be properly applied, with the help of good will. It was true that an organization did not have the same role in the case of conferences and permanent missions, but Part IV of the draft was concerned with conferences convened by, or under the auspices of, an international organization. Thus it was for the organization to make sure, when choosing a host State, that that State would grant delegations the necessary facilities. Thereafter, the organization had to exercise a kind of surveillance over the host State during the conference. If the Drafting Committee found no better wording for article 92, it could be kept as it stood.

55. Mr. ELIAS said he found Mr. Ushakov's criticism of the drafting of article 92 justified. The Commission should, however, bear in mind the criticism expressed in the Sixth Committee regarding the length of the draft, which consisted of 116 articles. The 1961 Vienna Convention on Diplomatic Relations contained less than half that number. He was concerned that the adoption of Mr. Ushakov's suggestion would make the draft still longer.

56. It should be remembered that article 92 and similar provisions of the draft had been put in their present form because of the Commission's desire to avoid the use of the formula *mutatis mutandis*. If that time-honoured, but admittedly somewhat inelegant formula had been used, the present difficulties would not have arisen.

57. Mr. AGO said that in any event article 92 should be divided into two articles, one dealing with general facilities and assistance by the organization, and the other with the inviolability of archives and documents, for those were two completely different subjects. In the first article, he suggested that the Drafting Committee should be guided by the corresponding provisions of

the Convention on Special Missions, since by reason of their temporary character special missions were more like delegations than permanent missions were. For the second, he was opposed to the inelegant solution of cross-reference.

58. Mr. ROSENNE observed that all members of the Commission were agreed on the need to shorten the draft. They should not overlook the possibility of converting articles 22, 24 and 27 into general provisions applicable to all the parts. He suggested that the Drafting Committee should try to find appropriate wording for that purpose.

59. An alternative solution would be for the Drafting Committee to prepare two separate draft conventions, the first dealing with permanent missions and permanent observer missions, and the second with all delegations and other temporary missions.

60. Mr. USHAKOV said he was in favour of reducing the total number of articles as much as possible.

61. He doubted whether the organization could keep the role of the host State under surveillance as Mr. Castren had suggested. Experience showed that host States did not consider themselves bound to keep in touch with the organization on conference matters and did not regard themselves as responsible to the organization in respect of delegations. Consequently, the Drafting Committee should either amend the wording of article 92 or find legal justification for the obligations imposed on the organization in regard to the host State.

62. Mr. TESLENKO (Deputy Secretary to the Commission) said that, in the practice of the United Nations and other international organizations, a conference or even a meeting of an organ in a State other than the host State was the subject of an agreement between the State in question and the organization which convened the conference or to which the organ belonged. That agreement usually included provisions on facilities, privileges and immunities.

63. It was evident that so far as the granting of facilities was concerned, the organization's means were very limited, as Mr. Ushakov had pointed out. But even so, the secretariat could always act as a post office or telephone exchange, and that often proved very useful.

64. Sir Humphrey WALDOCK said he was somewhat reassured by that information. The Commission had drafted its articles on precisely that understanding.

65. Since the draft dealt only with organizations of a universal character, and since it would cover only those cases in which the organization and the host State had not specified the privileges and immunities of delegations in a detailed agreement, the element of progressive development in the draft articles could perhaps be justified.

66. Mr. CASTRÉN explained that in making his previous intervention he had had in mind the agreements mentioned by the Deputy Secretary, but had been referring more especially to the negotiations which the organization undertook in advance and the commitments it entered into at that stage. It was in the organization's

own interests and in the interests of delegations that it should keep watch on the host State.

67. Mr. USHAKOV said that the information given by the Deputy Secretary did not concern article 92, because that article did not mention the conclusion of an agreement between the host State and the organization. In the absence of an agreement, it would appear that there was no obligation.

68. Mr. REUTER observed that at its last session the Commission had tended to regard conferences as veritable entities, almost endowed with legal personality. If difficulties arose after a conference, was it the President or the officers of the conference, or perhaps the organization itself which had legal authority to make claims against the host State?

69. Mr. YASSEEN stressed that the future convention concerned the case in which there were no special agreements on the various matters it regulated, especially privileges and facilities. And in that case, where delegations were sent to an organ it was for the organization to help secure observance of the convention; but where delegations were sent to a conference convened by an international organization it was for the secretariat of the conference to help secure observance. It was true to say that the role of the organization and the secretariat in performing that task was not merely that of a post office. For the organization and the secretariat could, indeed, intervene very effectively to remind the host State of its obligations.

70. Mr. AGO, in answer to Mr. Reuter's question, said that a conference had its own individual existence and its secretariat could approach the host State in case of difficulty.

71. The CHAIRMAN suggested that article 92 should be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.⁷

ARTICLE 93

72. The CHAIRMAN invited the Commission to consider article 93 on premises and accommodation. He drew attention to the drafting changes recommended by the Special Rapporteur, which consisted in replacing the word "delegation" by "delegations" throughout, and making the necessary consequential amendments.

73.

Article 93

Premises and accommodation

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

74. Mr. TAMMES said that, in view of the large number of persons generally included in a delegation to

an organ or conference, it was desirable to make article 93 rather less categorical. Instead of simply requiring the host State to assist, it might be better to use the phrase "as far as possible" or "to the extent of its ability". The situation was not comparable with that of special missions, to which the commentary referred. His doubts about the practicability of imposing a legal obligation on the host State extended to article 94, paragraph 2, and article 99, paragraph 1. He hoped the Drafting Committee would consider that practical problem.

75. Mr. USHAKOV said he was not sure whether it was better to refer to a "delegation" in the singular, as in the text adopted at first reading, or to "delegations" in the plural, as the Special Rapporteur now proposed.

76. It would appear difficult, if not impossible, for the organization to assist a delegation in procuring premises and accommodation in the city where the organ or conference was meeting, if that was not where the organization had its headquarters.

77. Mr. KEARNEY noted that the Government of the Netherlands had proposed that the provision in article 93 "be reversed to the effect that the organization provides assistance and that, where necessary, it is assisted therein by the host State" (A/CN.4/240/Add.3, section B.11). That seemed a reasonable proposal, since it was the general practice at international conferences for the secretariat of the organization to request delegations in advance to send particulars of the accommodation they required. Unless the host State itself organized the conference, it was not initially concerned with the problem of finding accommodation and would take action only at the request of the organization.

78. Another argument in favour of the Netherlands proposal was that, in article 1, sub-paragraph (m),⁸ an "organ of an international organization" was very broadly defined as "a principal or subsidiary organ, and any commission, committee or sub-group of any of those bodies". That meant that an international organization could set up any type of conference it wished, provided that it called it a commission, committee or sub-group, without having to notify the host State that the conference was to be held or entering into special arrangements with the host State regarding the meeting. In such a case it would surely be difficult to impose any obligation on the host State with respect to procuring accommodation for delegations. That situation was common in practice, and the Commission should hesitate before laying upon the host State the primary responsibility for assistance in procuring accommodation.

79. Mr. SETTE CÂMARA said that article 93 was based on article 23 of the Convention on Special Missions and article 23, paragraph 2, of the present draft articles.⁹ The latter provision placed a dual responsibility on the host State and the organization. In the case of a conference of limited duration which was attended by

⁷ For resumption of the discussion see 1133rd meeting, para. 136.

⁸ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 196.

⁹ *Op. cit.*, 1969, vol. II, p. 208.

many delegations, there might be a more pressing need for assistance in obtaining accommodation than in the case of permanent missions. Since the host State would probably benefit materially by the conference, it was only natural to assume that it would be prepared to offer assistance.

80. With the minor drafting changes recommended by the Special Rapporteur, he thought that article 93 could be accepted.

81. Mr. ROSENNE said he had at first been attracted by the Netherlands Government's proposal. After further reflection, however, he was prepared to accept the recommendation of the Special Rapporteur. The situation was perhaps a more delicate one than it appeared at first sight. There had been cases in which a host State had made it impossible for a delegation to function or even to be present at a conference, merely by bringing its influence to bear upon the availability of accommodation.

82. If article 93 was to have any basis in reality, it should require that the host State must have advance knowledge of the presence of the delegation. The situation was not at all the same as that covered by article 18 of the Convention on Special Missions, which dealt with the case of special missions meeting in the territory of a third State.

83. Consideration should also be given to the question whether there was any difference between a conference, however large, held at United Nations Headquarters under the Headquarters Agreement and one held elsewhere. For instance, the *Ad Hoc* Committee to Study the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction was a subsidiary organ of the General Assembly which, with over eighty members, sometimes met at Geneva, while the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation Among States had once met at Mexico City. The Drafting Committee should at least state clearly to what extent meetings could take place without any notification being given to the host State.

84. Mr. ELIAS said that article 93 would require some modification to meet the difficulty referred to by the Netherlands Government. He did not think that the analogy drawn between delegations and special missions was entirely apt. In the case of special missions the relationship was bilateral, since there was a common interest between the sending State and the receiving State, but in the case of delegations to organs or conferences the host State did not appear to be involved to the same extent.

85. There was much force in the argument that delegations to organs or conferences should be asked to submit their difficulties to the organization and not to the host State, since the operative agreement was between the organization and the host State. Article 93 provided that the host State should assist a delegation "if it so requests"; the difficulty was to determine to whom the request should be made. On one occasion, while attend-

ing an international conference, he had been compelled to leave his hotel after a certain period and had been able to obtain new accommodation only through the United Nations Secretariat. On another occasion, when a conference had been held at a considerable distance from the centre of town, the organization had provided delegations with the necessary transport; and again, one leader of a delegation had been turned out of his hotel and had been assisted by the United Nations Secretariat.

86. Mr. USHAKOV said that in some cities where there was a shortage of hotel rooms it was impossible to find accommodation without the assistance of the authorities. Hence it was surely the host State that should be responsible for assisting delegations which so requested, no matter whether they did so direct or through the organization.

87. The article should be kept as it stood.

88. Mr. REUTER said that matters should always be settled through the organization, which was in the best position to judge whether the intervention of the host State was necessary or not. It might be therefore advisable to amend the opening words of the article to read:

"The host State shall assist a delegation to an organ or to a conference, if necessary through the organization, in procuring . . .".

The second sentence would be deleted.

89. Mr. USTOR said that States gained certain moral and material advantages by acting as hosts to an international conference and most of them were prepared to assume some obligations in order to gain those advantages. Host States were, as a rule, prepared to deal with any complaints made by delegations, and usually appointed a liaison officer to a conference. Consequently, he saw no need to provide that complaints should be made only through the organization. In his experience such problems as arose at international conferences generally solved themselves, so he was prepared to accept the rather vague wording of article 93 as it stood.

90. Mr. BARTOŠ observed that the first and second parts of the first session of the General Assembly, held in London and New York in 1946, could not have been held without the arrangements made between the Secretariat and the United Kingdom and United States authorities to overcome accommodation and transport difficulties. It was necessary to include an article providing in general terms that the organization and the host State must take the necessary measures to ensure that delegations could perform their functions undisturbed.

91. Mr. ALBÓNICO said that in practice delegations to an organ or conference generally received assistance in finding accommodation from their embassies or permanent missions. The problem should not be exaggerated. He was prepared to support article 93 in its present form.

92. Mr. CASTRÉN said he was in favour of retaining the article as it stood. The obligation it laid down was primarily one for the host State, since the organ or conference was meeting in its territory. The organization

had no power to demand that premises be placed at the disposal of delegations, and must therefore apply to the host State. So why not let delegations act direct, and provide that they should request assistance from the organization only in case of need? The wording proposed by Mr. Reuter was shorter, though it did not affect the substance; but if the Commission accepted it, it would be departing from the form of words adopted for permanent missions and permanent observer missions.

93. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission was prepared to refer article 93 to the Drafting Committee.

*It was so agreed.*¹⁰

ARTICLE 94

94. The CHAIRMAN invited the Commission to consider article 94, on the inviolability of the premises, to which the Special Rapporteur had proposed no change.

95.

Article 94

Inviolability of the premises

1. The premises where a delegation to an organ or to a conference is established shall be inviolable. The agents of the host State may not enter the said premises, except with the consent of the head of the delegation or, if appropriate, of the head of the permanent diplomatic mission of the sending State accredited to the host State. Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the head of the delegation or of the head of the permanent diplomatic mission.

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

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

96. Mr. USTOR said he was opposed to the last sentence of paragraph 1. He suggested that the second sentence of that paragraph should include a reference to the consent of the head of the permanent mission to the organization.

97. Mr. ALCÍVAR categorically opposed the last sentence of paragraph 1 on the ground that it placed an undue limitation on the principle of inviolability.

98. Mr. USHAKOV reserved his position on the last sentence of paragraph 1.

99. Since, under article 81, the appointment of a head of delegation was a faculty and not an obligation, it might be asked how the second sentence of article 94, paragraph 1, could be applied when no head of delegation had been appointed. The same question arose with

regard to all the other articles which mentioned the head of the delegation. The Drafting Committee would have to find a more appropriate form of words.

100. Mr. SETTE CÂMARA said that article 94 had been severely criticized in the Sixth Committee and in the observations of governments. Some governments had suggested that the article should depart from article 25 of the Convention on Special Missions and be modelled on article 22 of the Vienna Convention on Diplomatic Relations.¹¹ That would eliminate the possibility of assuming the consent of the sending State in case of fire or other disaster. Special missions and delegations to conferences were generally accommodated in hotels and it was therefore normal to provide for such contingencies as those covered by article 94, paragraph 1; but since delegations did not enjoy the same protection as permanent missions, article 94 needed to be very emphatic in stating the principle of inviolability of the premises.

101. He was prepared to support article 94 in its present form if the Drafting Committee would undertake to reconcile it with article 25.

102. Mr. AGO endorsed Mr. Ushakov's comment on the second sentence of paragraph 1. It could be assumed that, if the conference or organ was meeting in the city where the organization had its headquarters, it would normally be the consent of the head of the permanent mission which had to be obtained; if the meeting was elsewhere, it would be logical to apply to the diplomatic representative accredited to the host State. The Drafting Committee should see how that idea could be expressed.

103. With regard to Mr. Alcívar's comment on the last sentence of paragraph 1, it should be remembered that the same question had arisen in connexion with the corresponding provision on permanent missions.¹² In order to prevent that provision from being interpreted to mean that if the head of the delegation refused his consent the agents of the host State could proceed without it, the Drafting Committee had decided to specify that such consent might be assumed in case of fire or other disaster that seriously endangered public safety, and only in the event that it had not been possible to contact the permanent representative in order to obtain his express consent.¹³

104. Mr. KEARNEY said he acknowledged the importance of the principle of inviolability of the premises, but did not think it possible to deal with that principle in such abstract terms as his colleagues envisaged. Delegations to organs or conferences were generally accommodated in hotels, and hotel rooms were far from inviolable. They could always be entered by cleaners, or even by house detectives if the occupants happened to be making too much noise. If members of a delegation refused to abide by the hotel rules, they could always be asked to leave. In his opinion it would be foolish of the Commission to draft for solemn adoption in some future

¹⁰ For resumption of the discussion see 1125th meeting, para. 62.

¹¹ United Nations, *Treaty Series*, vol. 500, pp. 106-108.

¹² See 1093rd meeting, para. 46 *et seq.*

¹³ See document A/CN.4/L.168, article 25, para. 1.

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.*¹⁴

The meeting rose at 12.55 p.m.

¹⁴ 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,¹ 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

¹ 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,² and in the Drafting Committee's revised article 26, modelled on the Vienna Convention on Consular Relations.³ 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.*⁴

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.

² United Nations, *Treaty Series*, vol. 500, p. 108, article 23.

³ *Op. cit.*, vol. 596, p. 312, article 60.

⁴ 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.⁵

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.⁶

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.

⁵ For resumption of the discussion see 1125th meeting, para. 81.

⁶ 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.⁷

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 94⁸ 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.⁹

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

⁷ For resumption of the discussion see 1125th meeting, para. 92.

⁸ See previous meeting, para. 95 *et seq.*

⁹ 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;¹⁰ 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,¹¹ 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

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

¹¹ 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,¹² 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

¹² 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.

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.

1110th MEETING

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

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

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

[Item one of the agenda]

(continued)

ARTICLE 114

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

2.

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

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

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

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

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

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

*It was so agreed.*¹

ARTICLE 115

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

6.

*Article 115**Facilities for departure*

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

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

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

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

*It was so agreed.*²

ARTICLE 116

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

11.

*Article 116**Protection of premises and archives*

1. When the meeting of an organ or a conference comes to an end, the host State must respect and protect the premises of a delegation so long as they are assigned to it, as well as the property and archives of the delegation. The sending State must take all appropriate measures to terminate this special duty of the host State within a reasonable time.

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

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

"[In the discharge of its obligations under the present paragraph,] the sending State may entrust the custody of the premises, property and archives of the delegation to a third State."

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

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

¹ For resumption of the discussion see 1127th meeting, para. 22.

² For resumption of the discussion see 1127th meeting, para. 18.

permanent missions,³ it only introduced an element of confusion.

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

*It was so agreed.*⁴

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

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

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

ARTICLE 6

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

Article 6

Establishment of permanent missions

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

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

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

³ See 1098th meeting, para. 87 *et seq.*

⁴ For resumption of the discussion see 1127th meeting, para. 35.

⁵ See 1092nd meeting, para. 51 *et seq.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.⁶

ARTICLE 7

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

Article 7

Functions of a permanent mission

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

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

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

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

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

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

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

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

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

⁶ For resumption of the discussion see 1118th meeting, para. 22.

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

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

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

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

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

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

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

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

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

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

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

51. Speaking as a member of the Commission, he said that a distinction should be made between the functions of the permanent mission as such, and the powers and competence of the permanent representative. The permanent representative could represent the sending State without special powers in accordance with article 13; but in that case it was he, not the permanent mission, who provided the representation. Article 7, as drafted by the Commission in 1968⁷ and as now proposed by the Drafting Committee, was correct. The wording could still be changed, but not the substance.

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.⁸

The meeting rose at 5.30 p.m.

⁸ For resumption of the discussion see 1132nd meeting, para. 67.

1111th MEETING

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

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

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

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

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

ARTICLE 8

2. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that article 8, paragraph 1, as adopted by the Commission in 1968¹ had provided *in fine* that the sending State might assign a permanent representative “as a member” of another of its permanent missions. That expression included administrative and technical staff and service staff. The Drafting Committee had taken the view that, to avoid offending anyone, the scope of the provision should be confined to the assignment of a permanent representative to the diplomatic staff of another mission. It had therefore inserted the words “of the diplomatic staff” after the words “as a member”.

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

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

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

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

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

Article 8

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.²

ARTICLE 9

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

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

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

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

20. The Committee had considered that the provisions of the former paragraph 4 adopted by the Commission in 1968³ were redundant, because they stated a self-evident truth. It had therefore deleted that paragraph, but thought that the reasons for its deletion should be explained in the commentary to article 9.

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

Article 9

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

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

² For resumption of the discussion see 1132nd meeting, para. 75.

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*⁴

ARTICLE 10

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

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

Article 10

Appointment of the members of the permanent mission

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

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

*It was so agreed.*⁵

ARTICLE 11

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

Article 11

Nationality of the members of the permanent mission

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

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

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

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

⁴ For resumption of the discussion see 1132nd meeting, para. 78.

⁵ For resumption of the discussion see 1132nd meeting, para. 82.

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

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

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

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

38. Mr. KEARNEY said that during the previous discussion of article 11⁶ the question had been raised whether a specific reference should be made to article 50. The text of article 11 was the outcome of the Commission's discussions on the relationship between article 50 and the draft as a whole, and on the possibility of improving the language and coverage of article 50. It was a matter for regret that the Commission was now reviewing the draft articles without having a revised text of article 50 before it so that it could determine the relationship between the various articles and the method to be

proposed for settling any disputes arising out for their provisions.

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

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

*It was so agreed.*⁸

ARTICLE 12

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

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

43. The text proposed by the Drafting Committee read:

Article 12

Credentials of the permanent representative

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

⁷ See previous meeting, paras. 17, 20 and 22.

⁸ For resumption of the discussion see 1135th meeting, para. 37.

⁹ See 1091st meeting, para. 13 *et seq.*

¹⁰ *Ibid.*, para. 46.

⁶ See 1090th and 1091st meetings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*¹¹

ARTICLE 13

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

62. The text proposed for article 13 read:

¹¹ For resumption of the discussion see 1114th meeting, para. 2.

Article 13

Accreditation to organs of the Organization

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

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

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

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

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

*It was so agreed.*¹²

ARTICLE 14

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

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

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

¹² For resumption of the discussion see 1132nd meeting, para. 87.

¹³ See 1091st meeting, para. 71.

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

69. The text proposed for article 14 read:

Article 14

Full powers in the conclusion of a treaty with the Organization

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

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*¹⁵

ARTICLE 15

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

80. The text proposed for article 15 read:

Article 15

Composition of the permanent mission

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

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

*It was so agreed.*¹⁶

ARTICLE 16

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

83. The text proposed for article 16 read:

Article 16

Size of the permanent mission

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

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

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

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

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

¹⁵ For resumption of the discussion see 1132nd meeting, para. 97.

¹⁶ For resumption of the discussion see 1132nd meeting, para. 101.

expression, though the formula used in article 11, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations¹⁷ was slightly different, the words "*qui règnent*" being used instead of the word "*existent*". He preferred the wording proposed by the Drafting Committee.

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

*It was so agreed.*¹⁸

The meeting rose at 12.55 p.m.

1112th MEETING

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

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

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

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

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

ARTICLE 17

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

¹⁷ United Nations, *Treaty Series*, vol. 500, p. 103.

¹⁸ For resumption of the discussion see 1132nd meeting, para. 104.

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

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

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

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

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

6. The new text proposed for article 17 read:

Article 17

Notifications

1. The sending State shall notify the Organization of:

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

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

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

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

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

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

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

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

It was so agreed.¹

ARTICLE 18

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

9. The text proposed for article 18 read:

Article 18

Chargé d'affaires ad interim

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

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

It was so agreed.²

ARTICLE 19

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

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

12. The text proposed for article 19 read:

Article 19

Precedence

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

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

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

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

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

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

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

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

It was so agreed.⁵

ARTICLE 20

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

¹ For resumption of the discussion see 1132nd meeting, para. 107.

² For resumption of the discussion see 1132nd meeting, para. 110.

³ See 1092nd meeting, para. 69 *et seq.*

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

⁵ For resumption of the discussion see 1132nd meeting, para. 114.

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

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

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

22. The text proposed for article 20 read:

Article 20

Offices of permanent missions

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

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

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

25. Mr. USHAKOV, speaking as a member of the Commission, said he thought the Commission should provisionally approve article 20, but that when the corresponding articles in the other parts of the draft had been considered, the Drafting Committee might perhaps have to align the wording with that of article 12 of the 1961 Vienna Convention on Diplomatic Relations⁸

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

It was so agreed.⁹

ARTICLE 21

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

Article 21

Use of flag and emblem

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

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

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

It was so agreed.¹⁰

ARTICLE 22

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

30. The text proposed for article 22 read:

Article 22

General facilities

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

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

It was so agreed.¹¹

ARTICLE 23

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

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

⁷ See 1092nd meeting, para. 85.

⁸ United Nations, *Treaty Series*, vol. 500, p. 104.

⁹ For resumption of the discussion see 1132nd meeting, para. 119.

¹⁰ For resumption of the discussion see 1132nd meeting, para. 123.

¹¹ For resumption of the discussion see 1132nd meeting, para. 127.

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

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

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

36. The text proposed for article 23 read:

Article 23

Premises and accommodation

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

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

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

*It was so agreed.*¹³

ARTICLE 24

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

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

40. The text proposed for article 24 read:

Article 24

Assistance by the Organization in respect of privileges and immunities

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

¹² For resumption of the discussion see 1132nd meeting, para. 130.

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

*It was so agreed.*¹³

ARTICLE 25

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

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

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

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

¹³ For resumption of the discussion see 1132nd meeting, para. 133.

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

¹⁵ General Assembly resolution 2530 (XXIV), Annex.

¹⁶ See 1093rd meeting, paras. 64 and 93.

46. The text proposed for article 25 read:

Article 25

Inviolability of the premises

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁷ United Nations, *Treaty Series*, vol. 500, p. 106.

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

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

60. Sir Humphrey WALDOCK explained that he was not in favour of going back to the formula used in article 31, paragraph 2, of the Vienna Convention on Consular Relations. That formula had been included by the Commission in article 25 of its 1967 draft articles on special missions¹⁸ as the last sentence of paragraph 1. When the Sixth Committee had examined the draft articles, however, it had replaced that formula by what was now the last sentence in article 25, paragraph 1, of the Convention on Special Missions.

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

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

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

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

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

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

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

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

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

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

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

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

¹⁹ *Op. cit.*, 1969, vol. II, p. 208.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁰ See 1093rd meeting, para. 85.

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

*It was so agreed.*²¹

The meeting rose at 12.55 p.m.

²¹ For resumption of the discussion see 1117th meeting, para. 31.

1113th MEETING

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

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

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

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

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

ARTICLE 26

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

3. For the reasons given by Mr. Kearney,¹ the Committee had amended the beginning of paragraph 1 to follow the model of article 32, paragraph 1 of the Vienna Convention on Consular Relations.² It could, indeed, be argued that the text of paragraph 1 adopted in 1969³ referred only to taxes levied on persons and not to those levied direct on buildings.

¹ See 1094th meeting, para. 6 *et seq.*

² United Nations, *Treaty Series*, vol. 596, p. 288.

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

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

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

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

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

Article 26

Exemption of the premises from taxation

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

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

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

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

*It was so agreed.*⁵

ARTICLE 27

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

⁴ See 1094th meeting, para. 15.

⁵ For resumption of the discussion see 1133rd meeting, para. 1.

Article 27

Inviolability of archives and documents

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

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

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

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

It was so agreed.⁷

ARTICLE 27 bis

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.⁹

ARTICLE 28

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

*Article 28**Freedom of movement*

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

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

It was so agreed.¹⁰

ARTICLE 29

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

⁶ General Assembly resolution 2530 (XXIV), Annex.

⁷ For resumption of the discussion see 1133rd meeting, para. 5.

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

⁹ For resumption of the discussion see 1135th meeting, para. 64.

¹⁰ For resumption of the discussion see 1133rd meeting, para. 8.

23. The text proposed for article 29 read:

Article 29

Freedom of communication

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*¹¹

¹¹ For resumption of the discussion see 1133rd meeting, para. 11.

ARTICLE 30

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

Article 30

Personal inviolability

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

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

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

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

*It was so agreed.*¹²

ARTICLE 31

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

Article 31

Inviolability of residence and property

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

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

32. Mr. ALBÓNICO noted that article 31 purported to give the private residence of the persons concerned the same inviolability and protection as the premises of the permanent mission. Since a qualification had been introduced into article 25 concerning such occurrences as fire, the remarks made on that subject in the discussion on article 25¹³ also applied to article 31.

¹² For resumption of the discussion see 1133rd meeting, para. 14.

¹³ See previous meeting, para. 47 *et seq.*

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

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

*It was so agreed.*¹⁴

ARTICLE 32

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

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

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

Article 32

Immunity from jurisdiction

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

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

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

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

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

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

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

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

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

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

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

¹⁴ For resumption of the discussion see 1133rd meeting, para. 17.

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

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

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

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

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

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

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

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

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

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

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

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

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

51. Sir Humphrey WALDOCK said he shared the concern expressed by previous speakers. The use of the phrase "covered by insurance" could give rise to much discussion and could weaken the provisions of paragraph 1 (*d*). The intention was to require the damages to be met and to make it clear that the possibility of private action would subsist until the claim for damages was settled through insurance. He would prefer to drop the concluding phrase of the sub-paragraph rather than leave it in its present defective form. A provision on the lines of article 31, paragraph 2 (*d*) of the 1969 Convention on Special Missions¹⁷ would leave a simple right of action in the case of traffic accidents; it was better not to weaken that safeguard by introducing a proviso of the kind proposed by the Drafting Committee.

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

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

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

¹⁶ United Nations, *Treaty Series*, vol. 500, p. 112, article 31.

¹⁷ General Assembly resolution 2530 (XXIV), Annex.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*¹⁹

ARTICLE 33

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

69. The text proposed for article 33 read:

Article 33

Waiver of immunity

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

2. Waiver must always be express.

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

¹⁸ United Nations, *Treaty Series*, vol. 596, p. 298.

¹⁹ For resumption of the discussion see 1117th meeting, para. 41.

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

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

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

*It was so agreed.*²⁰

ARTICLE 34²¹

71. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that article 34, on the settlement of civil claims, was based on article 42 of the draft articles on special missions which, in turn, had been based on resolution II adopted by the United Nations Conference on Diplomatic Intercourse and Immunities on 14 April 1961.²² The General Assembly had not included the provisions of draft article 42 in the Convention on Special Missions, but on 8 December 1969, had adopted resolution 2531 (XXIV) embodying a recommendation based on those provisions. The Drafting Committee therefore proposed that article 34 should be deleted. At the same time, it hoped that the Commission would explain the reasons for the deletion in the commentary to article 33 and would propose that those responsible for establishing the final text of the articles should adopt a resolution similar to General Assembly resolution 2531 (XXIV).

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

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

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

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

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

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

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

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

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

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

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

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

²⁰ For resumption of the discussion see 1133rd meeting, para. 26.

²¹ For text see 1095th meeting, para. 14.

²² United Nations, *Treaty Series*, vol. 500, pp. 218-220.

²³ See 1095th meeting, para. 62.

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

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

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

It was so agreed.²⁴

The meeting rose at 12.55 p.m.

²⁴ For resumption of the discussion see 1117th meeting, para. 20.

1114th MEETING

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

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

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

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

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

ARTICLE 12

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

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

Article 12

Credentials of the permanent representative

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

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

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

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

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

It was so agreed.²

ARTICLE 35

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

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

¹ See 1111th meeting, para. 60.

² For resumption of the discussion see 1132nd meeting, para. 84.

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

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

11. The text proposed for article 35 read:

Article 35

Exemption from social security legislation

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

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

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

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

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

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

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

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

the convention it was preparing and subsequent agreements.

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

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

It was so agreed.⁴

ARTICLE 36

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

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

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

18. The text proposed for article 36 read:

Article 36

Exemption from dues and taxes

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

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

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

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

⁴ For resumption of the discussion see 1133rd meeting, para. 34.

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

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

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

(e) charges levied for specific services rendered;

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

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

*It was so agreed.*⁶

ARTICLE 37

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

Article 37

Exemption from personal services

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

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

*It was so agreed.*⁷

ARTICLE 38

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

23. The text proposed for article 38 read:

Article 38

Exemption from customs duties and inspection

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

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

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

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

2. The personal baggage of the permanent representative or a member of the diplomatic staff of the permanent mission shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. In such cases, inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

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

*It was so agreed.*⁸

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

ARTICLE 40

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

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

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

Article 40

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

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

⁶ For resumption of the discussion see 1133rd meeting, para. 38.

⁷ For resumption of the discussion see 1133rd meeting, para. 41.

⁸ For resumption of the discussion see 1133rd meeting, para. 44.

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

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

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

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

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

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

*It was so agreed.*¹¹

ARTICLE 41

31. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made only a drafting change in article 41, which was based on article 38 of the Vienna Convention on Diplomatic Relations. In the French text of paragraph 1 of the latter article (the word “*que*” had been placed before the words “*pour les actes officiels*” instead of before the words “*de l’immunité de juridiction*”). In 1969 the Commission had reproduced in the French text of article 41¹² the erroneous wording of the Vienna Convention and had aligned the English text with it, thus also introducing the error into the English text.¹³ The Drafting Committee had restored the English

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

32. The text proposed for article 41 read:

Article 41

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

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

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

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

*It was so agreed.*¹⁵

ARTICLE 42

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

Article 42

Duration of privileges and immunities

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

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

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

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

¹⁰ United Nations, *Treaty Series*, vol. 500, p. 116.

¹¹ For resumption of the discussion see 1133rd meeting, para. 47.

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

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

¹⁴ See General Assembly resolution 2530 (XXIV), Annex.

¹⁵ For resumption of the discussion see 1133rd meeting, para. 50.

acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the host State was due solely to the presence there of the deceased as a member of the permanent mission or as a member of the family of a member of the permanent mission.

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

*It was so agreed.*¹⁶

ARTICLE 43

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

Article 43

Transit through the territory of a third State

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

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

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

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

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

*It was so agreed.*¹⁷

¹⁶ For resumption of the discussion see 1133rd meeting, para. 53.

¹⁷ For resumption of the discussion see 1135th meeting, para. 70.

ARTICLE 44

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

39. The text proposed for article 44 read:

Article 44

Non-discrimination

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

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

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

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

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

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

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

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

*It was so agreed.*¹⁸

ARTICLE 45

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

¹⁸ For resumption of the discussion see 1135th meeting, para. 78.

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

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

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

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

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

51. The text proposed for article 45 read:

Article 45

Respect for the laws and regulations of the host State

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

2. In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from jurisdiction, the sending State shall, unless it waives the immunity of the person concerned, recall him, terminate his functions with the mission or secure his departure, as appropriate. The sending State shall take the same action in case of grave and manifest interference in the internal affairs of the host State. This provision shall not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁹ See 1098th meeting, para. 9.

²⁰ United Nations, *Treaty Series*, vol. 11, p. 12.

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

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

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

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

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

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

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

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

The meeting rose at 6 p.m.

1115th MEETING

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

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

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

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

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

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

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

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

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

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

6. Mr. TAMMES said that, for those who were not familiar with the long history of article 45¹ the last sentence of paragraph 2 could be disturbing. It presented as an exception to the rule laid down in that paragraph an issue which was central to the purpose of the whole draft. The rule that the sanctions prescribed in paragraph 2 did not apply to acts performed in carrying out the functions of the permanent mission was really a qualification of the general rule laid down in paragraph 1

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

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

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

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

8. He was also concerned about the time-span covered by the provisions of paragraph 2. It had been suggested that they could apply to a period when the person concerned had been in the host State before beginning to enjoy full privileges under the present articles; he was opposed to that view. The question had been raised during the discussion on article 10, and Mr. Castrén had expressed the view that, if a person previously convicted of an offence in the host State was appointed as a member of a permanent mission, that State could rely on the provisions of article 45.² It had even been suggested that article 45 should be one of the qualifying articles listed in article 10. He suggested that the matter should be clarified in the commentary to article 45.

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

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

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

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

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

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

² See 1090th meeting, para. 84.

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

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

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

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

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

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

understanding that those explanations would appear in the commentary.

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

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

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

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

It was so agreed.³

ARTICLE 46

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

24. The text proposed for article 46 read:

Article 46

Professional or commercial activity

The permanent representative and the members of the diplomatic staff of the permanent mission shall not practise for personal profit any professional or commercial activity in the host State.

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

It was so agreed.⁴

ARTICLE 47

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

³ For resumption of the discussion see 1135th meeting, para. 46.

⁴ For resumption of the discussion see 1135th meeting, para. 49.

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

27. The text proposed for article 47 read:

Article 47

*End of the functions of the permanent representative
or of a member of the diplomatic staff*

The functions of the permanent representative or of a member of the diplomatic staff of the permanent mission shall come to an end, *inter alia*:

(a) on notification of their termination by the sending State to the Organization;

(b) if the permanent mission is finally or temporarily recalled.

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

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

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

*It was so agreed.*⁶

ARTICLE 48

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

31. The text proposed for article 48 read:

Article 48

Facilities for departure

The host State shall, if requested, grant facilities to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave its territory.

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

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

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

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

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

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

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

⁵ United Nations, *Treaty Series*, vol. 500, p. 123.

⁶ For resumption of the discussion see 1133rd meeting, para. 56.

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

⁸ United Nations, *Treaty Series*, vol. 500, p. 122.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.**

ARTICLE 49

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

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

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

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

52. The text proposed for article 49 read:

Article 49

Protection of premises, property and archives

1. When the permanent mission is temporarily or finally recalled, the host State must respect and protect the premises as well as the property and archives of the permanent mission. The sending State must take all appropriate measures to terminate this special duty of the host State within a reasonable time. It may entrust custody of the premises, property and archives of the permanent mission to a third State acceptable to the host State.

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

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

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

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

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

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

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

*It was so agreed.*¹¹

ARTICLE 50

59. The CHAIRMAN said that the Commission did not yet have before it all the texts relating to article 50. He reminded members that, at the end of the discussion on that article¹² the Commission had decided to refer it to the Drafting Committee, intimating that it was almost unanimously in favour of retaining the article and suggesting that, since other questions might arise during the consideration of subsequent articles, the Drafting Committee might prefer to defer consideration of it. He, as Chairman, had noted that opinion in the Commission was not unanimous regarding other methods of settling disputes and that no specific proposals had been made on legal rather than practical modes of settlement; he had suggested that the Special Rapporteur should prepare a draft "provision concerning the settlement of disputes which might arise from the application of the articles", as envisaged by the Commission in its commentary to article 50.¹³ On the proposal of one of its members, the Commission had also decided to ask the Special Rapporteur to prepare a working paper on that subject, together with a draft article, on the model of his working paper on the possible effects of exceptional situations (A/CN.4/L.166). The Special Rapporteur had informed the Secretariat that he had nearly completed the work and would submit it to the Commission shortly.

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

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

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

¹¹ For resumption of the discussion see 1133rd meeting, para. 59.

¹² See 1102nd meeting, paras. 17-21.

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

¹⁰ See 1098th meeting, para. 99.

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*¹⁵

The meeting rose at 1 p.m.

¹⁵ For resumption of the discussion see 1119th meeting, para. 81.

1116th MEETING

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

Chairman: Mr. Senjin TSURUOKA

later: Mr. Roberto AGO

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

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

Relations between States and international organizations

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

[Item 1 of the agenda]
(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

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

ARTICLE 39¹

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

3. The text proposed for article 39 read:

Article 39

Exemption from laws concerning acquisition of nationality

Members of the permanent mission not being nationals of the host State, and members of their families forming part of their household, shall not, solely by the operation of the law of the host State, acquire the nationality of that State.

4. However, since article 39, like article 40, dealt with the privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff, the Drafting Committee thought it would be more logical to place article 39 after article 40, and therefore proposed that the order of the two articles should be reversed.

5. Mr. USHAKOV said he assumed that that was merely a provisional proposal, since the Drafting Committee intended to review the order of all the articles in the draft at a later stage.

6. The CHAIRMAN said that, if there were no other comments, he would take it that the Commission provisionally approved the Drafting Committee's proposals for article 39 in the light of Mr. Ushakov's comment.

It was so agreed.³

¹ For previous discussions see 1096th meeting, para. 77; 1098th meeting, para. 101; 1099th meeting, para. 1.

² United Nations, *Treaty Series*, vol. 500, p. 224.

³ For resumption of the discussion see 1135th meeting, para. 40.

PART III. Permanent observer missions to international organizations

7. The CHAIRMAN invited the Commission to take up Part III of the draft, concerning permanent observer missions to international organizations (A/CN.4/L.168/Add.2).

ARTICLE 52

8. Mr. AGO (Chairman of the Drafting Committee), introducing article 52, said that in paragraph 1, in order to emphasize that there must be no discrimination in the establishment of permanent observer missions, the Drafting Committee had inserted the words "and with article 75" after the words "in accordance with the rules or practice of the Organization". The Committee would consider on second reading whether a corresponding change should be made in article 6 on the establishment of permanent missions.

9. As in article 6 and for the same reasons, the Drafting Committee had replaced the words "functions set forth" by the words "functions mentioned".

10. The Committee had added a second paragraph modelled on the paragraph 2 it had added to article 6 (A/CN.4/L.168).

11. The text proposed for article 52 read:

Article 52

Establishment of permanent observer missions

1. Non-member States may, in accordance with the rules or practice of the Organization and with article 75, establish permanent observer missions for the performance of the functions mentioned in article 53.

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

12. Mr. TAMMES said he could not accept the new text of article 52, for the reasons he had stated when the Commission had examined the previous text.⁴ Apart from the addition of the new paragraph 2, the article was in essentials unchanged and was still ambiguous inasmuch as it might be interpreted as imposing an obligation on the organization. As the text read at present, the organization could be required to permit the establishment of permanent observer missions provided that it had no rules or practice to the contrary. The problem had been well stated by Mr. Bartoš, who had asked whether the phrase "in accordance with the rules or practice of the Organization" meant that non-member States could establish permanent observer missions if the organization permitted them to do so, or that it was for the organization to lay down the conditions governing the establishment of observer missions.⁵

13. Mr. ALBÓNICO said he did not know whether the additional words "and with article 75" meant anything in the English and French texts; in the Spanish text they were meaningless.

⁴ See 1102nd meeting, para. 31 *et seq.*

⁵ *Ibid.*, para. 53.

14. Mr. USTOR disagreed with Mr. Tammes's view that the new text of article 52 could be interpreted to mean that non-member States could compel an organization to permit them to establish permanent observer missions. The organization's rights in the matter were amply safeguarded by the phrase "in accordance with the rules or practice of the Organization and with article 75". Any remaining doubts could easily be dispelled in the commentary.

15. Mr. KEARNEY expressed dissatisfaction with the new text and particularly with the reference to article 75. Article 75, on non-discrimination, was a general article which applied to all the draft articles in the part on permanent observer missions. It was not the Commission's practice to make specific references to an article of that type; that had been made clear when it had been suggested that a reference to article 50 should be included in article 10.⁶ If a reference to article 75 was accepted in article 52, there would seem to be no valid reason why such a reference should not be made in a number of other articles as well.

16. Mr. EUSTATHIADES agreed with Mr. Kearney that a general provision such as article 75, on non-discrimination, need not be expressly mentioned. In the present case, it was unnecessary to mention article 75 if the practice and rules of the organization permitted the establishment of permanent observer missions; if they did not, such a reference was even dangerous, for it would make it more difficult for organizations which did not permit the establishment of observer missions to change their policy.

17. He would not press for deletion of the reference to the rules or practice of the organization, provided that it was clearly explained in the commentary how that provision could be reconciled with the aim of making it the general practice to allow non-member States to establish permanent observer missions to international organizations.

18. Mr. USHAKOV said he doubted whether paragraph 1 could be interpreted as Mr. Tammes feared, since the establishment of a permanent observer mission, just like that of a permanent mission, was necessarily subject to the organization's consent.

19. Logically, either the reference to article 75 should be accepted, if the implicit reference to article 3 in the words "in accordance with the rules or practice of the Organization" was recognized, or all references to general provisions should be deleted. At all events, if the two references—explicit and implicit—were retained in article 52, article 6 should be amended accordingly.

20. Mr. REUTER agreed with previous speakers in finding the words "and with article 75" unacceptable.

21. Sir Humphrey WALDOCK said that, like other members, he did not think the reference to article 75 was either necessary or appropriate. It did not alter the sub-

stance of the article, since what the Commission was concerned with was the application of the principle of universality. The case of permanent observer missions presented a special problem, since it was necessary to safeguard the general position of organizations which did not have any rules or practice in the matter. Everyone could agree that the member States of an organization of a universal character should enjoy equal rights with respect to representation, but it was open to question whether non-member States should be allowed any rights at all. The real problem in such cases was, of course, essentially political and could not be solved by drafting. However, since there was nothing in the new text of article 52 to restrict the freedom of action of an organization in dealing with a non-member State, he was prepared to accept it.

22. Mr. AGO (Chairman of the Drafting Committee) said that, in appraising the wording of an article, particularly one that had to stress a number of requirements which were contradictory, but all had to be taken into consideration, it was necessary first to agree on the substance and then to see whether it was appropriately expressed. In article 52, three requirements had to be put into appropriate form. First, the will of the international organization, which was sovereign, must be respected, whether it chose to accept observer missions or not to accept them. Secondly, if the organization accepted permanent observer missions, it could make their establishment subject to certain conditions and procedures that were either defined in the rules of the organization, which was rather exceptional, or derived from its practice, which was normal. Thirdly, once an organization had agreed to accept permanent observer missions, it could not permit some States to establish them and refuse others.

23. The question was whether article 52, in its present wording, adequately reflected those three requirements. Some members feared that paragraph 1 could be interpreted to mean that the organization was obliged to accept the establishment of permanent observer missions. He did not think so. The words "in accordance with the rules or practice of the Organization" provided all the necessary safeguards, for if a non-member State wished to establish a permanent observer mission to an organization whose rules or practice did not allow it, such a mission could not be said to be established in accordance with the rules or practice of the organization. The use of those words made it quite impossible for a non-member State to establish an observer mission to an organization which did not wish it. That point should be made clear in the commentary.

24. The reference to article 75 was intended to express the idea that there must be no discrimination between non-member States. The reference was not, perhaps, superfluous, for the simple reason that the non-discrimination referred to in article 75 applied mainly to the treatment of sending States by the host State, whereas article 52 dealt with non-discrimination on the part of the organization. Perhaps it was not necessary to refer expressly to article 75 in cases where discrimination

⁶ See 1090th meeting, para. 73 *et seq.* and 1091st meeting, para. 4 *et seq.*

might be practiced by the host State; but it was well to do so where it was the organization which might discriminate.

25. Article 52, as drafted, was thus a fairly satisfactory expression of the Commission's ideas and aims.

26. Mr. KEARNEY said he might not have fully understood the Chairman of the Drafting Committee, but he saw no reason to abandon a principle of drafting which the Commission had followed for a long time. Even if article 52 made no reference to article 75, there was no doubt that the latter article would continue to apply to all the draft articles on permanent observer missions.

27. Mr. REUTER said that the very clear explanations given by the Chairman of the Drafting Committee confirmed his opinion that article 52 was unacceptable. After an organization had given non-member States permission to establish permanent observer missions, the rule of non-discrimination should certainly apply as between those States, but it was impossible to accept a rule which would force organizations to choose between two alternatives: to permit all non-member States to establish permanent observer missions or to permit none. Respect for the sovereignty of the organization required that its freedom to judge for itself be protected.

28. Mr. ALCÍVAR agreed with Sir Humphrey Waldock that the problem raised in article 52 with regard to organizations, and particularly with regard to the United Nations, was a political problem. He proposed that either article 52 should include a reference to article 75 or the phrase "in accordance with the rules or practice of the Organization" should be deleted.

29. Mr. TAMMES associated himself with Mr. Reuter's remarks. The possibility of interpreting article 52 as imposing an obligation on the organization would exist only if the organization had no rules or practice in the matter; but, as was clear from the comments received from a number of organizations, many had no such rules or practice. It was, of course, possible to remove all doubt by including an appropriate reference in the commentary, but he thought it would be better to do so in the text of the article itself by using some such phrase as "in so far as this is provided for in the relevant rules of the Organization", which he had previously proposed.⁷

30. Mr. USTOR said that he could not accept Mr. Reuter's contention that an organization of a universal character could make a choice between States. In his view, the same rule should apply to non-member States as to member States: to allow organizations to discriminate by permitting some States to establish permanent observer missions and refusing others would conflict with the principle of universality to which the Commission was committed.

31. As to Mr. Kearney's objection to the reference to article 75, it should be noted that article 3, although not

referred to as such, was nevertheless represented in article 52 by the words "in accordance with the rules or practice of the Organization".

32. With regard to the political content of article 52, it was true that organizations possessed a certain amount of freedom when it came to deciding whether they would or would not recognize political entities as States, but that freedom was relative and subject to the general principle of friendly relations, good faith and co-operation between States.

33. Mr. ROSENNE said that he shared the hesitation expressed by Mr. Tammes and Mr. Reuter; the new text of article 52, as presented and explained, seemed to change the whole character of permanent observer missions. He feared that the Commission was developing a tendency to include far too many rules of law in ephemeral commentaries which would disappear if the Vienna Convention on the Law of Treaties was ever properly applied.

34. It had been suggested that if the Commission accepted article 6, which permitted member States to establish permanent missions, it should also accept the same rule for application to non-member States. But that suggestion ignored the fact that before a State became a member of an organization, there was an initial process by which it became a member. However nominal the process of admission to membership in the United Nations might be today, it had still to be undergone in accordance with Article 4 of the Charter, and article 6 of the present draft articles applied only to States which had already undergone such a process.

35. He noted a slight difference between paragraph 2 of the new article 52 and article 6, paragraph 2, as provisionally approved by the Commission.⁸ Article 52, paragraph 2, read: "The Organization shall notify the host State of the establishment . . .", whereas article 6, paragraph 2, read: "The Organization shall notify to the host State the establishment . . .". He understood the text in article 52 to mean that notification would be made after the establishment of a permanent observer mission; that had not been the meaning given to the corresponding text of article 6.

36. Mr. USHAKOV said that the sovereignty of States was subject to the rule of general international law prohibiting the practice of discrimination between States. The sovereignty of international organizations was subject to the same incontestable rule of *jus cogens*. Hence it was inconceivable that members of the Commission, who should be guided exclusively by legal and not by political considerations, should grant the organization the right to discriminate between States.

37. Mr. ALBÓNICO said that, on merely reading article 52 in its present form as a layman, he would understand it to mean that non-member States had the right to establish permanent observer missions. The phrase "in accordance with the rules or practice of the

⁷ See 1102nd meeting, para. 32.

⁸ See 1110th meeting, para. 18.

Organization and with article 75” was of a purely procedural, not a substantive, nature. Since a political problem was involved, he thought some explicit reference to the agreement or consent of the organization was indispensable in the article.

38. Mr. CASTAÑEDA said that non-discrimination was implicitly a rule in all international organizations. An organization was free to lay down certain conditions for membership but, if a candidate fulfilled those conditions, it could not be refused admission. That principle had been confirmed by the International Court of Justice in its advisory opinion of 3 March 1950,⁹ the essence of which was that the United Nations could not deny admission to a State for any reasons other than those laid down in the Charter.

39. Mr. SETTE CÂMARA observed that, in Mr. Albónico's view, the element of consent of the organization was lacking in article 52; he, on the contrary, believed that it was present in the words “in accordance with the rules or practice of the Organization”, which, as Mr. Ustor had pointed out, constituted a reference to article 3. He saw no danger that the present wording would impose an obligation on organizations to accept permanent observer missions from non-member States.

40. In his opinion, the reference to article 75 was justified for the reason given by the Chairman of the Drafting Committee. He would support the new article 52 as it stood.

41. Mr. AGO (Chairman of the Drafting Committee) said that in his previous statement he had merely tried to justify the drafting of article 52, without expressing any views on the problems of substance it raised. Some members of the Commission appeared to be mainly concerned with the substance.

42. The question raised by Mr. Tammes and Mr. Albónico related to drafting. It was indeed open to question whether the phrase “in accordance with the rules or practice of the Organization” made it sufficiently clear that the organization was not obliged to accept permanent observer missions. He would have no objection to changing that phrase if the Commission could find a better one; but it would then be necessary to amend article 6 accordingly.

43. Mr. Kearney had also raised a question of drafting when he had expressed the opinion that the reference to article 75 should be deleted because that article was a general provision applicable to the whole draft, which therefore need not be mentioned expressly. However, Mr. Ushakov's remarks concerning the implicit reference to article 3 suggested that there were reasons for retaining the reference. He would have been tempted to agree with Mr. Kearney purely on the basis of drafting, but Mr. Reuter had advocated the deletion of the reference on grounds of substance, namely, the need to uphold the organization's freedom to judge for itself.

44. It was no use asking the Drafting Committee to revise a text when the Commission had not decided

exactly what it was to express. The Commission should decide whether the principle of non-discrimination was or was not applicable to the establishment of permanent observer missions by non-member States. Once that question had been settled, the choice of wording would be easy.

45. Mr. REUTER said that he had not intended to take a position on the scope of a rule of non-discrimination in general international law. He had simply meant to say that the real question was who was to decide whether a refusal did or did not amount to discrimination in a particular case. In his opinion it was clearly the organization itself which should decide, and it was in that connexion that he had referred to its sovereignty. He could not imagine that the Commission proposed to change the rule on admission to membership in the United Nations laid down in Article 4 of the Charter; nor could he imagine that the Organization had fewer rights in regard to non-member States than it had in regard to Member States.

46. Mr. ROSENNE asked whether the Chairman of the Drafting Committee could explain the relationship in time between articles 75 and 52. Specifically, what was the point in time at which the rule of non-discrimination came into operation: was it the moment when a permanent observer mission was established by the sending State, or did the rule apply retroactively or in a timeless way?

47. Mr. AGO (Chairman of the Drafting Committee) said that that was a very delicate question and deserved careful study. At first sight, it seemed that the rule of non-discrimination should apply from the moment when the organization decided to accept permanent observer missions; but that could not properly be called retroactive application. For a State which was not a member of an organization could request permission to establish a permanent observer mission at a time when the organization did not wish such missions to be established. Subsequently, that State might cease to exist, or become a member of the organization or decide not to establish a permanent observer mission. If it was still in existence, was still not a member and still wished to establish a mission when the organization decided to accept such missions, the State would probably make a new application to the organization.

48. Mr. NAGENDRA SINGH endorsed the explanations given by the Chairman of the Drafting Committee. But since article 75, on non-discrimination, applied to all the draft articles on permanent observer missions, he saw no reason to mention it specially in article 52. If the reference was nevertheless retained, the words “and with article 75” should be replaced by some such phrase as “and subject to the provisions of article 75”.

49. Mr. EUSTATHIADES said that, having commented on the drafting of article 52, he wished to add three remarks on the substance. First, it was not clear whether the article simply reflected existing practice or whether it was designed to give a general direction to the practice of organizations by establishing a rule to be followed in the future.

⁹ *I.C.J. Reports 1950*, p. 4.

50. Secondly, neither article 52 nor the commentary to it specified which organ of the organization was to give or refuse permission for the establishment of a mission, or on what criteria its decision would be based. The article referred only to the rules or practice of the organization; but there might be no rule and no uniform practice concerning the establishment of observer missions.

51. Thirdly, it would not be appropriate for a provision in a convention binding certain States to require organizations—which might mean their secretariats—to take a decision on a political matter and to make them responsible for settling such a delicate question as whether a given entity constituted a State. In some cases, however, an organization would have to decide that question because, as various members of the Commission had pointed out, only States could establish permanent observer missions. Since article 52 did not do so, each organization could be expected to establish appropriate procedure for the acceptance of observer missions.

52. Mr. KEARNEY observed that the discussion had revealed some concern at the difficulty of determining the meaning of paragraph 1. He proposed that the words “in accordance with the rules or practice of the Organization and with article 75” should be replaced by the words “when authorized by the Organization”. That change would have three beneficial results. The first was that the organization would be left to determine how the establishment of a permanent observer mission was to be authorized. The second was that any claim that a reference to article 75 was needed in article 52 would be disposed of. The third was that the confusion as to what constituted the “practice” of the organization would be removed.

53. In reply to a question by Mr. Ushakov, he said that his proposal did not affect article 6. He saw no connexion between article 6 and article 52. The constitution of an international organization invariably contained rules on the selection of its members; the reference to “Member States” in article 6 was an allusion to an established fact. The position with regard to article 52 was entirely different, in that the constituent instrument of no international organization contained provisions relating to non-member States.

54. Mr. USHAKOV said that Mr. Kearney’s amendment should be considered by the Drafting Committee. For his part he thought that if a non-member State had to obtain permission to establish a permanent observer mission, a member State should have to obtain permission to establish a permanent mission. Mr. Kearney’s amendment should therefore apply to article 6 as well as article 52.

55. The CHAIRMAN noted that article 52 had given rise to differences of opinion. He suggested that the article should be referred back to the Drafting Committee for reconsideration in the light of the discussion.

*It was so agreed.*¹⁰

¹⁰ For resumption of the discussion see 1118th meeting, para. 1.

56. Mr. TAMMES reminded the Commission that he had submitted an amendment to article 52.

57. The CHAIRMAN said that the Drafting Committee would take that amendment into account.

Mr. Ago, First Vice-Chairman, took the Chair.

ARTICLE 53

58. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that article 53 had been completely redrafted and simplified, but the substance was not affected. The text proposed by the Drafting Committee read:

Article 53

Functions of a permanent observer mission

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

(a) ensuring the representation of the sending State to the Organization and maintaining liaison with it;

(b) ascertaining activities in the Organization and reporting thereon to the Government of the sending State;

(c) promoting co-operation with the Organization and, when required, negotiating with it.

59. Mr. USHAKOV reminded the Commission that in article 7, on the functions of a permanent mission, it had replaced the words “ensuring representation” by the words “ensuring the representation”.¹¹

60. The CHAIRMAN,* speaking as a member of the Commission, expressed regret at that change. The representation of a State to an organization was not provided exclusively by its permanent mission. But since the change had been made in article 7, it had had to be made in article 53 as well.

61. Mr. REUTER said he thought the expression “ensuring the representation” was correct in article 53, but that in article 7 it should be “ensuring representation”. However, he deferred to the Commission’s decision.

62. Mr. ALBÓNICO welcomed the Drafting Committee’s version of article 53 as an improvement on the former text.

63. Mr. KEARNEY noted that the first part of subparagraph (a) of the Drafting Committee’s text of article 53 was identical with subparagraph (a) of article 7 as provisionally approved by the Commission. The former difference between the two texts had served the purpose of making a minor distinction between the representation of a non-member State by its permanent observer mission and the representation of a member State by its permanent mission.

64. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that although the wording of

¹¹ See 1110th meeting, paras. 47 and 62.

* Mr. Ago.

the opening phrase was now the same in both articles, article 53 mentioned the function of maintaining liaison with the organization in sub-paragraph (a), whereas article 7 mentioned that function in sub-paragraph (b). Apart from that, it had seemed that the difference between the functions of permanent missions and those of permanent observer missions should be brought out more by the commentaries than by the texts of articles 7 and 53.

65. Mr. KEARNEY observed that the difference in the organization of the sub-paragraphs did not really establish a significant distinction between the two types of representation. The function of representation would still be defined in the same terms for both types of mission, and he saw no justification for placing permanent observer missions on a par with permanent missions in that respect.

66. The CHAIRMAN,* speaking as a member of the Commission, said that the character of the representation was the same in both cases, although the permanent mission of a member State normally acted more frequently in its representative capacity than a permanent observer mission. The person appointed by the sending State was always a representative, whether he was at the head of a permanent mission or of a permanent observer mission.

67. Mr. KEARNEY reminded the Commission that, in its discussions on article 7, attention had been drawn to the difference between the representation of a member State "in" the organization by a permanent mission and the representation of a non-member State "at" the organization by a permanent observer mission.¹² That difference in wording had established a distinction which had now been lost through the use of the same preposition "to" in sub-paragraph (a) of both article 7 and article 53.

68. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that it was not possible to use the preposition "in"; it had been pointed out in discussion that a permanent mission represented the sending State "at" the organization, but never "in" the organization. In certain cases, the permanent representative might be authorized to represent the sending State "in" an organ of the organization, but that did not affect the position so far as the permanent mission was concerned. It would be regrettable if, in order to try to make a distinction between permanent missions and permanent observer missions, the erroneous concept of representation "in" the organization by a permanent mission were introduced into article 7.

69. Mr. USHAKOV considered that the point raised by Mr. Kearney was a matter of substance, since the representation of a member State and that of a non-member State were different in purpose. The same difference was to be found in bilateral diplomacy, between the purpose of an ordinary diplomatic mission and that of a

special mission. A special mission represented the sending State only for certain specific purposes, as could be seen from article 1, sub-paragraph (a), of the Convention on Special Missions.¹³ The commentary to article 53 should therefore make it clear that the purpose of a permanent mission and that of a permanent observer mission were not the same, although they both had a representative character.

70. Mr. REUTER said that a permanent observer mission had a monopoly of representation, which the permanent mission of a member State did not. That paradoxical situation probably explained the differences in wording between article 7 and article 53.

71. Sir Humphrey WALDOCK reminded the Commission that the text of article 53 referred to the Drafting Committee had used the words "at the Organization"; on the whole he preferred that phrase to the formula "to the Organization" now proposed by the Drafting Committee. However, he did not attach great importance to the use of one preposition rather than the other, and he noted that the corresponding French phrase "*auprès de l'Organisation*" had been given preference throughout the discussions. In his opinion the preposition used did not reflect on the character of the representation, which depended essentially on the functions performed by the mission concerned.

72. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that to the best of his recollection Sir Humphrey WaldoCK had explained in the Drafting Committee that the preposition "at" was the equivalent of the French "*auprès de*".

73. Mr. SETTE CÂMARA agreed with Mr. Kearney that the use of similar language in articles 7 and 53 would make it appear that the permanent mission and the permanent observer mission had the same functions. In reality, the main function of a permanent observer mission was that defined in article 53, sub-paragraph (b): namely, "ascertaining activities in the Organization and reporting thereon to the Government of the sending State". The function of representation, defined in sub-paragraph (a), did not have the same importance; that difference from a permanent mission was significant. He therefore suggested that the order of sub-paragraphs (a) and (b) in article 53 should be reversed. The resulting difference from article 7 would establish the necessary distinction between the functions of permanent missions and those of permanent observer missions.

74. Mr. ROSENNE pointed out that the character of representation depended not only on the functions of the mission concerned, but also on the sending State which the mission represented. In practice certain permanent observer missions, both at Geneva and in New York, had much greater representative activities than certain permanent missions. There were permanent missions whose activities could be quite nominal.

75. He did not believe that the use of the preposition "to" instead of "at" or "in" was very important. On the

* Mr. Ago.

¹² See 1089th meeting, para. 60 *et seq.* and 1110th meeting, para. 34 *et seq.*

¹³ See General Assembly resolution 2530 (XXIV), Annex.

other hand, the introduction of the definite article "the" before the word "representation" made some difference to the meaning of the text. In its present form, he thought that article 53, sub-paragraph (a), did not adequately reflect the elements which, taken together, distinguished a permanent observer mission from a permanent mission.

76. As he recollected it, Mr. Yasseen's proposal that the article "the" should be inserted before the word "representation" in article 7, sub-paragraph (a), had originally related to the French text. The Chairman had summarized the discussion in both English and French, and had referred to the insertion of the definite article "the" in the English text; article 7 had then been provisionally approved with that change.¹⁴ As a matter of language, the use of the definite article "the" in the English text of both article 7 and article 53 needed further scrutiny; it affected the structure of the sentence differently from the use of the article "la" in French.

77. Sir Humphrey WALDOCK agreed that in English it was better to say "Ensuring representation" than "Ensuring the representation", but he did not feel that there was any real difference in meaning. The changes which had been made in article 53 were simply the result of changes approved for article 7.

78. Mr. EUSTATHIADES observed that the difference between the expressions "maintaining the necessary liaison" and "maintaining liaison", used in articles 7 and 53 respectively, was certainly justified. The use of the expression "ensuring the representation" in both articles should not give rise to any difficulty because the commentaries could explain that the representation of a State by its mission did not preclude representation by other means.

The meeting rose at 1.5 p.m.

¹⁴ See 1110th meeting, paras. 47 and 62.

1117th MEETING

Monday, 14 June 1971, at 3.5 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Baroš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldoack, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168 and Add.1 to 3; A/CN.4/L.169; A/CN.4/L.170 and Add.1; A/CN.4/L.171; A/CN.4/L.172)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 53 (Functions of a permanent observer mission) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 53 as proposed by the Drafting Committee.

2. Mr. AGO (Chairman of the Drafting Committee) said that the Drafting Committee now proposed that sub-paragraph (a) of article 53 should be worded differently from sub-paragraph (a) of article 7 (A/CN.4/L.168), so as to reflect the difference between the functions of permanent missions and those of permanent observer missions, as several members of the Commission had suggested. The new text read:

"(a) ensuring, in relations with the Organization, the representation of the sending State and maintaining liaison with the Organization;"

The Drafting Committee left it to the English-speaking members to decide whether the definite article should be used before the word "representation" in the English text.

3. Mr. YASSEEN said he accepted the new wording, which removed the doubt about the scope of representation of a sending State by a permanent observer mission.

4. Mr. NAGENDRA SINGH said he agreed with Mr. Yasseen; the revised text was a distinct improvement.

5. Sir Humphrey WALDOCK said that if the French-speaking members of the Commission wished to use the words "*la représentation*", he could accept the inclusion of the word "the" before the word "representation" in the English version. But if the wording in French was to be "*une représentation*", then the English word "representation" should not be preceded by any article.

6. Mr. ALBÓNICO said that the text proposed by the Drafting Committee for sub-paragraph (a) was a marked improvement from the point of view of drafting. He still thought, however, that from the point of view of substance, there was a fundamental distinction between the institution of permanent missions, as described in article 7, and that of permanent observer missions, and that that distinction had not been brought out with sufficient clarity.

7. Mr. EUSTATHIADES said that the definite article should be retained in the French version, because it showed the difference between a permanent mission, which might not provide the only representation of the

sending State, and a permanent observer mission, which did provide the only representation.

8. Mr. ALCÍVAR said that in the Spanish text the definite article “*la*” was absolutely necessary.

9. Mr. REUTER said he approved of the text as it stood. If the Commission wished to make the distinction between permanent missions and permanent observer missions still clearer, it should amend sub-paragraph (c). To place those missions on an equal footing with respect to co-operation with the organization was possible, but questionable. In the case of permanent missions, such co-operation was the necessary, general and obvious consequence of participating in the work of the organization, whereas in the case of permanent observer missions it was neither so necessary nor so general and, above all, it was intermittent. It might therefore be better to find some other wording for sub-paragraph (c).

10. Sir Humphrey WALDOCK said that one of the functions of a permanent mission, as stated in article 7, sub-paragraph (e), was “promoting co-operation for the realization of the purposes and principles of the Organization”. There was a real difference, however, between that function, as performed by the permanent mission of a member of the organization, and the function of “promoting co-operation with the Organization” referred to in article 53, sub-paragraph (c).

11. Mr. USHAKOV said he agreed with Mr. Eustathiades. The Commission must decide whether it wished to bring out a difference between permanent missions and permanent observer missions and to amend articles 7 and 53 accordingly.

12. Mr. KEARNEY said he was not sure that the distinction between the use of the definite and the indefinite article was as clear in English as it was in French. In view of the explanations which had been given, however, he thought that it would be desirable to follow the French text fairly closely and to say “the representation”.

13. The CHAIRMAN asked Mr. Albónico whether he had any specific proposals to put forward that would lessen the apparent resemblance between article 7 and article 53.

14. Mr. ALBÓNICO said that he had no actual proposal to make; but he thought the distinction between a permanent mission and a permanent observer mission, as it applied to article 53, sub-paragraph (a), should be emphasized in the commentary.

15. Mr. USTOR noted that article 53 referred to “maintaining liaison”, while article 7 used the words “maintaining the necessary liaison”. The Commission should consider the distinction between those two provisions when deciding on the final draft.

16. Mr. SETTE CÂMARA said he had no objection to the Drafting Committee’s text, but he agreed with Mr. Albónico that the commentary should stress the difference between the functions of a permanent mission and those of a permanent observer mission.

17. The CHAIRMAN, speaking as a member of the Commission, drew attention to the distinction which

should be made between permanent representatives in New York and permanent representatives at Geneva. In New York, permanent representatives sat in all organs of which their country was a member, and the permanent mission did not have to notify the organization. Moreover, the heads of permanent missions were usually diplomats of high rank. The situation was different at Geneva. But since the draft dealt with relations between States and international organizations, and since the United Nations was the most important international organization, the text of the articles should not give the impression that the Commission was unaware of the real situation prevailing in New York.

18. Mr. AGO (Chairman of the Drafting Committee), referring to the remark made by Mr. Eustathiades, said he did not think it was correct to say that a permanent observer mission carried out all forms of representation to the organization; there were also observers, or observer delegations, which were not part of the mission. It would therefore be preferable to use the definite article in both the English and the French texts of articles 7 and 53.

19. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission was prepared to approve article 53 in the form proposed by the Drafting Committee.

*It was so agreed.*¹

ARTICLE 34 (Settlement of civil claims)²

20. Mr. AGO (Chairman of the Drafting Committee) reminded the Commission that the Drafting Committee had proposed that article 34, which imposed on the sending State the obligation to waive immunity whenever that could be done without impeding the performance of the functions of the permanent mission, should be deleted. The Committee had further suggested that those responsible for establishing the final text of the articles might adopt a resolution similar to General Assembly resolution 2531 (XXIV), on the settlement of civil claims.³ But since those proposals had deeply divided the Commission, most members being in favour of establishing an obligation and the Commission as a whole regretting the need to discard certain ideas embodied in the text of the article, the Drafting Committee now proposed a compromise solution consisting in the replacement of article 34 by a new paragraph 5 to be added to article 33, on waiver of immunity. The new provision did not establish an obligation to waive immunity, but it did impose on the sending State the duty to use its best endeavours to bring about a just settlement of the case if it was unwilling to waive immunity.

21. The text proposed for the new paragraph read:

“5. If the sending State does not waive the immunity of any of the persons mentioned in paragraph 1 in

¹ For resumption of the discussion see 1132nd meeting, para. 68.

² For previous discussions see 1095th meeting, para. 14; 1096th meeting, para. 1; 1113th meeting, para. 71.

³ See 1113th meeting, para. 71.

respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.”

22. Mr. YASSEEN said he was against the new solution proposed by the Drafting Committee. He was in favour of the method adopted by the Vienna Conference on Diplomatic Intercourse and Immunities⁴ and chosen by the General Assembly for the Convention on Special Missions. A resolution would be a perfectly adequate means of expressing the idea that the sending State had a duty to make special efforts to settle claims.

23. Mr. USHAKOV said that, in his opinion, the compromise proposed by the Drafting Committee was acceptable, since the text stated an already existing rule of customary law, that States must do their utmost to bring about a just settlement of all disputes, whatever their nature. The Commission might therefore adopt the proposal; by so doing it might succeed in proposing to States a solution more acceptable than that chosen in the case of the Convention on Diplomatic Relations and the Conventions on Special Missions.

24. Mr. REUTER said he endorsed Mr. Ushakov's comments and supported the solution proposed by the Drafting Committee. He would, however, like to point out to Mr. Ago, who was Special Rapporteur on State responsibility, that by replacing article 34 by a new paragraph 5 added to article 33, the Drafting Committee was replacing an obligation relating to a result by an obligation relating to conduct.

25. Mr. CASTAÑEDA said he was not satisfied with the substance of article 34, the wording of which was far too categorical. He was prepared to accept the Drafting Committee's proposal because it corresponded more closely to the actual practice of international organizations.

26. Mr. SETTE CÂMARA said he was glad that the Drafting Committee had abandoned the formula used in article 34, which imposed upon States a general and *a priori* obligation to waive immunity. He agreed with Mr. Ushakov and Mr. Castañeda that the new paragraph 5 of article 33 was a very skilful compromise.

27. Mr. ALBÓNICO said that he too supported the Drafting Committee's proposal. States were naturally jealous about the immunities of their representatives and in the new formula there was a satisfactory balance between the rights of the host State, the sending State and the individuals concerned.

28. Mr. ROSENNE said that in the light of the full history of resolution II on consideration of civil claims adopted by the United Nations Conference on Diplomatic Intercourse and Immunities,⁵ he would regret the disappearance of article 34, which stated the law on the matter as he understood it. He did not think that article had such far-reaching implications as some speakers had suggested. However, he was prepared to accept the Drafting Committee's proposal as a compromise which

would give more consideration to the position of injured persons than had originally been envisaged at the Vienna Conference.

29. Mr. CASTRÉN said that, like several other members of the Commission, he thought the solution proposed by the Drafting Committee was an acceptable compromise. It was something more than a resolution, but less than the text of article 34, which would probably not have been accepted by a plenipotentiary conference. To require that the Sending State should use its best endeavours to bring about a settlement if it was unwilling to waive immunity was a reasonable and fair solution.

30. The CHAIRMAN said that if there was no objection he would take it that, although opinions were divided, the Commission was prepared to approve the replacement of article 34 by the new paragraph 5 of article 33 proposed by the Drafting Committee.

*It was so agreed.*⁶

ARTICLE 25 (Inviolability of the premises)

31. Mr. AGO (Chairman of the Drafting Committee) said that the Commission's reception of the Drafting Committee's first proposals for article 25⁷ had discouraged it from attempting to produce a new text. The Committee therefore proposed that the Commission should revert to the wording it had adopted in 1969.⁸ That text was far from perfect, but it was likely to be approved by a conference of plenipotentiaries and it had the advantage of having been approved not only by the Commission, but also, in another context, by a large majority in the General Assembly.

32. Mr. ALCÍVAR said he wished to state for the record that he was entirely opposed to the last sentence of paragraph 1 of article 25.

33. Mr. ALBÓNICO said he was prepared to accept article 25, subject to the deletion, in the last sentence of paragraph 1, of the words “and only in the event that it has not been possible to obtain the express consent of the permanent representative”.

34. Mr. KEARNEY said that, although he was not satisfied with the article, he was prepared to accept it provisionally, subject to the deletion proposed by Mr. Albónico.

35. Mr. CASTAÑEDA said he fully supported the deletion proposed by Mr. Albónico. The hypothesis posited in the final clause of the last sentence of paragraph 1 was both improbable and illogical.

36. Mr. USHAKOV observed that opinion was still deeply divided on the Drafting Committee's proposal. However, there was no reason why the Commission should not provisionally adopt a compromise text which had already been endorsed by the General Assembly

⁴ United Nations, *Treaty Series*, vol. 500, pp. 218-220.

⁵ *Ibid.*

⁶ For resumption of the discussion see 1133rd meeting, para. 26.

⁷ See 1112th meeting, para. 42 *et seq.*

⁸ See 1093rd meeting, para. 47.

in the Convention on Special Missions.⁹ When the time came to adopt article 25 finally, members of the Commission would still be able to propose amendments to the text.

37. Mr. CASTRÉN said he supported the solution proposed by the Drafting Committee, although he thought that the Committee's first text was preferable, because it was more precise. He acknowledged that it was wiser to keep to a text which had already been accepted in an earlier convention.

38. Mr. REUTER said he would accept any text which might be proposed, since it was impossible to violate any rule of international law written or unwritten, when saving human lives.

39. Mr. NAGENDRA SINGH said he agreed with Mr. Ushakov that the Commission should provisionally approve article 25 as it stood.

40. The CHAIRMAN proposed that the Commission should provisionally approve article 25 on the understanding that members would be able to propose amendments when the time came to take a final decision on the article.

*It was so agreed.*¹⁰

ARTICLE 32 (Immunity from jurisdiction)

41. Mr. AGO (Chairman of the Drafting Committee) said that the only change the Drafting Committee had made in its previous text of article 32¹¹ was in paragraph 1 (d). In view of the possibility that, under the laws in force in certain countries, an insurance company might—as some members of the Commission feared—be able to invoke the immunity from jurisdiction of a person causing an accident as a ground for refusing to compensate the victim, the Committee had replaced the words “and only if those damages are not covered by insurance” by the words “where those damages are not recoverable from insurance”, so that paragraph 1 (d) read:

“(d) an action for damages arising out of an accident caused by a vehicle used by the person in question outside the exercise of the functions of the permanent mission where those damages are not recoverable from insurance.”

42. Mr. ALBÓNICO pointed out that the provisions of paragraph 1 (d) stated an exception to the basic principle of immunity from jurisdiction laid down in article 32. The concluding words, “where those damages are not recoverable from insurance”, were intended to provide for an exception to that exception, and would preclude an action against a member of the mission if the damages could be recovered from insurance.

43. As he saw it, the intention both of the Commission and of the Drafting Committee had been to lay down

a condition for the admissibility of an action against the person concerned. If an insurance policy in force covered the damage, no action would lie.

44. He proposed that, in the Spanish text, the concluding proviso, which at present read “*siempre que esos daños no sean recobrables mediante seguro*” should be amended to read “*y siempre que esos daños no hayan sido reparados previamente mediante seguro*” (“and where those damages have not been previously compensated by insurance”). It would thus be made clear that if the insurance company concerned raised any difficulty, the injured party could bring an action for damages against the member of the permanent mission concerned.

45. Mr. ALCÍVAR said he agreed with the previous speaker. In Spanish, the conjunction “y” was absolutely necessary. The rest of Mr. Albónico's amendment also improved the Spanish text and he would be prepared to accept it, although in the Drafting Committee he had accepted the Spanish version now before the Commission (A/CN.4/L.170/Add.1) because it was an exact translation of the English.

46. Mr. USHAKOV said that the text of paragraph 1 (d) was a compromise which the Drafting Committee had reached on second reading, in the light of the comments made in the Commission. Although the present wording was an improvement on the corresponding provision of the Convention on Special Missions, he reserved his position. The Commission had decided to add to article 33 a new paragraph 5 concerning the efforts to be made by the sending State to bring about the settlement of claims, as a result of which paragraph 1 (d) of article 32 might later be deleted.

47. Mr. KEARNEY said he would have no objection to replacing the English text of the concluding words of paragraph 1 (d) by the words: “and where those damages have not been previously recovered from insurance”. That wording corresponded to the amendment proposed in Spanish by Mr. Albónico and expressed what was intended more precisely. The idea which the Drafting Committee had wished to convey was that, if an insurance existed, the injured party must first attempt to obtain payment of damages from the insurance company; if he did not obtain it, he could then bring an action against the member of the permanent mission concerned.

48. Mr. AGO said he thought the word “*recouvré*” was perfectly satisfactory in the French version.

49. Mr. ALBÓNICO said that the main point of his proposal was the inclusion of the adverb “previously”. If the injured party was unable to obtain payment from the insurance company, the door would be open for action in court.

50. Sir Humphrey WALDOCK said that the idea behind the concluding proviso of paragraph 1 (d) was not an easy one to express. The corresponding provision, article 31, paragraph 2 (d), of the Convention on Special Missions was not qualified by any reference to insurance. The Commission had taken the view that a provision

⁹ See General Assembly resolution 2530 (XXIV), Annex, article 25.

¹⁰ For resumption of the discussion see 1132nd meeting, para. 136.

¹¹ See 1113th meeting, para. 37.

on those lines would be too strict and that the right of action should not arise if the damages arising out of an accident caused by a vehicle could be recovered from insurance. It was for that reason that the Drafting Committee had accepted the concluding proviso of paragraph 1 (*d*): "where those damages are not recoverable from insurance". The effect of that proviso would be the same if the word "where" was replaced by the word "if".

51. Mr. ALCÍVAR said that, in the Spanish text, the word "*recuperados*" would be better than "*recobrables*". The word "*previamente*", though not essential, would make the meaning of the Spanish text clearer.

52. Mr. USHAKOV said there was no need to add the word "*auparavant*" in the French text, since the conjunction "*si*" conveyed an idea of anteriority.

53. Mr. ALBÓNICO said that, in Spanish, the word "*siempre*", like the word "*si*" in French, indicated a condition. That condition, however, could be interpreted in two ways. It could be interpreted as relating to admissibility, in which case no action would lie if an insurance policy covered the damage. But it could also be interpreted as a requirement that the injured party should institute proceedings against the insurance company and exhaust all existing remedies before action could be taken against the member of the mission concerned.

54. Mr. YASSEEN said he approved of the French text, but thought the other versions were not exactly in line with it. In particular, the words "recoverable" and "damages" did not seem to correspond to the terms "*recouvré*" and "*dédommagement*".

55. Sir Humphrey WALDOCK said that in the Drafting Committee he himself had at first suggested the formula "if those damages cannot be recovered from insurance". But wording on those lines would give rise precisely to the difficulties mentioned by Mr. Albónico. If an insurance policy existed, the injured party would start negotiations with the insurance company concerned. The company might then object that its policy holder was not entirely to blame for the accident and that the other driver involved was partly at fault. The question would then arise whether an action against the member of the mission concerned would be possible in such a case. He was not at all certain of the answer to be given to that question on the basis of the French text.

56. Mr. REUTER said that the word "recoverable" was perhaps satisfactory in the English text, but in French not everything which was "*recouvrable*" was "*recouvré*".

57. Mr. USHAKOV proposed that it should be explained in the commentary how paragraph 1 (*d*) was to be interpreted. In the Drafting Committee's view, the provision meant that if the insurance company refused to pay the damages, the person responsible for the accident should take proceedings against it, and that it was only if those proceedings failed that a civil action could be brought against him.

58. Mr. ROSENNE said that, after listening to the discussion, he was not at all certain that the English text of the concluding proviso was clear.

59. Mr. KEARNEY asked whether it would be acceptable in French to introduce the adverb "previously", so as to make the sequence of operations clearer.

60. Mr. REUTER said he agreed with Mr. Ushakov that the wording proposed by the Drafting Committee was clear enough. Paragraph 1 (*d*) contained a prior condition that all the legal remedies against the insurance company must first have been exhausted. It would be impossible to deal in the commentary with every imaginable hypothesis relating to those remedies in a particular system of law. If the courts declared that proceedings could not be taken against the insurance company under the national law, damages could not be recovered from insurance. If the courts did agree to hear the case, they might not order the insurance company to pay the total damages, but might find that the plaintiff had a share of the responsibility. Such a ruling would indicate that an action taken direct against the person causing the accident had no greater chance of success.

61. Mr. ROSENNE said he was opposed to introducing the adverb "previously", which might well make paragraph 1 (*d*) self-contradictory. In many legal systems, if financial reparation was made, no action for damages would lie.

62. Mr. AGO said that it would be inadvisable to insert the word "*auparavant*" in the French text. The last clause of paragraph 1 (*d*) contained a legal as well as a time element. An action could be brought direct against the person causing the damage only if he was not insured, or if he was insured but the claim against the insurance company had failed, for legal or other reasons. The provision seemed reasonably clear.

63. Sir Humphrey WALDOCK said that the question was not a purely linguistic one. As far as English legal drafting was concerned, the formula "are not recoverable" was the appropriate one to use. If that formula were to be replaced by the words "cannot be recovered", the concluding proviso might be interpreted as amounting to a requirement of exhaustion of remedies as a precondition for the action envisaged in the main clause of paragraph 1 (*d*).

64. Mr. USHAKOV observed that the French and English texts seemed to be generally acceptable. He suggested that the Spanish-speaking members of the Commission should bring the Spanish text into line with the others.

65. Mr. EUSTATHIADES said he was still in favour of making paragraph 1 (*d*) refer expressly to vessels and aircraft. Article 32 was based on the corresponding provisions of the Vienna Convention on Diplomatic Relations and the Convention on Special Missions, neither of which referred to vessels or aircraft; but article 43 of the Vienna Convention on Consular Relations¹² did cover cases in which an accident was caused by a vessel

¹² United Nations, *Treaty Series*, vol. 596, p. 298.

or an aircraft. Although such cases might seem to be rare at present, they should either be mentioned in the article itself or be referred to in the commentary.

66. Mr. USHAKOV said his impression was that article 43 of the Vienna Convention on Consular Relations referred to vessels and aircraft of the sending State. Article 32 of the present draft, on the other hand, referred to vehicles owned by the permanent representative or a member of the diplomatic staff of the permanent mission in his personal capacity. Very few States at present allowed the persons mentioned in article 32 to use vessels or aircraft for private purposes, so that the cases covered by Mr. Eustathiades's proposal would be quite exceptional.

67. The CHAIRMAN said that, if there were no objection, he would take it that the Commission provisionally approved the English and French texts of article 32 as proposed, on the understanding that the Drafting Committee would improve the Spanish text of paragraph 1 (d), Mr. Eustathiades's remarks would be taken into consideration in drafting the commentary to article 32.

*It was so agreed.*¹⁵

The meeting rose at 6 p.m.

¹⁵ For resumption of the discussion see 1133rd meeting, para. 20.

1118th MEETING

Tuesday, 15 June 1971, at 11.55 a.m.

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168 and Add.1 to 3; A/CN.4/L.169; A/CN.4/L.170 and Add.1; A/CN.4/L.171; A/CN.4/L.172)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 52

1. The CHAIRMAN invited the Commission to consider article 52, which had been referred back to the Drafting Committee.¹

2. Mr. AGO (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 52:

Article 52

Establishment of permanent observer missions

1. Non-member States may, if the rules of the Organization so admit, establish permanent observer missions for the performance of the functions mentioned in article 53.

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

3. The Committee recommended that the Commission should use a similar wording *mutatis mutandis*, in article 6, on the establishment of permanent missions.

4. Mr. ALBÓNICO said he welcomed the Drafting Committee's new wording of article 52, paragraph 1, and article 6, paragraph 1, which met the wish of several members that the consent of the organization should be required for the establishment of a permanent observer mission or a permanent mission.

5. Mr. NAGENDRA SINGH also supported the Drafting Committee's new text of articles 52 and 6.

6. Mr. ROSENNE said he did not know of any international organization which had rules on the establishment of either permanent observer missions or permanent missions. In most cases it was a matter of practice and of decisions taken independently of the constitution and rules of the organization.

7. Mr. USHAKOV said that in drafting the new article 52 the Drafting Committee had been guided by Mr. Tammes's proposal² and assumed that the words "rules of the Organization" could also include rules established by practice. The application of the provisions of paragraph 1 would therefore depend on the interpretation given to those rules by each organization. Since practice had no binding force, the Drafting Committee had preferred not to mention it.

8. Mr. AGO (Chairman of the Drafting Committee) said that Mr. Rosenne had raised a very pertinent question. Mr. Rosenne thought it would be impossible to establish a mission of any kind if the expression "rules of the Organization" had to be taken as meaning only written rules, since no organization had written rules on the establishment of missions. He himself would be inclined to think that, on the contrary, if the establishment of missions was not expressly prohibited, that meant that it was always permitted. Nevertheless, the problem did exist, and the Drafting Committee had intended the rules of the organization to include its practice. Paragraph (5) of the commentary to article 3

¹ See 1116th meeting, paras. 8-55.

² *Ibid.*, para. 29.

stated that "The expression relevant rules of the Organization... is broad enough to include all relevant rules whatever their source: constituent instruments, resolutions of the organization concerned or the practice prevailing in that organization."³ Nevertheless, as the commentary did not have the same force as the text of the articles, it might be well to specify in the definitions that rules included practice, as was the case in article 52.

9. Mr. ROSENNE said he would welcome a report by the Drafting Committee on the suggestion that there should be a closer examination of the term "rules" and on the possibility of including a definition of that term in article 1.

10. He found the proviso "if the rules of the Organization so admit" rather too strong, at least in the English version. The use of the words "so admit" would make the clause liable to several interpretations. The intention appeared to be to refer rather to the organization's permission. He would, however, be glad to hear the views of the other English-speaking members on that point.

11. Mr. BARTOŠ said that the point raised by Mr. Rosenne was very important and should be dealt with in the text of the article. Some resolutions of the General Assembly were regarded as constitutional in character: the question of special missions, for instance, had been settled by two resolutions of that kind.⁴ But there were also rules of procedure of the Security Council, which laid down certain rules on the representation of governments through delegations to the Council. Mr. Rosenne had therefore been right to raise the question whether the expression "rules of the Organization" was intended to mean constitutional rules, quasi-constitutional rules or mere practice, which could be changed as the organization wished, without reference to any superior body. It would also be advisable to ascertain whether practice, once established, was binding on the organization.

12. Mr. EUSTATHIADES said it was understandable that the new text proposed by the Drafting Committee should have elicited the question put by Mr. Rosenne, but the explanations given by Mr. Ushakov and Mr. Ago dispelled all doubts. The Commission still had to decide, however, whether the word "practice" should be restored to the text or whether an explanation in the commentary would suffice. He himself would prefer to have the reference to practice put back in the text, though it was not a matter of great importance, since the commentary would explain that the rules of the organization included its practice. In any event, the new text clearly stipulated that the establishment of a non-permanent observer mission by a non-member State was an automatically enforceable right. But that left unsettled the question of the competence of the organization's secretariat to enquire whether the "non-member" was a State or not, and no organ other than the secretariat was mentioned

as being empowered to oppose the establishment of a permanent observer mission.

13. Mr. KEARNEY said it was important that the draft should be consistent. In article 3, the expression "relevant rules of the Organization" had been used; that expression had been taken from article 5 of the Vienna Convention on the Law of Treaties.⁵

14. One of the Drafting Committee's reasons for referring, in article 52, only to the "rules" of the organization, rather than to its "rules or practice", was the need for consistency. If the Commission reverted to the formulation of article 52 adopted at the first reading,⁶ it would give the impression that it intended to establish some distinction between articles 3 and 52; moreover, a statement in the definitions article that rules invariably included practice might not be accurate. The relationship between such a definition and the wording of the Convention on the Law of Treaties also had to be borne in mind, since complicated questions of interpretation might arise.

15. Sir Humphrey WALDOCK said he fully agreed with Mr. Kearney. In the Drafting Committee he had advocated the omission of a reference to the practice, as distinct from the rules, of the organization, partly in order not to raise problems of interpretation of the analogous formula in the Vienna Convention on the Law of Treaties.

16. During its work on the law of treaties, the Commission had considered whether it should include some definition of the rules of an organization; but it had reached the conclusion that that was not desirable, as the question seemed to belong rather to the law of international organizations.

17. The Commission was now making its first major attempt to codify the law of international organizations, and in that context there was perhaps less objection to the inclusion of such a definition. But it should not be thought that the drafting of the definition would be an easy task. What was important was that it should be made clear in the commentary that the term "rules" covered not only the constituent instruments of the organization concerned, but also such of its practice as constituted established customs binding on members so long as they were not altered by the organization.

18. Mr. REUTER said it was not for the Commission to determine what were the rules of the organization; that was a matter for each organization to decide for itself. In some organizations the rules would be the statutory written rules alone, in others they would be the statutory written rules and certain rules derived from duly adopted resolutions of certain organs—which could change—and in yet others they would be not only the constitutional rules and the written rules drawn up by the organization itself, but also customary rules. There was no law of international organizations from which an exact defini-

³ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 198.

⁴ See General Assembly resolutions 2530 (XXIV) and 2531 (XXIV).

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

⁶ See 1102nd meeting, para. 23.

tion of the expression "rules of the Organization" could be derived. If the Commission attempted such a definition it would be advancing a claim—never before asserted and against which he himself strongly protested—to establish a general law of international organizations which would decide, for all the organization concerned, what were the legal sources of the law of the organization; and that was quite impossible. He was content with the expression "rules of the Organization", precisely because it was a reference which granted a certain autonomy to each organization. In any event, he did not see by what legal instrument the Commission could produce a system of law which would be supra-constitutional and would have to be respected by all the organizations to which the draft articles applied. He therefore dissociated himself very definitely from all that had been said to the contrary. It was only with that express reservation that he could provisionally approve article 52.

19. Mr. YASSEEN said he agreed with Mr. Reuter that the expression "rules of the Organization" was a reference to the constitution of each international organization, the sources of those rules varying from one organization to another. Thus a resolution of the General Assembly, which could not be the source of a legal rule, could, even though without binding force, be regarded as a rule of the Organization. If the expression "rules of the Organization" were given a flexible interpretation, it would be possible to avoid mentioning practice, which might be a source of misunderstanding.

20. Mr. CASTRÉN said that he too found the new text of article 52 acceptable and considered that "rules" also covered customary rules. It would be advisable, however, to make that clear in the commentary.

21. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 52 as proposed by the Drafting Committee, noting the comments which were to be reflected in the commentary.

It was so agreed.⁷

ARTICLE 6⁸

22. The CHAIRMAN invited the Commission to consider article 6, with the amendments proposed by the Drafting Committee to bring it into line with article 52.

23. Mr. AGO (Chairman of the Drafting Committee) said that the amended text proposed by the Drafting Committee read:

Article 6

Establishment of permanent missions

1. Member States may, if the rules of the Organization so admit, establish permanent missions for the performance of the functions mentioned in article 7.

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

⁷ For resumption of the discussion see 1132nd meeting, para. 62.

⁸ For previous text and discussion see 1110th meeting, para. 18 *et seq.*

24. Mr. USHAKOV said that the reasons adduced in favour of the new text of article 52 applied equally to article 6, and the two articles should be made uniform.

25. Mr. YASSEEN said he was in favour of amending article 6 in the same way as article 52, as that would establish a symmetry between the establishment of permanent missions and the establishment of permanent observer missions.

26. Mr. ROSENNE said he found it difficult to accept the idea of symmetry between two things that were dissimilar. He reserved his position regarding the words which the Drafting Committee wished to insert in article 6.

27. Mr. CASTRÉN said he thought the amendments proposed by the Drafting Committee improved the text of article 6.

28. Mr. ALCÍVAR said he accepted the inclusion of the words proposed by the Drafting Committee, which provided a better explanation of the sources of the legal rules applicable in an international organization. Those sources included the practice of the organization. Some organizations, such as the International Bank for Reconstruction and Development, had no permanent missions. Where such missions existed, they had originated in the practice of the organization.

29. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 6 as proposed by the Drafting Committee.

It was so agreed.⁹

ARTICLE 54

30. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had redrafted article 54 on the model of the text provisionally approved for article 8.¹⁰

The proposed text read:

Article 54

Multiple accreditations, appointments or assignments

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

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

31. Speaking on behalf of the Working Group which had been set up to harmonize the different parts of the draft,¹¹ he suggested that the word "appointments" in

⁹ For resumption of the discussion see 1132nd meeting, para. 62.

¹⁰ See 1111th meeting, paras. 6 and 15.

¹¹ See 1106th meeting, para. 85.

the title of article 54 should be deleted, so that the title would read: "Multiple accreditations or assignments". In the body of the article, only the verbs "accredit" and "assign" were used.

32. Mr. EUSTATHIADES pointed out that article 54 only provided for a faculty of the sending State, without stating that the faculty was subject to the rules or practice of the organization. That should be explained in the commentary, since some organizations might not accept multiple accreditations or assignments.

33. Mr. AGO (Chairman of the Drafting Committee) said that in substance, what Mr. Eustathiades had said was correct; but all the draft articles were without prejudice to the rules of the organization, should they differ from the provisions of the draft itself. That principle might be weakened if it were mentioned in one particular case and not in another. Article 54 had to be interpreted in the way suggested by Mr. Eustathiades, whether the point was mentioned in the commentary or not.

34. Mr. USTOR said that the Commission should approve article 54 on the understanding that it might ultimately be combined with article 8.

35. Sir Humphrey WALDOCK said that the title in English, as agreed upon in the Working Group, should be "Multiple accreditations and appointments".

36. Mr. ROSENNE said it seemed curious that the word "assignments" should be deleted in the title, while the verb "assign" was used in both paragraphs of the text.

37. Sir Humphrey WALDOCK pointed out that the title for article 8 proposed by the Special Rapporteur was "Accreditation to two or more international organizations or appointment to two or more permanent missions" (A/CN.4/241/Add.2). For the sake of consistency, therefore, the word "appointment" should also be used in article 54.

38. Mr. ROSENNE suggested that, in order to avoid confusion, the Commission should refrain from dealing with the titles of articles at that stage and concentrate on the texts.

39. Mr. BARTOŠ observed that the word "*affectations*" in the French text did not correspond to the English word "appointments", which was the equivalent of the French word "*nominations*". A person could be assigned only if he was already in the service of the State, but he could be appointed whether he was in the service of the State or not.

40. Mr. CASTRÉN pointed out that the persons referred to in article 55 who might be given multiple accreditations or assignments were, in principle, already in the service of the State.

41. Mr. NAGENDRA SINGH asked whether it was generally agreed that the word "appointments" should be used in both article 8 and article 54.

42. The CHAIRMAN proposed that the Commission should provisionally approve article 54 as proposed by

the Drafting Committee, on the understanding that the text could be reviewed later in the light of the final wording of article 8 and the general articles.

*It was so agreed.*¹³

ARTICLE 55

43. Mr. AGO (Chairman of the Drafting Committee) said that in article 55 the Drafting Committee had made only a minor drafting change in the Spanish text. The text proposed read:

Article 55

Appointment of the members of the permanent observer mission

Subject to the provisions of articles 56 and 60, the sending State may freely appoint the members of the permanent observer mission.

44. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article 55 as proposed by the Drafting Committee.

*It was so agreed.*¹³

ARTICLE 56

45. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made no changes in article 56, the text of which read:

Article 56

Nationality of the members of the permanent observer mission

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

46. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article 56 as proposed by the Drafting Committee.

*It was so agreed.*¹⁴

ARTICLE 57¹⁵

47. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made the two paragraphs of article 57 into two separate articles, provisionally numbered 57 and 57 *bis* (A/CN.4/L.168/Add.2). In the article now numbered 57, no changes of importance had been made. The proposed text read:

¹³ For resumption of the discussion see 1132nd meeting, para. 75.

¹³ For resumption of the discussion see 1132nd meeting, para. 82.

¹⁴ For resumption of the discussion see 1135th meeting, para. 37.

¹⁵ For previous text and discussion see 1103rd meeting, para. 67 *et seq.*

*Article 57**Credentials of the permanent observer*

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

48. Mr. USHAKOV suggested that the phrase "if that is allowed by the practice followed in the Organization" should be placed immediately before the words "by another competent authority". In its present position, that phrase seemed to relate not only to cases in which another authority was competent, but to all the cases mentioned in article 57. However, that change could be made later.

49. Mr. ALCÍVAR said that Mr. Ushakov's amendment did not apply to the Spanish text, which was already drafted as he suggested.

50. Mr. ROSENNE said that, in the light of the discussion about the meaning to be attributed to the word "rules" in article 52, the Commission should, at the final stage of its work on the draft, give particular attention to the words "the practice followed in the Organization".

51. Mr. EUSTATHIADES thought that the absence of a comma after the words "sending State" made it clear that the words which followed did not relate to all the cases mentioned. Mr. Ushakov's proposal might make for greater clarity, however, and there was no reason to defer consideration of it.

52. With regard to Mr. Rosenne's comment, it seemed that when the article had first been drafted, the word "practice" had been intended to have a wider meaning than "rules". Practice was generally more flexible and could be adapted to each specific case. In view of the discussion on article 52, however, those terms certainly ought to be clarified and used consistently.

53. Mr. ROSENNE said there was already general agreement in the Commission that "rules" included "practice", and that that point should be brought out in the commentary and perhaps also in the definitions article.

54. Mr. SETTE CÂMARA said that he agreed with the Drafting Committee's decision to refer only to the "practice" followed in the organization in article 57, because the organization was not an authority empowered to issue credentials and that was not a matter which came within the scope of its internal rules.

55. Mr. REUTER said he fully agreed with Mr. Rosenne. In the written observations of the secretariats of certain international organizations, particularly the International Labour Office, a distinction had been made between *de jure* and *de facto* practice. Consequently, when the final text of the draft was revised, the Commission should make it clear whether, for the purposes of the application of the articles, "practice" came within the meaning of the "rules of the Organization" or whether it had a wider meaning.

56. Mr. AGO said he too thought that, when the text of article 3 and of the definitions had been finally settled, the Commission should review the whole draft in order to avoid any contradiction between different acceptations of the words "practice" and "rules".

57. Mr. NAGENDRA SINGH said he thought the Commission could approve article 57 as proposed by the Drafting Committee, provided that some satisfactory solution could be found for the problem of the word "practice". One way out of the difficulty would be to replace the phrase "if that is allowed by the practice followed in the Organization" by "if that is allowed by the Organization".

58. The CHAIRMAN suggested that the Commission should provisionally approve article 57 as proposed by the Drafting Committee, on the understanding that the wording could be reviewed later.

*It was so agreed.*¹⁶

The meeting rose at 1.10 p.m.

¹⁶ For resumption of the discussion see 1132nd meeting, para. 84.

1119th MEETING

Wednesday, 16 June 1971, at 10.15 a.m.

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.166; A/CN.4/L.168 and Add.1 to 3; A/CN.4/L.169; A/CN.4/L.170 and Add.1; A/CN.4/L.171; A/CN.4/L.172)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the draft articles proposed by the Drafting Committee (A/CN.4/L.168/Add.2), starting with article 57 *bis*.

ARTICLE 57 *bis*¹

2. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had aligned the text of article 57 *bis* with that of article 13, paragraph 1, as provisionally approved by the Commission.² In the last clause of article 57 *bis*, which did not appear in article 13, it had replaced the word "permitted" by "admitted", since it believed that the latter word better reflected the idea which the Commission had meant to express in 1970.³

3. The text proposed for article 57 *bis* read:

*Article 57 bis**Accreditation to organs of the Organization*

A non-member State may specify in the credentials transmitted in accordance with article 57 that its permanent observer shall represent it as an observer in one or more organs of the Organization when such representation is admitted.

4. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article 57 *bis* as proposed by the Drafting Committee.

*It was so agreed.*⁴

ARTICLE 58

5. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had aligned article 58 with the text provisionally approved by the Commission for article 14.⁵ The text proposed read:

*Article 58**Full powers in the conclusion of a treaty with the Organization*

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

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

6. Mr. ROSENNE said he hoped that the Drafting Committee would consider whether it would not be sufficient to say, in the last clause of paragraph 2, "unless it appears from the circumstances that the intention of the parties was to dispense with full powers".

7. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally

approved article 58 as proposed by the Drafting Committee.

*It was so agreed.*⁶

ARTICLE 59

8. Mr. AGO (Chairman of the Drafting Committee) recalled that article 59, as adopted by the Commission in 1970, had had two paragraphs.⁷ Paragraph 1 had corresponded to article 15; paragraph 2, based on article 9, paragraph 2 of the Convention on Special Missions⁸ had corresponded to article 107 in Part IV of the draft. The Commission had observed in paragraph (2) of its commentary to article 59 that "No similar provision has been included in part II of the draft relating to permanent missions but it is the intention of the Commission to consider the inclusion of such a provision during its second reading of that part". The Drafting Committee was considering the possibility of turning article 59, paragraph 2 into a general provision applicable to all parts of the draft. It had therefore reproduced only the provisions of paragraph 1 in the text it was proposing to the Commission, which read:

*Article 59**Composition of the permanent observer mission*

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

9. Mr. NAGENDRA SINGH said that if the Commission decided to delete the original paragraph 2 of the article, the principle stated in it should certainly be included in a separate article elsewhere in the draft.

10. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 59 as proposed by the Drafting Committee.

*It was so agreed.*⁹

ARTICLE 60

11. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had aligned the French and Spanish texts of article 60 with the corresponding texts of article 16 provisionally approved by the Commission.¹⁰ The text proposed for article 60 read:

*Article 60**Size of the permanent observer mission*

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

¹ Formerly article 57, paragraph 2; see 1103rd meeting, para. 68 and 1118th meeting, para. 47.

² See 1111th meeting, paras. 62 and 65.

³ See *Yearbook of the International Law Commission, 1970*, vol. I, p. 107, para. 15 *et seq.*

⁴ For resumption of the discussion see 1132nd meeting, para. 87.

⁵ See 1111th meeting, paras. 69 and 78.

⁶ For resumption of the discussion see 1132nd meeting, para. 97.

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

⁸ See General Assembly resolution 2530 (XXIV), Annex.

⁹ For resumption of the discussion see 1132nd meeting, para. 101.

¹⁰ See 1111th meeting, paras. 83 and 88.

12. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article 60 as proposed by the Drafting Committee.

*It was so agreed.*¹¹

ARTICLE 61

13. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had aligned article 61 with the text of article 17 provisionally approved by the Commission.¹² The text proposed read:

Article 61 *Notifications*

1. The sending State shall notify the Organization of:

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

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

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

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

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

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

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

14. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article 61 as proposed by the Drafting Committee.

*It was so agreed.*¹³

ARTICLE 62

15. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had aligned article 62 with the text of article 18 provisionally approved by the Commission.¹⁴ It had thereby eliminated the two differences in drafting between those articles to which the Commission had drawn attention in its commentary to article 62.¹⁵

16. The text proposed for article 62 read:

Article 62 *Chargé d'affaires ad interim*

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

17. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article 62 as proposed by the Drafting Committee.

*It was so agreed.*¹⁶

ARTICLE 62 bis

18. Mr. AGO (Chairman of the Drafting Committee) said that the Commission had referred to the Drafting Committee "the question whether an article on precedence should be included in Part III or whether the matter should be dealt with in a commentary".¹⁷ In the light of the discussion on that question in the Commission, the Committee was proposing an article 62 bis, on precedence, modelled on article 19 as provisionally approved by the Commission.¹⁸

19. The text proposed for article 62 bis read:

Article 62 bis *Precedence*

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

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

*It was so agreed.*¹⁹

ARTICLE 63

21. Mr. AGO (Chairman of the Drafting Committee) said that the Drafting Committee had aligned the text of article 63 with article 20 as provisionally approved by the Commission.²⁰ The text proposed read:

Article 63 *Office of the permanent observer mission*

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

¹¹ For resumption of the discussion see 1132nd meeting, para. 104.

¹² See 1112th meeting, paras. 6 and 7.

¹³ For resumption of the discussion see 1132nd meeting, para. 107.

¹⁴ See 1112th meeting, paras. 9 and 10.

¹⁵ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

¹⁶ For resumption of the discussion see 1132nd meeting, para. 110.

¹⁷ See 1104th meeting, para. 34.

¹⁸ See 1112th meeting, paras. 12 and 19.

¹⁹ For resumption of the discussion see 1132nd meeting, para. 114.

²⁰ See 1112th meeting, paras. 22 and 26.

22. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article 63 as proposed by the Drafting Committee.

*It was so agreed.*²¹

ARTICLE 64

23. Mr. AGO (Chairman of the Drafting Committee) explained that in view of the previous discussion on article 64,²² the Committee had deleted the square brackets enclosing the words "flag and" in the title and in paragraph 1. The text proposed for article 64 read:

Article 64

Use of flag and emblem

1. The permanent observer mission shall have the right to use the flag and emblem of the sending State on its premises.

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

24. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article 64 as proposed by the Drafting Committee.

*It was so agreed.*²³

ARTICLES 49 bis and 77 bis

25. Mr. AGO (Chairman of the Drafting Committee) reminded the Commission that the Special Rapporteur had submitted a working paper on the possible effects of exceptional situations on the representation of States in international organizations (A/CN.4/L.166). That paper contained three draft articles, articles 49 bis, 77 bis and 116 bis, intended for Parts II, III and IV of the draft respectively. After considering those articles at its 1099th and 1100th meetings, the Commission had referred them to the Drafting Committee. For the time being, the Committee was only submitting texts for articles 49 bis and 77 bis, which were virtually identical (A/CN.4/L.168/Add.3). When it had completed its first reading of Part IV, concerning delegations, it would be in a position to decide whether article 116 bis should be worded in the same way.

26. The new texts of draft articles 49 bis and 77 bis differed from the former texts in three ways. First, the words "does not in itself imply recognition", in the second sentence of the former texts, had been amended to read "shall not by itself imply recognition". Secondly, the words "any act in application of the present articles" had been inserted in the new paragraph 2 in order to show that neither the establishment or maintenance of

a permanent mission, nor any measure taken in application of the future convention would imply recognition. Lastly, the notion of recognition of governments had been added to that of recognition of States proper, because cases of non-recognition of governments were even more common than cases of non-recognition of States.

27. The text proposed for article 49 bis read:

Article 49 bis

Effects of the application of the present articles on bilateral relations

1. The rights and obligations of the host State and the sending State under the present articles are not conditional upon the existence or maintenance of diplomatic or consular relations.

2. The establishment or maintenance of a permanent mission or any act in application of the present articles shall not by itself imply recognition by the sending State of the host State or its government or by the host State of the sending State or its government.

28. Mr. CASTRÉN congratulated the Chairman of the Drafting Committee on his excellent introduction. All the drafting changes made in the two articles were justified and considerably improved the text.

29. He would like to know why the words "nor does it [the establishment or maintenance of a permanent mission] affect the situation in regard to diplomatic or consular relations between the host State and the sending State", which appeared at the end of the articles proposed by the Special Rapporteur, had been omitted from the articles proposed by the Drafting Committee.

30. Mr. ROSENNE said he had originally had some doubts about the advisability of dealing with the problem of recognition, but he was now prepared to accept the wording proposed by the Drafting Committee.

31. Mr. EUSTATHIADES congratulated the Drafting Committee on its text for articles 49 bis and 77 bis. Without making a specific proposal, he wished to indicate that the words "conditional upon" in paragraph 1 did not seem to him to be appropriate, at least in the French version. However, they were better than the verb "affect", which was used in the previous version of the articles.

32. As to the words "any act in application of the present articles", they might perhaps be amended to read simply "any application of these articles" or "the application of these articles".

33. Mr. USHAKOV reiterated the doubts he had expressed in the Drafting Committee about paragraph 2 of the articles under consideration. Article 7 of the Convention on Special Missions, on which the two articles in question were based, did not go into the question of reciprocal recognition by the States concerned. It was for States themselves to decide whether the establishment of a permanent mission implied mutual recognition, and no limitation should be placed on their will, as was done in paragraph 2.

34. While he could accept the text proposed by the Drafting Committee, he thought it might be better not to mention the question of recognition.

²¹ For resumption of the discussion see 1132nd meeting, para. 119.

²² See 1104th meeting, para. 42 *et seq.*

²³ For resumption of the discussion see 1132nd meeting, para. 123.

35. Mr. NAGENDRA SINGH said he would prefer paragraph 1 to follow the language of article 7 of the Convention on Special Missions, which read: "The existence of diplomatic or consular relations is not necessary for the sending or reception of a special mission".

36. He could accept the text of paragraph 2, although it could be improved, from the point of view of drafting, by inserting the word "performed" after the words "or any act".

37. Mr. USTOR proposed that the words "between them" should be added after the words "diplomatic or consular relations" in paragraph 1.

38. With regard to paragraph 2, he could understand the doubts expressed by Mr. Ushakov, because recognition was a delicate matter which States generally preferred to regulate themselves. In the interests of the universality of the organization, however, he thought the text proposed by the Drafting Committee would serve a useful purpose by allaying the fears of host States, which might otherwise oppose the establishment of a permanent mission on the grounds that the entity represented was not a State, that was to say not recognized by them.

39. Mr. ROSENNE said he could not support Mr. Nagendra Singh's suggestion that paragraph 1 should follow the language of article 7 of the Convention on Special Missions. That article had, among other things, envisaged the situation where a special mission might be sent to a State to negotiate the question of its recognition. It should be made clear in the commentary that there was no analogy between those articles.

40. He agreed with Mr. Ustor's proposal; the addition of the words "between them" at the end of paragraph 1 would be an improvement in drafting.

41. As to the objections made by some members to the words "are not conditional" in paragraph 1, he suggested that the word "conditional" might be replaced by "dependent".

42. Sir Humphrey WALDOCK supported Mr. Ustor's proposal to add the words "between them" at the end of paragraph 1. He agreed with Mr. Rosenne that there was no true analogy between article 49 *bis* and article 7 of the Convention on Special Missions.

43. He himself had no difficulty in accepting the words "conditional upon" in paragraph 1, though he wondered whether the words *conditionnés* in the French text had exactly the same meaning, since the underlying idea, as Mr. Rosenne had pointed out, was that the rights and obligations were in no way dependent on the existence or maintenance of diplomatic or consular relations.

44. Paragraph 2 served a useful purpose. Moreover, in his view, it reflected a now widespread practice which constituted existing international law, whereby host States such as Switzerland, whether as depositaries for treaties or as members of an organization, dealt with States or governments which they did not recognize, without being considered as having in any way affected their bilateral relations with those States or governments.

45. Mr. ALBÓNICO said that the reference to "rights and obligations" in paragraph 1 was not sufficiently comprehensive, since there were matters not relating to rights and obligations, such as those referred to in articles 2, 3 and 4, which should also not be conditional upon the existence or maintenance of diplomatic or consular relations. He therefore proposed that paragraph 1 should be amended to read:

"No provision in the present convention shall be affected by the fact that diplomatic or consular relations exist or do not exist between the sending State and the host State."

46. In paragraph 2, he proposed that a full stop should be placed after the words "of the host State or its government" and that a final sentence should be added which would read: "The same shall apply to the host State with respect to the sending State or its government". In its present form, the Spanish text of paragraph 2 was not readily understandable.

47. Mr. BARTOŠ said he wished to clarify a point concerning the preparation of the Convention on Special Missions. In the draft convention submitted by the Sixth Committee to the General Assembly, a distinction had been made between the existence of diplomatic or consular relations, on the one hand, and recognition on the other. The International Law Commission's draft had recognized that special missions could be exchanged even between States which did not recognize each other.²⁴ But in the Sixth Committee of the General Assembly, Nigeria had requested the deletion of that clause and it had been omitted from the final text.²⁵

48. It was very doubtful whether a parallel could be established, so far as recognition was concerned, between article 7 of the Convention on Special Missions and the article 49 *bis* under consideration. The former article was concerned with bilateral relations, which required that the sending State and the receiving State should be in agreement; but the establishment of a mission to an international organization, with which the latter article was concerned, was merely a consequence of the fact that the sending State was a member of that organization. In agreeing to act as host to the organization, the host State had to accept the consequences, whatever its relations with the sending State might be. Thus, countries which did not have diplomatic relations with Switzerland, or which were not even recognized by that country, had established permanent missions or permanent observer missions to international organizations at Geneva. He had, however, noticed that where a sending State and a host State which did not recognize each other were both members of the same organization, they often neglected to make the normal notifications. For that reason, he was not opposed to the idea put forward by Mr. Rosenne.

²⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 350, article 7.

²⁵ See General Assembly resolution 2530 (XXIV), Annex, article 7.

49. Mr. SETTE CÂMARA said that he could accept paragraph 1, with the amendment proposed by Mr. Ustor.
50. The text of paragraph 2 proposed by the Drafting Committee was a very useful provision, particularly with the addition of the words "or its government" in connexion with both the sending State and the host State.
51. Mr. REUTER said he approved of article 49 *bis* as a whole and found paragraph 2 particularly valuable. Where permanent missions were concerned, the problems relating to recognition were very delicate, but also very real, as was shown by France's recognition of the government at Peking and its permanent delegation to UNESCO.
52. As to drafting, he supported the amendment to paragraph 1 proposed by Mr. Ustor. In the French version, the words "*entre eux*" should be inserted after the words "*le maintien*".
53. The word "*conditionnés*" in the French version seemed correct. In that particular context, it meant that the rights and obligations were not influenced by the existence or maintenance of diplomatic or consular relations. It was true that certain conditions for the exercise of those rights and obligations might be changed and that an expression such as "are not dependent on" might perhaps be more satisfactory, but as the Drafting Committee had agreed on the words "conditional upon", it would be better not to reopen the matter.
54. Mr. YASSEEN said he thought the new wording of article 49 *bis* accurately reflected positive law.
55. Although the expression "are not conditional upon" was not entirely satisfactory, a formula such as "do not depend on" would be no improvement. In point of fact, the existence of the rights and obligations referred to in article 49 *bis* was not in question; those rights and obligations existed and would exist in any case. Hence the words "conditional upon" expressed the idea better.
56. Mr. AGO (Chairman of the Drafting Committee) endorsed Mr. Bartoš' remarks concerning the inaptness of establishing a parallel with the Convention on Special Missions. Whereas that Convention governed bilateral relations between the sending State and the receiving State, the draft articles were mainly concerned with relations between States and organizations, and dealt only indirectly with relations between the sending State and the host State. Thus the absence of relations between those two States could not affect their reciprocal rights and obligations, which derived solely from their participation in an international organization.
57. The expression "conditional upon" was quite adequate from the legal point of view. It meant that the existence of diplomatic or consular relations between the sending State and the host State did not constitute a condition for the exercise of their respective rights and obligations.
58. The amendment proposed by Mr. Ustor would provide a useful clarification.
59. The rule in paragraph 2 might appear to be self-evident, but it was nonetheless useful to state it expressly.
60. The reason why the Drafting Committee had inserted the phrase "or any act in application of the present articles" was that without it certain measures taken in application of the articles might be interpreted as implying recognition. That applied to participation in consultations between the host State, the sending State and the organization, in accordance with article 50. Nevertheless, although such acts did not entail automatic recognition, as was clear from the use of the words "by itself", they could, if that was the will of the States concerned, constitute an indirect form of recognition.
61. In reply to the question put by Mr. Castrén, he explained that the Drafting Committee had deleted the last phrase of article 49 *bis*, as proposed by the Special Rapporteur, because it had seemed to the Committee to be a truism.
62. Mr. USHAKOV said he wished to make two points that had not occurred to him during the discussion in the Drafting Committee. First, the former text of article 49 *bis* had begun: "The severance or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles." The idea expressed in that sentence had been, as it were, turned round by the Drafting Committee: the word "existence" had replaced the word "absence" and the word "maintenance" had replaced the word "severance". The former wording was clearer.
63. The second point concerned the substance: the phrase "the existence or maintenance of diplomatic or consular relations", in paragraph 1, did not cover the case of non-recognition. In his view, it was important to specify in paragraph 1 that non-recognition of the States in question or of their governments did not affect their rights and obligations under the draft articles.
64. He therefore suggested that articles 49 *bis* and 77 *bis* should be referred back to the Drafting Committee.
65. Mr. CASTRÉN said he was completely satisfied with the answer which the Chairman of the Drafting Committee had given to his question. Since it was obvious that the establishment or maintenance of a permanent mission by the sending State did not affect diplomatic or consular relations between the host State and the sending State, there was no need to say so expressly, as the Special Rapporteur's text had done.
66. Mr. ROSENNE said it was not really necessary to refer the two articles back to the Drafting Committee. The Commission could probably approve them on the understanding that the Drafting Committee, in the process of retouching the whole draft at the final stage of the work, would carefully examine two points.
67. The first was connected with the comments made by Mr. Ushakov and with Mr. Ustor's amendment to paragraph 1, which seemed to have been accepted in the course of the discussion. It was the problem of the exact expression to be given to the element of mutuality; what was involved, as he saw it, was mutual rights and obligations as between the host State and the sending State, not as between either of those States and the organization. It would be for the Drafting Committee to decide

whether that element went without saying or whether it needed to be reflected in some way in the wording of the article.

68. The second point concerned the order of paragraphs 1 and 2. The Commission might consider giving first place to the more far-reaching and more general question dealt with in paragraph 2, and second place to the more explicit provisions of paragraph 1.

69. Mr. KEARNEY said that the language of the two paragraphs was perhaps not very clear. He did share certain of the objections which had been raised during the discussion, in particular the matters for concern which had been expressed by Mr. Ushakov.

70. The net effect of the provisions in paragraph 1 seemed reasonably clear. It would not make very much difference to that effect if the negative formulation were altered; there were other ways of expressing the same idea, for instance: "The lack of diplomatic or consular relations does not affect the rights and obligations of the host State and the sending State under the present articles". The formulation proposed by the Drafting Committee had, however, been arrived at after long discussion and he himself was inclined to keep it, subject to retouching when the Drafting Committee went through the whole draft at the final stage.

71. Paragraph 2 conveyed the idea that whatever was done pursuant to the present draft articles could not be invoked in support of a claim to recognition. In that connexion, he drew attention to the recent practice regarding the recognition of governments, as distinct from the recognition of States. Because of frequent replacement of governments, a practice had evolved whereby a State did not take any formal action on the question of recognition of a new government in another State; it continued to deal with the government in power and allowed the problem of recognition to disappear; the new government might not at any stage be formally notified of its recognition.

72. In view of the fact that practice in the matter was in a somewhat fluid stage, it was desirable to confine the provisions on the subject to a general saving clause. As far as the formulation was concerned, the one proposed by the Drafting Committee seemed adequate.

73. Mr. NAGENDRA SINGH said that he fully supported the formulation of paragraph 2, but had some comments to make on the wording of paragraph 1. The basic idea of paragraph 1 was that, irrespective of whether diplomatic or consular relations existed between the host State and the sending State, the provisions of the present draft articles would apply. That being so, the paragraph could be reworded more briefly and more categorically to read:

"The existence of diplomatic or consular relations between the host State and the sending State is not necessary for purposes of the application of the present articles."

74. The wording proposed by the Drafting Committee placed the emphasis on the rights and obligations of the two States in question. Undoubtedly, those rights and

obligations did not depend upon the existence of diplomatic or consular relations between them, but there was another aspect of the matter: the fact that no such relations existed between the two States could still cast a shadow over the application of the provisions of the draft articles.

75. He realized that the wording he proposed had some similarity with that of article 7 of the Convention on Special Missions a provision which, of course, referred to bilateral relations. But the fact that the provisions under discussion referred to multilateral relations should not deter the Commission from accepting his proposed wording on its own merits, in view of the basic identity of purpose of those provisions with article 7 of the Convention on Special Missions.

76. Mr. AGO (Chairman of the Drafting Committee) said that the discussion had confirmed him in his opinion that article 49 *bis* should not speak of "the application of the present articles", but rather of the rights and obligations which, in the present articles, concerned the mutual relations between the sending State and the host State. It was obvious that there was nothing else in the draft which could be affected by non-recognition or by the non-existence of diplomatic or consular relations.

77. Mr. Ushakov had raised two points. The first was mainly a matter of drafting, but he was perhaps right in thinking that it would be better to speak of the absence or severance, rather than the existence or maintenance, of diplomatic or consular relations, since it was precisely in those two exceptional cases that the Commission wished to establish that the rights and obligations of the host State and the sending State were not affected. On the second point, Mr. Ushakov was quite right. It was true that the absence of diplomatic and consular relations could be said to cover the case of non-recognition, since non-recognition necessarily implied the absence of relations; but to make the text complete, non-recognition must also be mentioned in paragraph 1, which might read:

"The rights and obligations of the host State and the sending State under the present articles are not affected by the non-existence or severance of diplomatic or consular relations between them or by the non-recognition of one of the States or its government by the other."

78. Mr. USHAKOV said he would be fully satisfied with that wording.

79. Mr. EUSTATHIADES agreed with Mr. Rosenne that it would be better to reverse the order of the two paragraphs. What was most important, however, was to adopt Mr. Ushakov's ideas as just proposed by Mr. Ago, particularly since many of the most recent studies on the question of recognition showed that the meaning of recognition was defined largely by reference to non-recognition. Moreover, recognition did not necessarily entail the establishment of diplomatic or consular relations. Hence it was non-recognition that should be mentioned in paragraph 1.

80. The CHAIRMAN said that, as several drafting amendments had been proposed, it seemed that articles

49 *bis* and 77 *bis* should be referred back to the Drafting Committee.

*It was so agreed.*²⁶

ARTICLE 50²⁷ and proposed new articles 50 *bis* and 50 *ter*

81. The CHAIRMAN invited the Commission to consider article 50, for which the Special Rapporteur proposed the following new text (A/CN.4/L.171):

Article 50

Consultations and settlement of disputes

1. If any question arises between a sending State and the host State concerning the application of the present articles, consultations between the host State, the sending State and the Organization shall be held upon the request of either State or the Organization itself.

2. If the consultations referred to in paragraph 1 fail to achieve a result satisfactory to the parties concerned and in the absence of agreement by the parties concerned to have recourse to another mode of settlement, the matter shall be submitted to a conciliation commission or any other mode of settlement as may be set up for the purpose of settling such disputes within the Organization.

3. The preceding paragraphs are without prejudice to provisions concerning settlement of disputes contained in international agreements in force between States or between States and international organizations.

82. He also drew attention to the three new articles proposed by Mr. Kearney (A/CN.4/L.169) to replace the former text of article 50. Those articles read:

Article 50

*Consultations between the sending State,
the host State and the Organization*

1. If any difference arises between one or more sending States and the host State concerning their respective rights and obligations under the present articles, consultations between the host State, the sending State and the Organization shall be held upon the request of either State or the Organization itself.

2. In the event the difference is not disposed of by means of consultations, any State engaged therein or the Organization may refer it to conciliation by a written notice to the Secretary-General of the Organization that sets forth the substance of the difference. The notice shall be transmitted to all members of the Organization.

Article 50 bis

Permanent Conciliation Commission

1. The Organization shall establish a Permanent Conciliation Commission at the Headquarters of the Organization for the purpose of seeking to reconcile differences between one or more sending States and the host State regarding their respective rights and obligations under these articles.

2. The Commission shall consist of five members selected as follows:

(a) three members elected by the competent organ of the Organization;

(b) one member selected by the host State;

(c) one member selected by the Secretary-General of the Organization.

Each member shall have an alternate selected in the same fashion as that member. The members and alternates shall be persons who are knowledgeable regarding international law and international organizations and who will be readily available to attend sessions of the Commission. A member shall be replaced in sessions of the Commission by his alternate whenever the member is either permanently or temporarily unable to serve.

3. Members shall have five-year terms of office on the Commission. In the event of the death, incapacity or resignation of a member or of an alternate, a successor shall be selected to serve the unexpired portion of the term in the same manner as his predecessor had been selected.

4. The Commission shall select a Chairman from among the three elected members by majority vote.

Article 50 ter

Conciliation Procedure

1. The Secretary-General shall transmit a copy of the notice required by paragraph 2 of Article 50 to the Chairman of the Commission. Any member of the Organization that has not been engaged in the consultations may participate in the conciliation proceedings by notifying the Chairman of the Commission within fifteen days of receipt of the Secretary-General's notification of proceedings.

2. The Chairman shall schedule a meeting of the Commission at as early a date as practicable to which representatives of all the members who participated in the consultations or who have requested to participate in the proceedings shall be invited. At this meeting the Commission shall determine the issues which require consideration and examine what steps are necessary in order to assist the conciliation procedure, in particular whether written and oral submissions, the taking of evidence and hearing of witnesses are required.

3. The Commission shall conduct its further proceedings in such manner as it considers will best promote conciliation. The Commission may request an advisory opinion from the International Court of Justice in the name of the Organization regarding the interpretation or application of these articles.

4. If the Commission is unable to secure agreement among the members participating in the proceedings on a resolution of the difference before it within nine months of the initial meeting, it shall prepare a report of the proceedings that it has conducted and submit it to the Secretary-General and all participating members. The report shall include the Commission's findings upon the facts and the law and its recommendations as to the course of action that should be followed by the participating parties. The time limit for the submission of the report shall be extended as required if a request for an advisory opinion has been submitted.

5. The Commission shall reach its decisions by majority vote.

83. Mr. EUSTATHIADES said he had three preliminary comments to make on article 50 as proposed by the Special Rapporteur, whom he congratulated on his work and on the text submitted. First, the system proposed—namely, that if consultations failed, the parties to a dispute should either reach agreement on another mode of settlement or submit the dispute to a conciliation commission—had the advantage of being flexible, since

²⁶ For resumption of the discussion see 1121st meeting, para. 43.

²⁷ For previous text and discussions see 1100th meeting, para. 45 *et seq.*, 1101st and 1102nd meetings, and 1115th meeting, para. 59 *et seq.*

the conciliation procedure would be initiated only as a last resort and would be compulsory only if the parties could not agree on another mode of settlement. However, the time spent in seeking another mode of settlement if the consultations failed might be long, which would be unfortunate in disputes of the kind that would have to be settled. Consequently, the system proposed by Mr. Kearney in his amendments—that of passing on direct from the consultations to conciliation—seemed preferable, at least in principle.

84. Secondly, he wondered whether the words “the parties concerned”, which occurred twice in paragraph 2 of the text proposed by the Special Rapporteur, included the organization. In paragraph 1, the right to request consultations was, quite rightly, also granted to the organization, which meant that it was in the interests of the organization to resolve any difficulties. It therefore seemed necessary to define the meaning of the expression “parties concerned” more precisely.

85. Thirdly, the principle of maintaining agreements in force, stated in paragraph 3, was right as a general rule, but certain cases should be taken into consideration so as not to exclude the organization from the conciliation procedure. Under the terms of paragraph 3, a conciliation agreement between the host State and the sending State would take precedence over the procedures provided for in paragraphs 1 and 2, so that the organization would not be able to take part in the settlement of the dispute. Intervention by the organization might, however, be in the interests of the international community.

86. In short, in order to take account of the multiplicity and variety of the international organizations to which the articles would apply, he would prefer, in principle, a compulsory conciliation procedure that was more clearly defined and pre-established, such as Mr. Kearney had proposed, to the rather over-flexible procedure suggested by the Special Rapporteur, which might leave the settlement of disputes between the host State and the sending State too long in abeyance.

The meeting rose at 12.50 p.m.

1120th MEETING

Thursday, 17 June 1971, at 10 a.m.

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.169; A/CN.4/L.171)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 50 (Consultations and settlement of disputes) and proposed new articles 50 *bis* and 50 *ter* (continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's redraft of article 50 (A/CN.4/L.171) and of Mr. Kearney's proposal to replace that article by three new articles (A/CN.4/L.169).

2. Mr. KEARNEY said that at that stage he would not discuss the Special Rapporteur's new text for article 50, but would introduce his own proposal for that article and for two additional articles to be numbered 50 *bis* and 50 *ter*.

3. During the Commission's previous short discussion of article 50 he had briefly explained his reasons for proposing a rewording of the article.¹ His proposal was not intended to affect the substance of paragraph 1, but simply to emphasize that the provision related to differences regarding rights and obligations arising under the present articles.

4. His new text of article 50, paragraph 1 required a correction. In view of the reference to “one or more sending States” in the opening phrase, the words “sending State” in the latter part of the paragraph should be in the plural, and the words “either State” should be altered accordingly.

5. Paragraph 2 provided that, if the consultations referred to in the previous paragraph did not result in an agreed settlement, any State engaged in the dispute was entitled to refer the matter to conciliation.

6. The question arose whether conciliation was the most appropriate procedure for the settlement of disputes in the present instance. In deciding that question, it should be borne in mind that the subject-matter of the draft articles was already covered by existing agreements dealing with the settlement of disputes. The draft articles would apply mainly to organizations in the United Nations system, and article VIII, section 30, of the 1946 Convention on the Privileges and Immunities of the United Nations² provided that “All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement”. The

¹ See 1115th meeting, para. 61.

² United Nations, *Treaty Series*, vol. 1, p. 30.

same section made provision for a request to the International Court for an advisory opinion on any legal question involved in a difference between the United Nations and one of its Members, but stated that the opinion "shall be accepted as decisive by the parties". Thus the system instituted by the 1946 Convention was strictly judicial in character.

7. Article VIII, section 21 of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations³ made provision for compulsory arbitration for the settlement of any dispute between the United Nations and the United States concerning the interpretation or application of the Agreement, and there was a clause under which either the Secretary-General or the United States could ask the General Assembly "to request of the International Court of Justice an advisory opinion on any legal question arising in the course of such proceedings".

8. In view of the existence of those provisions, it would not be reasonable for the Commission to formulate draft articles which would apply mainly to organizations in the United Nations system without making some provision for the settlement of disputes. He himself would prefer to have such disputes referred to the International Court of Justice or to arbitration, because either of those two methods would lead to a final settlement. He was nevertheless proposing settlement by conciliation, because that was the mode of settlement provided for in article 66 of the Vienna Convention on the Law of Treaties and in the Annex to that Convention.⁴ He hoped that his proposal, based on a recent precedent, would be the means of avoiding a protracted discussion such as had taken place at the Conference on the Law of Treaties.

9. The arrangement he proposed differed in some respects, however, from the one adopted in the Vienna Convention, because of the different nature of the problems involved. The proposed procedure would cover disputes on the interpretation or application of articles which provided for some kind of privilege or immunity; such disputes could not be compared with those involving such grave matters as the termination or suspension of a treaty.

10. One important difference was that a dispute concerning the application or interpretation of the draft articles would involve the separate and conflicting interests of the sending State or States, the host State and the organization, whereas the disputes envisaged in article 66 of the Vienna Convention on the Law of Treaties would normally be between a State party to a treaty and another State party, or a group of States parties, having similar interests.

11. A second difference was that the draft articles would apply to a wide variety of organizations. It would therefore not be desirable to have a single conciliation commission to deal with all disputes regardless of their

origin, as in the Vienna Convention on the Law of Treaties; it was preferable to have a separate conciliation body for each organization.

12. A further consideration was that international organizations were institutions of a permanent character. That made it necessary to establish a permanent body to settle disputes; there was a greater need for such a body than in the case of disputes which might relate to a wide variety of different treaties.

13. The most important consideration, however, was that if a dispute arose between one sending State and the host State over the present draft articles, the other sending States would be vitally interested in the outcome, since the interests of all sending States would be involved.

14. It was necessary to take those differences into account in the arrangements for conciliation. In particular, it was not possible to rely on an *ad hoc* conciliation commission to settle each dispute. The establishment of such temporary bodies might result in a diversity of rulings on the same type of problem, so that different delegations would be treated in different ways, contrary to the rule of non-discrimination. It was therefore necessary to establish a permanent commission at the headquarters of each organization.

15. With regard to the composition of the proposed conciliation commission, there were two main defects in the idea of a three-member body consisting of representatives of the sending State concerned, the host State and the Secretary-General of the organization. The first was that such a system would invariably place the representative of the organization in the invidious position of having to cast the decisive vote, thus reducing his ability to reconcile the differences between the host State and the sending State. The second defect was that such system would not take into account the interest which all sending States had in the decision reached on a dispute affecting one of them.

16. For those reasons, he proposed in paragraph 2 of article 50 *bis* that the permanent conciliation commission should consist of five members: three elected by the competent organ of the organization, one selected by the host State and one selected by the Secretary-General of the organization. No provision was made for the selection of a member by the sending State concerned in the dispute, because its interests would be adequately protected by the fact that all three members elected by the competent organ of the organization would come from sending States; it was extremely unlikely that the organ in question would elect a person from the host State.

17. He realized that, with only one member out of five selected by the host State, his proposed conciliation commission was somewhat lacking in balance but there was perhaps no way of avoiding that.

18. He proposed that members of the permanent conciliation commission should serve for a period of five years, in the interests of continuity.

19. With regard to the conciliation procedure, the provisions in his proposed new article 50 *ter* followed

³ *Op. cit.*, vol. 11, p. 30.

⁴ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, pp. 298 and 301 (United Nations publication, Sales No.: E.70.V.5).

closely those of the Annex to the 1969 Vienna Convention on the Law of Treaties, though they were not quite so detailed. The wording used in paragraphs 2 and 3 of article 50 *ter* was as general as possible. The provisions of paragraph 3 differed from the corresponding provisions of the Vienna Convention in that they allowed an advisory opinion to be requested from the International Court of Justice. He had included that provision because there was a similar clause both in the United Nations Headquarters Agreement and in the 1946 Convention on the Privileges and Immunities of the United Nations.

20. The system he proposed was intended as a residuary provision. Articles 3, 4 and 5 would make it clear that an organization was perfectly free to adopt any method of settling disputes it chose, and that the draft articles did not affect existing arrangements for the settlement of disputes provided for in the constituent instruments of international organizations or any future agreements on that subject. As a residuary rule, his proposal would be useful to organizations which did not have any established procedure for settlement. He hoped that a system on the lines he proposed would be included in the Commission's draft articles.

21. Mr. USHAKOV thanked Mr. Kearney for his explanations and in particular for his reply to the comments he (Mr. Ushakov) had made during the previous discussion.⁶

22. He fully supported the principle of the conciliation procedure proposed both by the Special Rapporteur and by Mr. Kearney. Their proposals differed slightly in substance, in that in the Special Rapporteur's text the establishment of a conciliation commission was a faculty which might be exercised by the organization, whereas that was not the case in Mr. Kearney's proposal. But since Mr. Kearney had intimated that he was not opposed to that idea, he (Mr. Ushakov) proposed that in paragraph 2 of the text for article 50 submitted by Mr. Kearney, the last part of the first sentence, should be amended to read "refer it to a conciliation body which may be established by the Organization".

23. It was open to question, however, whether the Commission could impose a compulsory method of settling disputes on an organization, since it had still not been decided whether international organizations would or would not be parties to the convention resulting from the draft articles. That was an additional reason why article 50 should state a faculty, not an obligation.

24. In paragraph 2 of the text for article 50 submitted by the Special Rapporteur, he proposed that the words "a conciliation commission" should be replaced by "a conciliation body" and the words "any other mode of settlement" by "any other settlement body".

25. As the principle underlying the two texts before the Commission had been accepted, he was prepared to approve either of them, with the amendments he had proposed.

26. He could accept both the substance and the drafting of articles 50 *bis* and 50 *ter*, but, as in the case of article 50, he doubted whether the Commission could impose special rules on an organization so long as the question whether organizations were to participate in the future convention had not been settled. It might be better simply to state in the commentary that the Commission had had before it proposals for a conciliation body and a conciliation procedure, to explain what those proposals had been and leave it to governments to decide.

27. Mr. CASTRÉN said that the two proposals to expand article 50 were most welcome, since several members of the Commission, including himself, had expressed the opinion at previous meetings that article 50, though useful, was inadequate for the settlement of disputes or other questions which might arise concerning the application of the articles, and had mentioned conciliation procedure, arbitration or recourse to the International Court of Justice as an essential complement to consultations. The compulsory conciliation procedure provided for in the two proposals before the Commission did not guarantee that a dispute would be settled in all cases, but it was nonetheless a more effective arrangement than mere consultations; moreover, it was probable that a very large majority of States, if not all, would be able to agree to provision for a procedure of that kind in the future convention.

28. It was hard to make a definite choice between the two proposals, which both had advantages; it should be possible to combine them. The title proposed by the Special Rapporteur, which mentioned the settlement of disputes as well as consultations, was more accurate and was therefore preferable. For paragraph 1, the Special Rapporteur's text—which was, in fact, the text adopted by the Commission at first reading was a better starting-point, since the phrase "question... concerning the application of the present articles" was preferable to the phrase "difference... concerning their respective rights and obligations under the present articles" used by Mr. Kearney; for a question which was the subject of consultations might not yet be serious enough to be called a difference. On the other hand, Mr. Kearney's text was correct in stating that a difference might arise between one or more sending States and the host State, not only between one sending State and the host State.

29. In paragraph 2 of both proposals it should be specified that recourse to the conciliation procedure, or to any other mode of settlement, as the Special Rapporteur proposed, was permitted if the consultations failed to achieve a result satisfactory to the parties concerned that was to say, to the States engaged in the consultations and to the organization, as Mr. Kearney's text expressly stated "within a reasonable time", and he proposed the insertion of those words. The Special Rapporteur proposed that a question which was not settled should be automatically submitted to another mode of settlement, though he did not say how; Mr. Kearney's proposal which provided that there could be recourse to another mode of settlement on the initiative either of the States concerned or of the organization, was preferable in that respect.

⁶ See 1115th meeting, para. 63.

30. He did not see what difficulties could arise from the application of paragraph 3 of the Special Rapporteur's text, as Mr. Eustathiades feared. A provision of that kind, which already appeared in several treaties on the peaceful settlement of disputes between States, was useful and made article 50 more flexible. It was also in conformity with the previous paragraph, which made provision for other modes of settlement besides the conciliation procedure.

31. He approved of the principle underlying the other two very detailed articles proposed by Mr. Kearney, articles 50 *bis* and 50 *ter*, and thought such details were useful, though perhaps they should be left to the diplomatic conference which would take the final decision on the draft articles. In any event, it would be better to place them in an annex to the draft, as had been done with similar rules in the case of the Vienna Convention on the Law of Treaties. Without going into those articles in detail, he would like to suggest that at least one member of the conciliation commission referred to in article 50 *bis*, paragraph 2, should be chosen from among the sending States concerned.

32. Mr. YASSEEN said that the mode of settlement of disputes should be suited to the kind of international relations concerned. In the case of multilateral diplomacy, with which the Commission was concerned, an attempt should be made to institutionalize the procedures and to supplement what already existed. The consultation procedure provided for in article 50 was very useful, but since it might not be possible to settle a dispute by that means and it was in the interest of the international community that it should be settled, it was right to provide for recourse to other modes of settlement, in particular conciliation, or at least to recognize the need for them, if it was considered that a uniform mode of settlement could not be established for all organizations.

33. He believed however, that the consultation procedure should be set out in a separate article. The other modes of settlement, to be provided for in case the consultations failed, should be dealt with in another article, as they had been in the Vienna Convention on the Law of Treaties, in order to make it quite clear that they constituted a new phase for the settlement of general questions of concern to an organization and to the international community as a whole.

34. It was wise to include conciliation as a stage in the settlement of disputes. In the main, the rules proposed by Mr. Kearney were acceptable. The important point was to accept the principle underlying them, without trying to ascertain, as Mr. Ushakov wished to do, whether those rules could be invoked against organizations, since the same question arose in regard to many other provisions of the draft. The organizations might perhaps have to be invited by a resolution of the General Assembly to comply with rules of that nature, but in any event the Commission could make no progress in its work if it hesitated to state them.

35. In multilateral international relations it was extremely important to arrive at a settlement of disputes, so as to

complement the conciliation procedure, which was only one stage; there was reason to provide for a means of imposing a settlement and thus finally settling the dispute in the interests of all members of the organization. He was inclined to favour recourse to arbitration or to the International Court of Justice, since he thought it necessary to make provision for the final settlement of disputes, even though there was every reason to believe that, with the help of good faith, they would in most cases be settled by means of consultations or conciliation.

36. Mr. ROSENNE said he was glad that the Special Rapporteur and Mr. Kearney had submitted specific proposals to remedy the inadequacies of article 50 as adopted by the Commission in 1969.⁶

37. It was necessary to include provisions on the procedure to be applied if the consultations produced no result, and Mr. Kearney had made a convincing case for his approach.

38. In paragraph 5 of his working paper (A/CN.4/L.171), the Special Rapporteur had said that "given the multiplicity and variety of international organizations to which these articles would apply, it would be difficult to provide for a standing uniform machinery for a rigid procedure of settlement". A passage on those lines should be included in the commentary to article 50.

39. He did not believe that the Commission should take a decision at that stage on the question whether the provisions of article 66 of the Vienna Convention on the Law of Treaties and the Annex to that Convention provided the best model, even though they might be suitably adapted. The problems to which article 50 would apply concerned a relatively confined area of international relations. The difficulties which had arisen in connexion with the Vienna Convention on the Law of Treaties had been due to the fact that that Convention applied to all aspects of treaty relations.

40. In view of the statement by the Special Rapporteur to which he had just referred and of the absence of an exact analogy with the Vienna Convention, it was necessary, as a first step, to leave each organization free to evolve the kind of procedure best suited to its needs. Nevertheless, it was highly desirable that the Commission should put forward, even if only in a tentative fashion, some sort of residuary procedure or model rules on which organizations could build. That should be done in such a way as not to exclude the possibility of the adoption of joint procedures by a number of organizations. He was thinking of arrangements such as those between the Administrative Tribunal of the United Nations and the Administrative Tribunal of the International Labour Organisation. With some exceptions, the former covered all the organizations of the United Nations system having their headquarters on the American continent, while the latter covered those with headquarters in Europe. The organizations themselves might wish to adopt machinery on those lines and that possibility should be left open.

⁶ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 221.

41. With regard to the drafting, he agreed with Mr. Cas-trén that the Special Rapporteur's title for article 50 was more apt. The Special Rapporteur's paragraph 1, how-ever, was rather too broadly drafted. It would be going too far to say "If any question arises between a sending State and the host State concerning the application of the present articles ...". The draft articles covered a wide variety of topics and a question might well arise which affected the host State as a member of the organization, but had no relation to privileges and immunities. The text proposed by Mr. Kearney for paragraph 1 put the matter in the correct perspective, but the Drafting Com-mittee should consider whether it should not refer to "mutual rights and obligations" rather than "respective rights and obligations"; it was the rights of the sending State and the host State vis-à-vis each other, that were involved.

42. In paragraph 2, he favoured Mr. Kearney's proposal for the opening words: "In the event the difference is not disposed of by means of consultations, any State engaged therein or the Organization may refer it...". That for-mulation was preferable to the Special Rapporteur's, which was vaguer and more impersonal and thus open to abuse. He was not fully convinced, however, that con-ciliation should now be definitely chosen as the appro-priate mode of settlement, and he would therefore suggest that the first sentence should conclude with some such wording as "... may refer it to such mode of settlement as may be set up within each Organization".

43. The provisions of paragraph 1 of Mr. Kearney's article 50 *bis* should be retained as a residuary rule. If the organization concerned did not have any *ad hoc* or standing arrangement for the settlement of disputes, the provisions of that paragraph concerning a conciliation commission would apply.

44. He did not believe that the Commission should adopt the remainder of article 50 *bis* or the whole of article 50 *ter* at the present stage. He agreed with Mr. Ushakov that the proposals they contained should be included in the commentary, together with a statement that they had been placed before the Commission during the discussion and that the Commission wished to put them forward for consideration during the diplomatic phase of the work.

45. Generally speaking, the proposals were acceptable to him, although some points of detail might perhaps require more careful consideration. In particular, it seemed premature to take a firm decision on the question of a request for an advisory opinion from the Inter-national Court of Justice, mentioned in paragraph 3 of article 50 *ter*. It would have to be considered whether that provision was in conformity with article 96 of the Charter.

46. If the Commission decided to include the remainder of article 50 *bis* and article 50 *ter* in the draft, he reserved his right to comment on those provisions. But it was essential to include paragraph 3 of the Special Rap-porteur's proposal in article 50, not only because the question had been considered by the Commission in connexion with the law of treaties, but also because

the substance of the present draft articles made it neces-sary to deal with the question of the multiplicity of treaty provisions on the settlement of disputes.

47. All the provisions he had recommended for reten-tion should form a single article consisting of four or five paragraphs, not several separate articles.

48. Mr. ALCÍVAR said he had always adopted a cau-tious approach to the idea of establishing compulsory procedure for the peaceful settlement of disputes. The future convention should undoubtedly include some pro- vision for such settlement, but the question was whether it should be limited to consultations, which did not involve any element of compulsion, or whether it should go further and make a conciliation procedure obligatory.

49. In principle, he himself favoured the fairly flexible arrangement proposed by the Special Rapporteur. The conciliation procedure proposed by Mr. Kearney was more rigid; in particular, he had some doubts about paragraph 5 of Mr. Kearney's proposed article 50 *ter* which provided that "The Commission shall reach its decisions by majority vote", since to his mind it was open to question whether such a provision implied con-ciliation or arbitration. A conciliation commission would merely express an opinion or make a recommendation; if that opinion or recommendation was to have any binding force, the commission would have to be more in the nature of a tribunal.

50. He also had certain reservations about Mr. Kear-ney's proposed article 50 *bis*, under which three mem-bers of the conciliation commission would be elected by the competent organ of the organization, one member would be selected by the host State and one member would be selected by the Secretary-General of the orga-nization. It was surely strange that a sending State which was a party to the dispute should not also be entitled to appoint at least one member to the Commission, par-ticularly in view of the fact that several sending States might be involved in a dispute with the host State.

51. Mr. REUTER congratulated the Special Rap-porteur and Mr. Kearney on their proposed articles. The Special Rapporteur's text had the merit of simplicity, while Mr. Kearney's contained a series of detailed and imaginative proposals. He also welcomed the fact that every member of the Commission was trying to arrive at a joint solution to the problem under consideration; that was encouraging for the future progress of the Commission's work.

52. Without examining the proposals in detail, he observed that the Commission should not provide for any procedure which went beyond conciliation; for if it did, quite a number of States might find the future con- vention unacceptable for that reason. The same would apply if conciliation was made compulsory, with pro-cedures that would allow the organization to intervene in all disputes arising between one or more sending States and the host State; through the entry into operation of the conciliation commission, those States might sub-sequently be led to have recourse to other modes of settlement. Hence it might well be that certain States

which were in favour of arbitration would refuse to be bound by such a system.

53. As Mr. Ushakov had rightly observed, it should not be forgotten that the convention being prepared was to be open for signature by States, so that it would not be binding on international organizations. But as Mr. Yasseen had said, those considerations should not prevent the Commission from doing its work. The Vienna Convention on the Law of Treaties was an encouraging precedent: although that instrument had not been adopted and signed by international organizations, it contained articles which concerned them directly.

54. There appeared to be general agreement in the Commission that conciliation should be made compulsory, in addition to the compulsory consultation procedure already provided for. In fact, recourse to consultations was already, in substance though not in form, a kind of conciliation procedure. In providing for real means of conciliation, one could either make it a formal procedure based to some extent on that used for arbitration, or retain its diplomatic character in certain minor respects. The authors of the drafts had each adopted one of those two approaches. He himself found it difficult to choose between them; but he believed that if conciliation was made compulsory, it would be preferable to have a very flexible system, for a number of reasons.

55. First, there were already a number of international instruments which could be invoked for the settlement of the kind of dispute under consideration. In the case of a dispute involving the United States of America, as host State to the United Nations, it would be possible to take into consideration the Headquarters Agreement between the United Nations and the United States of America, the Convention on the Privileges and Immunities of the United Nations, the Vienna Convention on the Law of Treaties and the convention now being prepared. Each of those texts contained different provisions on the settlement of disputes, and it was therefore important to provide for a simple and flexible system in the draft provisions now under study.

56. Secondly, it was very venturesome to provide that organizations should take part in the settlement of disputes of the kind envisaged. It was true that any dispute relating to the future convention would directly involve an organization and it would therefore be a party to all such disputes. But if a rigid system was established, the organization would be systematically involved in the settlement of those disputes, even if that was not the wish of the organization itself or of the States concerned.

57. Thirdly, conciliation procedure did not have a long history in international relations. Since 1946, cases of arbitration and conciliation involving international organizations had been relatively rare. So if conciliation procedure was to be introduced into the draft articles, care should be taken to ensure that it was sufficiently flexible not to remain a dead letter. Although it was desirable to establish machinery to which recourse would be easy in all cases, the conciliators should be appointed, not beforehand and *in abstracto*, but in the light of the circumstances of each case.

58. The considerations he had put forward should not be taken to mean that he had made any definite choice: the two drafts could still be improved or perhaps combined.

59. Mr. TAMMES said it had always been his impression that, on the basis of the Special Rapporteur's draft, the Commission tended to draw up two different kinds of article; one aimed at the maximum of clarity and precision, while the other could only express the existence of a certain balance of interests. In articles of the latter kind, it was necessary to rely on a subjective assessment of those interests and to apply it with discretion. Examples of such articles were article 16, which provided that the size of the permanent mission should not exceed what was "reasonable and normal", and article 34, which provided that if the sending State did not waive immunity, it should "use its best endeavours to bring about a just settlement of such claims". If, in the application of such articles, difficulties should arise as a result of different assessments of the interests involved, the conciliation procedure would be an appropriate and elastic method of resolving those difficulties.

60. He could see no valid reason, however, why those articles which were intended to be precise and definite should not be put into effect as a result of a final decision by some third party. In that respect he was inclined to support Mr. Yasseen's views concerning a third stage in the conciliation process. That element was lacking in the Special Rapporteur's proposal and also in Mr. Kearney's, which sought a final solution only through conciliation. Mr. Kearney had indeed referred to the settlement clauses in international agreements already in force, but it was to be expected that those clauses would eventually be replaced by the corresponding clauses in the present draft.

61. He himself did not think the conciliation procedure alone would ever result in a definite decision; it was more likely to end up with a mere recommendation, so that the original dispute would, in fact, remain undecided. It should be borne in mind that article 66 of the Vienna Convention on the Law of Treaties⁷ provided for a three-fold solution: judicial settlement, arbitration and conciliation.

62. In general, he could accept paragraph 2 of the Special Rapporteur's proposed text for article 50; it followed article VII, section 24, of the Convention on the Privileges and Immunities of the Specialized Agencies, part of which read "If such consultations fail to achieve a result satisfactory to the State and the specialized agency concerned, the question... shall be submitted to the International Court of Justice...".⁸ Mr. Eustathiades had asked which were the parties concerned; that question could be answered by replacing the words "satisfactory to the State and the specialized agency concerned" by the words "satisfactory to the host State, the sending State and the Organization".

⁷ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 298 (United Nations publication, Sales No.: E.70.V.5).

⁸ United Nations, *Treaty Series*, vol. 33, pp. 276-278.

63. He thought that the words "may be set up for the purpose of settling such disputes" in paragraph 2 of the Special Rapporteur's proposed article 50 should be amended to read "shall be set up...". In general, he was against imposing obligations on the organization, but there were certain obligations which it must inevitably accept if it was to function smoothly. In that respect, he preferred Mr. Kearney's formula, which presented a model settlement procedure that was complete in itself.

64. He shared the doubts expressed by Mr. Ushakov and Mr. Rosenne about Mr. Kearney's proposed articles 50 *bis* and 50 *ter*, because there were some international organizations, especially those with representative assemblies and governing bodies, which might prefer to be left free to draw up rules adapted to their own specific needs.

65. Unlike some other speakers, he was somewhat puzzled by paragraph 3 in the Special Rapporteur's proposed article 50. Article 65, paragraph 4 of the Convention on the Law of Treaties read: "Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes". The complicating factor was that, with the Special Rapporteur's paragraph 3, both the new and the old settlement clauses would be applicable concurrently, since some States would accept the new convention, while others would choose to be bound by the existing agreements.

66. Sir Humphrey WALDOCK said he did not share Mr. Rosenne's objection to a uniform mode of settlement, such as a conciliation procedure, on the ground that there was a considerable difference in nature and functions between international organizations. However important those differences might be, the present articles dealt with a comparatively limited subject-matter, and there was a certain uniformity in the problems to be solved in all the organizations.

67. He had some sympathy with Mr. Yasseen's suggestion that a third stage might be necessary after the conciliation procedure. Compulsory consultations were a form of supervised negotiation; conciliation, though more formal, was also a kind of supervised negotiation; and in the end a satisfactory result might not be achieved. The question then arose whether the Commission should not propose some final stage, such as compulsory reference to the International Court of Justice or to arbitration.

68. He agreed with Mr. Yasseen that if States were to be induced to consider the possibility of accepting compulsory reference to the Court or to arbitration, it might well be in the context of a convention of the kind envisaged in the present articles, since there was a certain mutuality of interests and special relations among the parties which might incline them to view such a compulsory procedure more favourably. It would be necessary, however, to provide machinery which stood a

reasonable chance of being accepted by the general body of States. In that connexion, he agreed with Mr. Reuter that it might be better to adopt a comparatively simple and flexible formula.

69. Paragraph 1 of the Special Rapporteur's text confirmed the right of compulsory reference to consultations, inasmuch as it stated that the host State, the sending State or the organization could request such reference and that the consultations would then be held. In paragraph 2, however, the situation was not quite so clear, since that paragraph stated that in the event of failure of the consultations, "the matter shall be submitted to a conciliation commission . . .". That recalled the classic problem of a joint submission to arbitration by a *compromis*, or a right to institute proceedings by unilateral application; in that respect, therefore, paragraph 2 was in need of some clarification.

70. Since not only the interests of individual States, but also the proper functioning of the organization was involved, he thought it would also be possible to refer the dispute to one of the plenary organs of the organization, subject to the latter's being ready to place the matter on its agenda. That possibility did not seem to be excluded by any of the procedures so far proposed.

71. He did not share the difficulties which some members experienced with regard to paragraph 3, since it seemed clear that none of the present proposals could derogate from the general obligation of States to settle disputes in accordance with their obligations under existing treaties.

72. Nor did he share Mr. Tammes' difficulty with the words "may be set up for the purpose of settling such disputes" in paragraph 2. The general obligation envisaged in paragraph 2 would not in any case derogate from the right of the organization to establish its own conciliation procedure.

73. The draft articles prepared by Mr. Kearney contained many valuable elements, particularly the provision in paragraph 4 of article 50 *ter* that the conciliation commission should submit a report of its findings to the Secretary-General and all participating members. If a draft was to be accepted at the future conference, it must be reasonably simple and concentrate on the nature of the conciliation commission itself. In particular, if the host State was to be represented in the commission, the draft would hardly prove acceptable unless other States were also represented.

74. Mr. KEARNEY was envisaging a conciliation commission which would be a permanent body; there was merit in that proposal, but he would like to hear the views of the Commission before reaching any final decision on it.

The meeting rose at 1 p.m.

1121st MEETING

Friday, 18 June 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168/Add.3; A/CN.4/L.169; A/CN.4/L.170/Add.2; A/CN.4/L.171; A/CN.4/L.173)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 50 (Consultations and settlement of disputes) and proposed new articles 50 *bis* and 50 *ter* (continued)

1. The CHAIRMAN invited the Commission to continue consideration of the new text for article 50 proposed by the Special Rapporteur (A/CN.4/L.171), together with Mr. Kearney's alternative proposal (A/CN.4/L.169).
2. Mr. NAGENDRA SINGH said there would be a regrettable lacuna in the Commission's work if it failed to take a positive stand on the question of the settlement of disputes. Some well-known voluntary measures for settlement did already exist, but the world had progressed beyond the forms of negotiation, conciliation, arbitration and judicial settlement which had been known ages ago. The least that could be done was to make provision for compulsory conciliation. Some advance must be registered.
3. The text proposed by Mr. Kearney in his articles 50, 50 *bis* and 50 *ter* was exhaustive. He would have been prepared to accept a shorter formulation, as had been suggested by Sir Humphrey Waldock, but feared that it might take the form to be seen in some of the existing constituent instruments and would not make the same impact as a comprehensive text. If conciliation was to be compulsory, something like article 50 *bis* was undoubtedly called for.
4. The question then arose whether each international organization should have its own conciliation commission or whether one commission should act for several organizations, in the same way as the present administrative tribunals. In his opinion the Special Rapporteur

was right in his submission that, given the multiplicity and variety of international organizations, "it would be difficult to provide for a standing uniform machinery for a rigid procedure of settlement". Sovereign States might well hesitate to submit their differences to some common tribunal like the International Court of Justice, because they were unwilling to have their differences given world-wide publicity.

5. As to whether the conciliation commission should be a permanent or an *ad hoc* body, he had originally preferred the latter solution, but after careful consideration had come to the conclusion that a permanent body would be more likely to take an impartial view of each case and produce fruitful results. The reasons was that a permanent body would already be in existence when the dispute arose, whereas an *ad hoc* body would be set up afterwards and hence might meet with difficulties regarding its composition.

6. He fully agreed with those who felt that the sending State must be included in the membership of the conciliation commission, since that was the least that could be accepted by any sovereign State. Paragraph 2 (a) of article 50 *bis* provided that three members of the Commission should be elected by the competent organ of the organization, while paragraph 2 (b) provided that one member should be selected by the host State. He assumed that one or more of the three members referred to in paragraph 2 (a) would represent the sending State, since the host State was separately provided for in paragraph 2 (b). However, since Mr. Alcívar and Sir Humphrey Waldock had the impression that the sending State was not included in the membership of the commission as envisaged in that text, it should be made clear that one of the three members elected by the competent organ of the organization would represent the sending State.

7. Mr. Kearney had gone on to propose in the same paragraph of article 50 *bis* that each member should have an alternate selected in the same way as the member. He agreed with Sir Humphrey Waldock, however, that the Commission should not go into too much detail; it should leave the question of alternates to be decided by the members themselves.

8. Paragraph 1 of article 50, as proposed by Mr. Kearney, should be retained with its present title, but paragraph 2 should form a new article 50 *bis* entitled "Settlement of disputes".

9. The wording "If any difference arises between one or more sending States . . ." was to be preferred to the wording in the Special Rapporteur's draft, "If any question arises . . .", as being more specific.

10. With regard to the involvement of international organizations in article 50 *bis*, that difficulty would be removed once the convention was adopted, since the organization, being only the sum total of its member States, would be bound to support the convention.

11. He had no objection to article 50 *ter* as such, though he would prefer the details of the conciliation procedure to be left to the conciliation commission itself

and not stated in the article. In order to shorten the article, he would suggest deleting paragraphs 1 and 2 and stating in the commentary that the procedure should be similar to that provided for in the Vienna Convention on the Law of Treaties.¹

12. Paragraph 3 of article 50 *ter*, which represented the third stage referred to by Mr. Yasseen, should be reworded on more positive and categorical lines. Article VIII, section 30, of the Convention on the Privileges and Immunities of the United Nations,² which represented existing practice in the matter, stipulated that "All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice . . .", and went on: "The opinion given by the Court shall be accepted as decisive by the parties". If the Commission was to make a positive contribution to international law, the substance of those provisions should be incorporated in paragraphs 3 and 4 of article 50 *ter*.

13. Paragraph 3 of the Special Rapporteur's article 50, which safeguarded the provisions concerning settlement of disputes contained in existing international agreements, should be retained, since the Commission could not expect to impose its own formulation now, and disregard existing constituent instruments.

14. The Drafting Committee should be asked to combine the best features of the proposals submitted by the Special Rapporteur and Mr. Kearney, since each had its merits.

15. Mr. AGO said that the drafts submitted by the Special Rapporteur and Mr. Kearney considerably facilitated the Commission's task. Paragraph 3 of the text proposed by the Special Rapporteur embodied a suggestion which he (Mr. Ago) had made. Mr. Kearney's text duly emphasized the compulsory character of the conciliation procedure and mentioned the part that could be played by the International Court of Justice.

16. Although it was too early for drafting comments, it should be noted that it would be incorrect to speak of consultation procedure or to give the impression that the Commission regarded consultations as a procedure for the settlement of disputes. In fact, it was quite normal for consultations to be held, but the term "procedure" went too far. Both drafts for article 50 avoided that pitfall in paragraph 1.

17. With regard to paragraph 2, the phrase "In the event the difference is not disposed of by means of consultations", used by Mr. Kearney, seemed preferable to "If the consultations . . . fail to achieve a result satisfactory to the parties concerned", which was the phrase used by the Special Rapporteur. All consultations implied an agreement between the parties and it was important to make it clear that it was when the parties

did not arrive at a satisfactory result that the dispute should be submitted to a conciliation commission.

18. It should also be made clear that that mode of settlement was not for all disputes concerning the application of the future convention in general, but only for disputes concerning the respective rights and obligations of the host State and the sending State. Any dispute between one of those States and the organization should be submitted to one of the other modes of settlement that might be set up for that purpose within the organization.

19. It was certainly advisable to make recourse to the conciliation procedure compulsory, but in that respect the Special Rapporteur's draft was less clear than Mr. Kearney's. The latter's proposals were, however, rather ponderous. The reason why detailed regulations had been laid down in the Vienna Convention on the Law of Treaties was that it was concerned with disputes relating to the application of treaties concluded by States: no international organization was involved. In the present case, on the other hand, an organization was always interested in the settlement of the dispute, as a third party. In that situation, it should be possible to follow the solution adopted in a large number of agreements concluded between States, and also between States and private companies, which, in the event of disputes concerning the application of those agreements, provided for the establishment of a conciliation commission generally composed of three members, one to be appointed by each of the parties concerned, and a third, or umpire, to be appointed by a neutral personage, such as the Secretary-General of the United Nations, the secretary of an international organization, or the President of the International Court of Justice.

20. Article 50 might therefore, contain some such provision as "Any dispute concerning the respective rights and obligations of a sending State and the host State shall be submitted to a conciliation commission which shall be set up immediately and shall be composed of three members, one of whom shall be appointed by the sending State and one by the host State, while the chief conciliator shall be appointed by the Organization". Such a procedure would not only be automatic, but would also have the advantage of being simple and of not requiring the establishment of a permanent conciliation commission.

21. It was open to question whether there was any need, as Mr. Yasseen had suggested, to provide for other modes of settlement if the conciliation procedure failed. The concept of conciliation was still developing, and in some respects was getting closer to arbitration. Although the findings of a conciliation commission were not binding, the parties concerned would not be in a position to reject them easily. It would, however, be useful, as Mr. Kearney proposed, to stipulate that the conciliation commission could request an advisory opinion from the International Court of Justice in the name of the organization. It was obvious that such a commission should have that faculty, which was normally accorded to the organization.

¹ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 298, article 66, and p. 301, Annex (United Nations publication, Sales No.: E.70.V.5).

² United Nations, *Treaty Series*, vol. 1, p. 30.

22. Mr. USTOR said there was no great difference between paragraph 1 of article 50 as proposed by the Special Rapporteur and as proposed by Mr. Kearney. He himself preferred the Special Rapporteur's text, which was the same as that adopted by the Commission in 1969. At that time, the Commission had stated in paragraph (2) of its commentary that "Article 50 is intended to be sufficiently flexible to envisage the holding of consultations between the sending State and the host State or between either or both of them and the organization concerned".³ He hoped the Drafting Committee would give careful consideration to that commentary, since paragraph 1 in its present form did not adequately reflect the idea that consultations were not necessarily always triangular and that it might not be necessary to involve the organization.

23. Paragraph 2 of the Special Rapporteur's article 50 stated that: "If the consultations referred to in paragraph 1 fail to achieve a result satisfactory to the parties concerned . . . , the matter shall be submitted to a conciliation commission . . .". That provision called for compulsory conciliation and was therefore clear and acceptable to all. On the other hand, paragraph 2 of Mr. Kearney's article 50 envisaged optional rather than compulsory conciliation, since it stated that "In the event the difference is not disposed of by means of consultations, any State engaged therein or the Organization may refer it to conciliation . . .". It was made clear later, in articles 50 *bis* and 50 *ter*, that compulsory conciliation machinery would be established, but paragraph 2 contained no reference to an obligation, and he felt bound to draw the Drafting Committee's attention to that inconsistency.

24. It was Mr. Kearney's idea that unsuccessful consultations should be continued by a conciliation procedure, for which purpose he proposed a uniform conciliation commission for all organizations. Mr. Ushakov, however, had asked whether the future convention would be able to compel organizations to establish such a commission, and other members had questioned whether it would be advisable to have a uniform system of conciliation in all organizations.

25. In paragraph 5 of his Working Paper (A/CN.4/L.171), the Special Rapporteur had expressed the view that it would be difficult to establish such a uniform system; other members, however, including Sir Humphrey Waldock, had pointed out that the matters which would call for settlement would be limited to a special field and would probably be uniform in nature. He himself believed that, while such problems might be uniform from the legal point of view, they might be extremely diverse from the political point of view because of the difference in the political importance of various international organizations. Since the great majority of organizations were of a technical character, like the World Meteorological Organization, he wondered whether it would be possible to establish the same compulsory system for all of them. Perhaps it might be

better to leave it to the organizations concerned to decide what measures they should adopt when consultations failed to yield results.

26. With regard to the third stage, consisting of arbitral or judicial settlement, envisaged by Mr. Yasseen, he thought that since many of the questions which might arise would be a highly technical character, such as those involving problems of the recognition of States, the Commission should not establish an excessively strict system.

27. As to paragraph 3 of the Special Rapporteur's draft, he pointed out that the Commission had rejected a similar paragraph in 1969, because it had not considered it advisable to include it in view of the terms of articles 3 and 4.⁴ In his opinion, paragraph 3 of the Special Rapporteur's draft was unnecessary for the same reasons.

28. Mr. SETTE CÂMARA said he did not believe that consultations by themselves were likely to settle future controversies; he was therefore prepared to support some procedure for judicial settlement, arbitration and conciliation, such as that provided for in article 66 of the Vienna Convention on the Law of Treaties.

29. The multiplicity and variety of international organizations had led the Special Rapporteur to propose a general and flexible article 50, whereas Mr. Kearney had submitted an elaborate plan for conciliation machinery and had even laid down the procedure to be followed. He himself was inclined to favour the more flexible approach adopted by the Special Rapporteur, although many features of Mr. Kearney's text could be reconciled with that of the Special Rapporteur.

30. Mr. USTOR had been right to point out that the original text of article 50 had been intended to be sufficiently flexible to envisage the holding of consultations between the sending State and the host State or between either or both of them and the organization concerned.

31. What was true of consultations was also true of the conciliation procedure; the latter was not arbitration, but only a form of negotiation, any decisions reached through it were of merely persuasive value. Mr. Ago had spoken of the evolution of the idea of conciliation during the past few years, but had recognized that it was based on moral, not on legal authority. The Annex to the Vienna Convention on the Law of Treaties defined the nature of a conciliation commission in paragraph 5, which read: "The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute".

32. He feared that the ingenious proposals made by Mr. Kearney would be unlikely to win support at a future conference, since the conciliation machinery he envisaged would limit the discretion of the parties to choose their own means of settlement. He, therefore, proposed that the two texts be referred to the Drafting Committee, with a request that it explore the possibility of extracting from them a single, eclectic formula.

³ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 221.

⁴ *Op. cit.*, 1969, vol. I, p. 48, para. 25 and p. 193, para. 34.

33. Mr. ALBÓNICO said that the Special Rapporteur's text for article 50 comprised three realistic, practical and flexible paragraphs, while Mr. Kearney's proposal was more complete, less flexible and rather complicated.

34. In his view, the importance of disputes should not be exaggerated, since they would usually relate to such questions as privileges and immunities, which would be fairly easy to settle. It was necessary to maintain a just proportion between cause and effect, and complex machinery should not be set up to deal with minor matters. It should not be forgotten that the organization had an even greater interest in a dispute than the States which might be involved in it, for it was vitally important that the proper functioning of the organization should not be impaired.

35. He was inclined to think, therefore, that three basic ideas should be established in article 50. The first paragraph should provide for consultations as a first means of settling disputes, as in paragraph 1 of the Special Rapporteur's text. The second paragraph should provide that, if the consultations failed to achieve the desired results, the way would be open for the immediate application of the existing system for the settlement of disputes between the host State and the sending State. The third paragraph should provide that, if such a system did not exist or could not be applied because the subject of the dispute was not within the scope of bilateral measures, there would be compulsory recourse to conciliation, arbitration or judicial settlement. Establishment of the rules for the precise means of settlement would be a matter for the future diplomatic conference.

36. Mr. USHAKOV said he wished to qualify the statement he had made at the previous meeting to the effect that the Commission could not impose obligations on international organizations in the draft articles.⁵

37. In point of fact, it could do so only under certain conditions, which were met, for example, in the case of article 24. That provision imposed on the organization the obligation to assist the sending State, its permanent mission and the members of the permanent mission in securing the enjoyment of the privileges provided for by the draft articles. The situation contemplated in article 24 involved not only the organization, but also the sending State and the host State, so that the Commission was entitled to draft the article within the framework of regulation of the rights and obligations of those States. Furthermore, such a provision merely codified international law or contributed to its progressive development. Lastly, the obligation stated in article 24 was subject to the reservation in the general provisions of the draft, in particular article 3, which reserved the relevant rules of the organization.

38. On the other hand, the Commission could not impose obligations on an organization with respect to questions which fell within its exclusive sphere of competence. Articles 50 *bis* and 50 *ter* proposed by Mr. Kearney imposed obligations on the organization which did

in fact fall within its exclusive sphere of competence; for they dealt with the composition of the conciliation body and the procedure to be followed, which the organization should be free to settle as it wished. The organization could establish permanent or temporary machinery, as it saw fit, and refer the matter in dispute to one of its organs or to an organ of another organization or to a temporary body already in existence.

39. Paragraph 1 of the article proposed by the Special Rapporteur provided for an obligation which the Commission could impose on the organization, since it related to consultations which concerned both the host State, the sending State and the organization.

40. Paragraph 2 stated the obligation to submit the dispute to a conciliation commission, and that obligation was also acceptable for the same reason. But paragraph 2 also imposed on the organization the obligation to set up a conciliation commission, which was a matter within its own competence. That obligation would be unacceptable unless the organization was also permitted to establish another mode of settlement, as provided in the last clause of paragraph 2.

41. It was therefore essential to make a distinction between the obligations which could be imposed on organizations and those which fell within their exclusive sphere of competence.

42. The CHAIRMAN said that most of the comments made during the discussion had concerned drafting. If there were no objections, therefore, he would take it that members agreed that article 50, as it appeared in the Special Rapporteur's working paper (A/CN.4/L.171), should be referred to the Drafting Committee together with the texts proposed by Mr. Kearney (A/CN.4/L.169), for examination in the light of the views expressed.

*It was so agreed.*⁶

ARTICLES 49 *bis* and 77 *bis*⁷

43. The CHAIRMAN invited the Commission to consider articles 49 *bis* and 77 *bis* as adopted by the Drafting Committee at second reading (A/CN.4/L.170/Add.2), subject to later review of the expression "the present articles". The texts of the two articles were virtually identical.

44. Mr. AGO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 49 *bis*:

Article 49 bis

Non-recognition of States or governments or absence of diplomatic or consular relations

1. The rights and obligations of the host State and of the sending State under the present articles shall be affected neither by the non-recognition by one of those States of the other State or of its government nor by the non-existence or the severance of diplomatic or consular relations between them.

⁶ For resumption of the discussion see 1136th meeting, para. 2.

⁷ For previous text and discussion see 1119th meeting, para. 25 *et seq.*

⁵ See previous meeting, para. 23.

2. The establishment or maintenance of a permanent mission or any act in application of the present articles shall not by itself imply recognition by the sending State of the host State or its government or by the host State of the sending State or its government.

45. The Committee thought the proposed wording was probably the best way of providing for all three situations—non-recognition, and absence or severance of diplomatic or consular relations—in which the rights and obligations of the host State and the sending State might be affected.

46. Mr. YASSEEN said he could accept the new wording, which was a definite improvement on the previous text and met the valid points made by various members of the Commission.

47. Mr. USHAKOV also supported the new text.

48. Mr. ROSENNE said that the Drafting Committee's French version of article 49 *bis* was to be commended, but he would suggest that, when in due course it came to retouch the whole draft, it should review the English version of paragraph 1 with a view to making it more idiomatic.

49. Mr. AGO said that the two texts were in fact completely in line with one another, since the English word "neither" corresponded exactly to the French "ni".

50. Mr. KEARNEY said that matters of style depended on taste.

51. Mr. NAGENDRA SINGH said that, in the Drafting Committee, he had suggested a somewhat simpler formulation for paragraph 1, which read:

"The absence of recognition between the host State and the sending State or the lack of diplomatic or consular relations between them shall in no way affect the rights and obligations of the host State and of the sending State arising out of the provisions of the present articles."

52. He had withdrawn his suggestion, however, and accepted the text proposed by the Drafting Committee, because it expressed the substance of the matter very clearly, even if not very elegantly.

53. Mr. USTOR said he supported the text proposed for article 49 *bis*, which should now be considered by the Drafting Committee for inclusion in the general provisions.

54. The commentary might perhaps explain that the rule in paragraph 1 also applied in relations between two sending States. Admittedly, there were few provisions in the draft articles which mentioned such relations; one instance was article 50, which provided for consultations between two or more sending States. It would be appropriate to specify in the commentary that the exercise by a sending State of its right to participate in such consultations did not imply recognition of another sending State exercising the same right.

55. Mr. ROSENNE said he would hesitate to go as far as Mr. USTOR proposed. He suggested that either

the commentary to article 49 *bis*, or perhaps the introductory comments to the whole draft, should specify that the Commission had left aside the question of relations between two sending States.

56. Mr. EUSTATHIADES said he thought that an explanation in the commentary would be appropriate and would not affect other aspects of the question.

57. Mr. ALBÓNICO suggested that it might be preferable to reverse the order of the two paragraphs. The article would then begin with the provision concerning the normal situation, namely, the establishment of a mission, and go on to deal in its second paragraph with the abnormal situation of non-recognition.

58. Mr. AGO said that the Drafting Committee had considered that idea, but had taken the view that the most important point was to ensure that non-recognition or the absence of diplomatic relations would have no effect on the rights and obligations of the host State and the sending State. The provision in paragraph 2 was a kind of general safeguard clause. Moreover, it stated a self-evident truth and was thus not so important as the provision in paragraph 1.

59. With regard to the question where article 49 *bis* should be placed, he pointed out that the article did not relate to the draft as a whole, but only to the part concerning the rights and obligations of the host State on the one hand, and the rights and obligations of the sending State on the other. It would therefore be better to leave it in Part II.

60. Mr. Ustor's point concerning relations between two sending States was so self-evident that it did not seem necessary to mention it, except perhaps in the commentary.

61. Mr. USHAKOV said he supported Mr. Ustor's proposal. There was no reason why the point should not be mentioned in the commentary, with a reference to the customary rules and practice of the organization, since it was also a general question which had already been settled, for example, in regard to the admission of member States.

62. Mr. CASTRÉN said he agreed with Mr. Ago that the present text covered Mr. Ustor's point. The Commission could, however, decide in due course whether it should be mentioned in the commentary.

63. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 49 *bis* as adopted at second reading by the Drafting Committee, on the understanding that it would later consider where the article was to be placed in the draft and what was to be included in the commentary.

*It was so agreed.**

64. The CHAIRMAN said that if there were no objections he would take it that the Commission also provi-

* For resumption of the discussion see 1135th meeting, para. 75.

sionally approved article 77 *bis*, the text of which was the same as that of article 49 *bis* except for the substitution of the words "permanent observer mission" for "permanent mission" in paragraph 2.

*It was so agreed.*⁹

PART V. *Observer delegations of States to organs and conferences*

65. The CHAIRMAN invited the Commission to consider Part V of the draft articles, on observer delegations of States to organs and to conferences, submitted by the Special Rapporteur in his working paper (A/CN.4/L.173).¹⁰ He suggested that consideration of article 117 on the use of terms be deferred until later, and that Commission now consider article 118.

It was so agreed.

ARTICLE 118

66.

Article 118

Sending of observer delegations

1. A State not member of an organ may send an observer delegation thereto in accordance with the rules of procedure of that organ.

2. A State not participating in a conference may send a delegation thereto in accordance with the rules of procedure of that conference.

67. Mr. EUSTATHIADES said he thought that in paragraph 1 the reference should be to a State not member of an organization, rather than a State not member of an organ.

68. Mr. USTOR said that paragraph 1 was in fact intended to cover two situations. The first was that of a State non-member of an organization which sent an observer delegation to a session or meeting of an organ of that organization; the second was that of a State member of an organization which was not a member of one of its organs, but which sent an observer delegation to a meeting of that organ.

69. Paragraph 2 also dealt with two situations. The first was that of a State member of an organization which, as a member, had the right to participate fully in a conference, but did not wish to do so and preferred to send an observer delegation; the second was that of a State non-member of an organization which was entitled to send an observer delegation under the rules of procedure of the conference.

70. He suggested that article 118 be divided into four parts, so as to deal separately with the four situations he had mentioned.

71. Mr. ROSENNE said he agreed with the two previous speakers, but wished to draw attention to another problem.

72. The limitation of the provisions of paragraph 1 to rules of procedure was too narrow. Article 31 of the Charter allowed "Any Member of the United Nations which is not a member of the Security Council" to "participate, without vote, in the discussion of any question brought before the Security Council" which specially affected that Member's interests. The question of the submission of a dispute to the Security Council or the General Assembly by a non-member State was dealt with in article 35 (2). Article 69 of the Charter provided that "The Economic and Social Council shall invite any Member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that Member". The same rule was carried through the rules of procedure or terms of reference of the various subsidiary organs of the Council.

73. Those provisions showed that there was a much broader basis for participation, at least by States not members of an organ, than was suggested in the proposed text of article 118.

74. The same was true of paragraph 2. The question of the participation of an observer delegation in an international conference was only partly a matter for the rules of procedure of the conference. It would be recalled, for example, that at the 1958 Geneva Conference on the Law of the Sea, very serious issues had been raised following the proposal to amend the Conference's rules of procedure so as to enable States not participating in the Conference to send observers to it.¹¹ The question of observer delegations was, however, sometimes regulated in the resolution or other decision convening a conference.

75. For those reasons, he suggested that the Drafting Committee should endeavour to produce a broader formula for both paragraph 1 and paragraph 2.

76. Mr. AGO said he agreed with Mr. Ustor. He understood Mr. Eustathiades' misgivings, however, and thought that even though there should not be the least difference between the two cases, it would be better to provide separately for the situation of a State not a member of an organization, which could send only observers to all the organs of that organization, and the situation of a State member of an organization which was not a member of an organ of that organization, but sent an observer to it.

77. Mr. ALBÓNICO said that article 118 ought to reflect the changes which had been made to the wording of article 52 (Establishment of permanent observer missions) and, in consequence, to article 6 (Establishment of permanent missions) by the Drafting Committee. He therefore urged that in both paragraphs of article 118 the wording should be adjusted so as to take into account the element of consent of the organ or conference.

78. Mr. USHAKOV said that the sending of an observer delegation did not depend solely on the rules of procedure of the organ or conference concerned. The

⁹ For resumption of the discussion see 1135th meeting, para. 75.

¹⁰ See 1105th meeting, paras. 1-11.

¹¹ *United Nations Conference on the Law of the Sea, 1958, Official Records*, vol. II, pp. 3-6 (United Nations publication, Sales No.: 58.V.4, vol. II).

article should provide for cases in which the organization, the organ or the conference invited States to send observer delegations.

79. Provision should also be made for the possibility of States members of an organization being able to participate as observers in the work of any of its organs whatsoever, which likewise did not always depend on the rules of procedure of the organization or organ.

80. Article 118 should therefore consist of several paragraphs covering the various possible situations.

81. Mr. CASTRÉN said he approved of article 118 in substance, but the drafting was unsatisfactory in several respects. He proposed that paragraph 1 be amended to read:

“A State not a member of the Organization may send an observer delegation, in accordance with the rules of procedure, to the meetings of one or more organs of the Organization.”

82. In paragraph 2, the word “observer” should be inserted before the word “delegation”. Furthermore, since the sending of an observer delegation was a form of participation, the paragraph should be amended to read:

“The participation of a State in a conference as an observer depends on the rules of procedure of that conference.”

83. As Mr. Ushakov had suggested, provision should also be made for the possibility of an invitation from the organization or conference.

84. Mr. KEARNEY said he wished to protest strongly against the misuse of the terms “delegation” and “representative” throughout the articles in Part V. A “delegate” was a full participant in a meeting or conference and a “delegation” consisted of a number of delegates. There was therefore no justification for using the expression “observer delegation”. An observer could in no instance be regarded as a full participant. The expression “observer delegation” should be replaced throughout by the word “observer”.

85. Similarly, it was a misnomer to speak of an “observer representative”; the appropriate term to use was again “observer”.

86. In article 118, paragraph 1 should specify the right of a State which was not a member of an organ to “send an observer” thereto and paragraph 2 should similarly empower a State not participating in a conference to “send an observer” thereto.

87. Mr. ROSENNE said that the Drafting Committee should consider carefully whether it was appropriate to use the expression “not participating in a conference”, because of the meaning given to the term “participating” in the 1969 Vienna Convention on the Law of Treaties and in paragraph (4) of the commentary to article 78 of the present draft articles.¹³

The meeting rose at 1 p.m.

¹³ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

1122nd MEETING

Monday, 21 June 1971, at 3.5. p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tamames, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168/Add.4 and 5; A/CN.4/L.173)

[Item 1 of the agenda]

(continued)

ARTICLE 118 (Sending of observer delegations) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 118, as proposed by the Special Rapporteur (A/CN.4/L.173).
2. Mr. SETTE CÂMARA said that Part V of the draft, which dealt with observer delegations of States to organs and to conferences, was necessary to complete the Commission's work on item 1 of its agenda. The subject was related to the everyday practice of States, which frequently sent such observers.
3. It would be going too far, however, to place those observers on a par with delegations which actually participated in the work of an organ or conference. The Special Rapporteur had perhaps been led in that direction by considerations of symmetry. Practice, however, did not show that States were eager to send observer delegations with all the attributes of normal delegations or of permanent observer missions. To use the terminology of article 120, a temporary observer delegation of such a size would be neither reasonable nor normal.
4. The draft articles on observer delegations should therefore be simplified and reduced to the lower level of individual observers, which would be more in conformity with State practice. If the Commission were to take a decision on those lines, it would be easy for the Drafting Committee to purge the articles of their inflationary excesses.
5. The wording of article 118 needed some correction. For example, in paragraph 2, the words “a delegation” should be replaced by the words “an observer delegation” so as to be in line with paragraph 1.
6. Paragraph 2 referred to the sending of such a delegation by a State “not participating in a conference”.

In fact, situations could arise in which a State was a member of an organ or a participant in a conference, but did not actually take part in its deliberations. Such cases had occurred in the Security Council and there was also the case of France, which was a non-participating member of the Conference of the Committee on Disarmament. Obviously in such cases the State concerned had the right to send a delegation, and not merely an observer delegation, whenever it so wished. The Drafting Committee should endeavour to adjust the language of paragraph 2 to cover those cases.

7. Mr. USTOR said there was no need for a long series of articles on observer delegations; the concern expressed by Mr. Kearney on that point was shared by all members.

8. Nevertheless, the set of draft articles prepared by the Special Rapporteur for Part V provided a useful basis for discussion, which would enable the Commission to ascertain the similarities as well as the differences between regular delegations and observer delegations. When that process had been completed, it might be possible to merge the provisions on the two types of delegation, thereby shortening the draft.

9. The main difference between the two types of delegation related to their functions, but he noted that Part IV, on delegations of States to organs and to conferences, did not contain an article on functions. The Special Rapporteur had perhaps believed that such an article was unnecessary because of the provisions of sub-paragraphs (c) and (d) of article 78, on use of terms, which defined delegations, and thus brought out the difference between them and the observer delegations defined in sub-paragraphs (c) and (d) of article 117.

10. The Commission would consider at a later stage whether there were also differences between the two types of delegation with respect to their legal position and their privileges and immunities. At first sight it would seem that the privileges and immunities would have to be very much the same, since both types of delegation represented States.

11. It had been pointed out during the discussion that an observer delegation very often consisted of only one observer. In fact, the delegation of a member State could also consist of a single representative. On the other hand, there had been cases of observer delegations with a membership of nearly 100: for example, at the Geneva Conference of Foreign Ministers in 1959.

12. Mr. KEARNEY said that his basic objection to the concept of "observer delegations" was not connected with their size, but with the fact that an observer was not a delegate in the normal sense of the term. A delegate was a person who attended a conference or a meeting of an organ as the representative of a State and fully participated as such in the conference or meeting. If the draft articles were to refer to "observer delegations", they would cause confusion by suggesting that an observer was similar to a delegate, which was not the case.

13. Mr. USTOR said that the question was essentially one of terminology. It would be necessary to find an

expression to designate the representative of a State who did not fully participate in a conference or meeting, but who acted as an observer.

14. Mr. ROSENNE said that in article 78, sub-paragraph (d), a "delegation to a conference" was stated to mean "the delegation sent by a participating State to represent it at the conference", and in paragraph (4) of the commentary to that article,¹ it was explained that the word "participating" was used in that provision "in the same general sense as that word is used in article 9 of the Vienna Convention on the Law of Treaties".²

15. It was worth recalling that, in connexion with that article of the Vienna Convention, there had been a discussion on the problem of a delegation which did not take part in the work of a conference, but which at the very end merely voted for the adoption of the instrument formulated by the conference; the conclusion had been reached that such a delegation would be the delegation of a "participating State". In view of those considerations, the Drafting Commission should examine carefully the use, in article 78 and articles 117 and 118, of the expressions "participating State" and "State not participating in a conference", in order to ensure that there was no conflict with the provisions of the Vienna Convention on the Law of Treaties.

16. Mr. YASSEEN said he had never been in favour of the Commission drafting articles on observer delegations to organs and conferences. But since it had started on that course, it must now examine the subject in all its aspects.

17. The very concept of an "observer" was extremely complex. An observer could be sent by a State which was a member of an organization but was not represented in one of its organs, or by a State which was not a member of the organization. In the case of conferences, an observer could be sent by a State entitled to participate in the conference, or by a State which was not entitled to participate.

18. The task of the Commission, which was considering Part V of the Draft at first reading only, was therefore extremely complicated. It would have been sufficient to state the two rules governing the whole subject, which were set out in article 118, but it had been decided to draft a series of separate articles and the Drafting Committee would have to consider the substance as well as the form of the new provisions. First, however, the question should be considered by the Working Group.

19. Mr. KEARNEY said he agreed that it would be dangerous for the Commission to undertake the drafting of provisions concerning observers; references to that subject should be kept to a minimum.

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

² *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 290 (United Nations publication, Sales No. E.70.V.5).

20. He appreciated the desire to deal with the subject in the interests of completeness and of the balance of the draft, but it should be appreciated that the Commission did not have before it the necessary material to determine the proper course of action. He had consulted a number of books on conferences and on diplomacy and had been unable to find any reference to research on the subject of observers. The Commission was taking up the subject without any observations by the Special Rapporteur to provide guidance on principle or on practice. It was embarking on a course which would lead it to propose draft articles destined to form part of an international treaty, without first having submitted them to governments for their comments.

21. Mr. EUSTATHIADES said he noted that the provisions proposed by the Special Rapporteur, in particular articles 118 and 121, used the term "observer delegation" and clearly implied that a delegation consisted of a number of persons. The term "observer delegation" had come into use with the establishment of international organizations. Previously, it had been customary to speak of one or more observers. As a single observer might be sent to an organ or to a conference, that possibility should be clearly indicated in the articles under consideration. He therefore suggested that the term "observer delegation" be replaced by the term "observer or observer delegation", both in the titles and in the texts of the articles.

22. Mr. USHAKOV said that the Commission could not ignore the question of observer delegations to organs and conferences, because such delegations did exist. It was clear from the discussion that the Commission was aware of the need to deal with the subject; it only remained to be seen what decision it would ultimately take. It might add to the draft articles a Part V which it had considered at first reading; or after discussing the question it might be unable to reach agreement on a text and have to postpone that part of its work.

23. Mr. YASSEEN explained that the purpose of his previous remarks had been to stress the difficulty of the tasks confronting the Working Group and the Drafting Committee. Since the Commission had decided to study the question, it was important that its work should be complete.

24. Mr. NAGENDRA SINGH said he agreed with those members who thought that the problem of observer delegations should be covered by the draft articles for the sake of completeness, but he also agreed with Mr. Yasseen that the Commission should consider the matter thoroughly.

25. On the question of the number of persons serving on an observer delegation, he suggested that, in article 117, on the use of terms, the provisions of sub-paragraphs (c) and (d) should be so framed as to make it clear that an observer delegation could consist of one or more persons. It was, of course, very common for an observer delegation to consist of a single observer.

26. Mr. REUTER said he fully supported Mr. Yasseen. He was worried that the Commission was now moving into an area with which he himself was quite unfamiliar.

Even if his colleagues were better informed, there was no denying that the practice regarding observer delegations was very little known.

27. It was surprising that none of the articles proposed by the Special Rapporteur dealt with the functions of an observer delegation. It was not enough to say, as was implied in sub-paragraphs (c) and (d) of articles 117, that the function of an observer delegation was to represent the sending State. Every State official exercised a function of representation, but it was always combined with some other function. In the present case it was combined with the function of observing.

28. As Mr. Yasseen had pointed out, there were many ways of observing; and the best observers were not, perhaps, always to be found in observer delegations. The function of a delegation to an organ such as the Security Council was not so much to observe as to take part in discussions of direct concern to the sending State. The function of representation prevailed over the function of observation. The first essential, therefore, was to set out the various functions which an observer delegation could perform.

29. Mr. AGO said that the Commission had already had to make several choices. It had decided, first, to deal not only with the permanent missions and delegations of States members of an organization, but also with those of non-member States. When it had drafted the articles on permanent observer missions, it had gone so far as to say that a member of a permanent observer mission could represent his State in an organ of an organization or at a conference. It was that provision which had induced it later to draft separate articles on observer delegations.

30. The articles proposed by the Special Rapporteur seemed to be modelled too closely on those of the other parts of the draft. They did not reflect the essential difference between a member State and a non-member State, with respect to representation in an organ or participation in a conference. To devote a separate article to the size of an observer delegation was to take little account of reality, since a single observer might well be sent to an organ or to a conference.

31. As certain questions of substance would have to be settled before the whole matter was referred to the Drafting Committee, the articles proposed by the Special Rapporteur should first be examined by the Working Group under the chairmanship of Mr. Kearney.

32. Mr. ROSENNE said he noted that there was no proposal to reject the set of articles prepared by the Special Rapporteur on observer delegations (A./CN.4/L.173), but merely a proposal to refer them either to the Drafting Committee or to the small Working Group.

33. That being so, he wished to draw attention to an example taken from his own experience as representative of his country. In that capacity, he had sat in the Security Council, although his country was not a member of the Council. He had thus participated in the discussion of a question brought before the Security Council in which the interests of his country were specially affected. He

had spoken and taken part in the discussions as of right, and he had been consulted by the President of the Security Council in the course of consultations carried out by the President.

34. When the Commission had adopted article 78, on the use of terms, in Part IV of the draft, he had been under the impression that the type of representation he had described was covered by the provisions of that article. But a comparison of the definition of a "delegation to an organ" in sub-paragraph (c) of article 78 with sub-paragraph (c) of article 117 on the meaning of the term "observer delegation to an organ", showed that the example he had given appeared to fall outside the scope of both provisions.

35. The Drafting Committee would therefore have to consider carefully the wording of sub-paragraph (c) of article 78 and sub-paragraph (c) of article 117, because those two provisions, if taken together, were certainly not correct.

36. Sir Humphrey WALDOCK said that the draft articles on observers, which the Special Rapporteur had prepared in response to the Commission's request, were based largely on analogy. In the short time available, they had necessarily been formulated by an intellectual process rather than as a result of a thorough examination of the practice in the matter, which was not easy to ascertain quickly.

37. The Commission should at any rate make an attempt to deal with the subject of observers and he would be prepared to agree to the suggestion that the whole subject be referred to the small Working Group, which would examine whether some modified form of the Special Rapporteur's articles 117 to 127 could be included in the Commission's draft, either as an integral part of the draft or as an annex.

38. The Secretariat could perhaps assist the Working Group by providing it with some information on the subject of observers sent to organizations having their headquarters at Geneva. He was not suggesting that any major study be undertaken, but simply that such information as could be readily obtained should be given orally to the Group.

39. Mr. MOVCHAN (Secretary to the Commission) said it would be possible for the Secretariat to give the Working Group, even as soon as its next meeting, some information that was available at Geneva. For example, it could supply information on participation by observers for States that were not Members of the United Nations, but were parties to the Statute of the International Court of Justice, in the work of the General Assembly on amendments to the Statute of the Court.

40. Mr. BARTOŠ said it was important to note the distinction between passive and active observer delegations. That distinction was not always made in practice, but it should be taken into account by the Drafting Committee. It would even be advisable to devote a separate paragraph in each article to each of those categories.

41. An observer delegation was passive so long as it confined itself to observing. It became active when its

function also included taking action to protect the interests of the sending State. When the observer delegation of a State not a member of an organization objected to specific acts by member States, it was representing the sending State and playing a really active role. In such cases the head of the observer delegation abandoned his role of vigilant observer to request permission to speak and to intervene actively in the proceedings, as sometimes happened in the Security Council.

42. Active and passive observer delegations should therefore be dealt with separately in the articles of Part V of the draft.

43. Mr. KEARNEY said the discussion had shown that the subject of observers involved many difficult problems on which there was not much information available. To give one example, article 118, paragraph 2, provided that a State not participating in a conference might send a "delegation" thereto "in accordance with the rules of procedure of that conference". In fact, the rules of procedure of a conference were always adopted after the conference had begun, so that the State sending the observer would not know whether he would be admitted or not. The question was a difficult one and he would not venture to give a definite answer to it at that stage.

44. Mr. USTOR said there was general agreement that the Commission should endeavour to draft a complete set of articles; it should therefore do its best not to omit the subject of observer delegations.

45. The discussion had shown that there were many different kinds of delegations. To illustrate their diversity, he would give an example from a non-universal organization, the Council for Mutual Economic Assistance (CMEA). Yugoslavia, was not a member of the Council, but had entered into a special agreement with it, in virtue of which it participated in the Council's work with a wide range of rights. The delegations of Yugoslavia to certain bodies of the CMEA were more than observers, but less than full fledged delegations of member States.

46. The Commission had now before it the texts of articles 81 to 86, on delegations, as proposed by the Drafting Committee (A/CN.4/L.168/Add.5). Sub-paragraphs (c) and (d) of article 78, on the use of terms, stated the meaning of the terms "delegation to an organ" and "delegation to a conference", without specifying whether those delegations came from member States or from non-member States. The Drafting Committee should consider whether those provisions should take that aspect of the matter into account and whether a separate provision on the functions of delegations should be included in the draft articles.

47. Mr. BARTOŠ said that Mr. Ustor's remarks about Yugoslavia's participation in the CMEA also applied to its participation in a European organization of an entirely different political complexion. To the CMEA, Yugoslavia had sent an observer delegation, appointed as such in accordance with the rules of procedure of that organization. On certain questions, Yugoslavia had undertaken to co-operate and participate in decisions; on others, its delegation had to confine itself to observing and to expressing the opinion of its Government.

48. The position of Yugoslavia was rather different in the Organisation for Economic Co-operation and Development. There, its delegation played an active role in organs and conferences in which matters of direct concern to it were discussed. If it had no direct interest in the questions to be discussed, it was not invited and performed only observer functions.

49. Many other countries were in a similar situation. In addition, some so-called "protecting" States participated in conferences as observers to assist the States taking part. At some regional conferences, there were a number of different statuses for different participating States, some of them allowing the exercise of observer functions pure and simple, and some active participation which might be partial or total.

50. After the First World War, the allies had invited certain States to take part in the drafting of the peace treaties, believing that they had only a limited interest in the proceedings. A distinction had been made between States entitled to be consulted and States entitled to ask to be consulted; thus their observer delegations had not been of the same character. After the Second World War, at the Paris Conference, a similar distinction had been made, together with an additional distinction relating to the oral or written character of the consultations.

51. The sending States had always claimed that their delegations had an active role to play in those conferences. The so-called principal Allied Powers, on the other hand, had maintained that, in view of the so-called "legitimate" interests of the great Powers, the sending States could play only an observer role.

52. The question was thus exceedingly complex; it was important to simplify it as much as possible and not to disregard the two modes of expression he had mentioned.

53. The CHAIRMAN, speaking as a member of the Commission, said he must admit that in spite of his long diplomatic experience, he had little knowledge of the subject under discussion.

54. When the Commission had drafted the Convention on the Law of Treaties, it had excluded unwritten agreements and no one criticized it on that account. It could do the same in the present case. He did not wish to exaggerate the difficulties, but it must be admitted that it would be risky to draft provisions on a little known subject. It was true that the Commission was required to work on the codification and progressive development of international law, but it must not ignore custom and practice either.

55. As matters stood, it should not be too ambitious, but should make a last effort to draw up some simple, easily applicable articles.

56. Sir Humphrey WALDOCK said that all the remarks made about difficulties of the present subject were really connected with the meaning to be attached to the term "observer". The discussion had shown that there were different types of participant and various

degrees of participation in a conference. An attempt should be made to define the term "observer".

57. The CHAIRMAN said that the Commission might perhaps wish to refer the whole of Part V to the Working Group for review in the light of the discussion.

58. Mr. ROSENNE said he had no objection to that course; the Working Group might examine whether a new proposal could be submitted to the Commission. First of all, however, it might be desirable for the Commission to examine briefly articles 119 to 127.

59. Mr. USHAKOV said he thought such an examination would be a waste of time.

60. Mr. SETTE CÂMARA said that the debate on article 118 had shown that the Special Rapporteur's draft articles did not provide an adequate basis for a discussion of the subject of observers. He therefore favoured the idea of referring the document immediately to the Working Group without examining articles 119 to 127.

61. Mr. ALBÓNICO suggested that the Special Rapporteur should be informed of the present discussion and invited to reply to the comments of members.

62. Mr. ROSENNE said that he had not raised any formal objection to the whole series of articles being referred to the Working Group.

63. Mr. CASTRÉN said he was in favour of referring the Special Rapporteur's working paper to the Working Group without further discussion.

64. The CHAIRMAN said that if there were no objections he would take it that the Commission agreed to refer the Special Rapporteur's working paper (A/CN.4/L.173) to the Working Group, together with the comments made at the present meeting and the previous meeting.

It was so agreed.³

QUESTION OF CONFERENCES NOT CONVENED BY INTERNATIONAL ORGANIZATIONS

65. Mr. TAMMES said that he would like to repeat a proposal he had made at an earlier meeting, namely, that the Special Rapporteur be asked to submit an article covering conferences not convened by international organizations.⁴

66. Mr. EUSTATHIADES said that a distinction could be made between, on the one hand, conferences meeting under the auspices of international organizations of a universal character or under the auspices of other international organizations, and on the other hand, conferences not convened by international organizations, that was to say primarily political conferences. That was a question, the Working Group might be asked to clarify.

67. Mr. USHAKOV observed that the last sentence of article 2, paragraph 2, made the draft articles applicable

³ For resumption of the discussion see 1139th meeting.

⁴ See 1105th meeting, paras. 19-23.

to the representatives of States to international organizations not of a universal character if the States members of such organizations so agreed, so that it would be sufficient to draft a similar provision applicable to delegations to conferences not meeting under the auspices of an international organization of a universal character. That being so, it would be better to wait until the Commission came to consider the general provisions before deciding to draft new articles.

68. Mr. ROSENNE said that he too thought the answer to the question would be found in a revised version of article 2, which would be made applicable to the whole draft.

69. Mr. EUSTATHIADES said that the question raised by Mr. Tammes ought not to be ignored. In order to avoid analogies, it ought to be made clear why a distinction should be made between conferences meeting under the auspices of an international organization of a universal character and conferences not connected with any international organization, which might be regional or universal, but would be primarily political in character. However, the scope of the Commission's terms of reference should be carefully considered.

70. Mr. TAMMES said he was not pressing the Commission to ask the Special Rapporteur to prepare articles on the question he had mentioned.

71. Mr. USHAKOV said that in that case perhaps the Working Group might be asked to deal with it.

72. The CHAIRMAN said that if there were no objections he would take it that the Commission agreed to ask the Working Group to study the question of delegations to conferences not meeting under the auspices of an international organization of a universal character.

It was so agreed.⁵

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(*resumed from the previous meeting*)

73. The CHAIRMAN invited the Commission to consider articles 65 to 77 as proposed by the Drafting Committee (A/CN.4/L.168/Add.4).

ARTICLE 65

74. Mr. AGO (Chairman of the Drafting Committee) said that the Drafting Committee had considered it advisable to retain the intentional difference in wording between article 65 and the corresponding article in Part II, namely, article 22. In the latter article, the words "all facilities" were used, whereas article 65 spoke of "the facilities required".

75. The text proposed by the Drafting Committee for article 65, which was unchanged, read:

Article 65
General facilities

The host State shall accord to the permanent observer mission the facilities required for the performance of its functions.

⁵ For resumption of the discussion see 1132nd meeting, para. 9.

The Organization shall assist the permanent observer mission in obtaining those facilities and shall accord to the mission such facilities as lie within its own competence.

76. Mr. YASSEEN said he approved of the wording proposed.

77. Mr. USTOR said that the article as a whole was quite acceptable to him, though he wondered whether the different nuances in the wording of articles 22 and 65 were really necessary.

78. Mr. AGO (Chairman of the Drafting Committee) said that the Drafting Committee would try to meet Mr. Ustor's point at a later stage.

79. The CHAIRMAN said that if there were no objections he would take it that the Commission provisionally approved article 65, on the understanding that it would be re-examined in conjunction with article 22.

It was so agreed.⁶

ARTICLES 66 and 66 bis

80. Mr. AGO (Chairman of the Drafting Committee) said that article 66, as adopted by the Commission in 1970, had dealt with two different questions,⁷ and the Committee had considered it advisable to split it into two separate articles, numbered provisionally 66 and 66 bis, modelled on articles 23 and 24 respectively.

81. The texts proposed for articles 66 and 66 bis read:

Article 66

Premises and accommodation

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

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

Article 66 bis

Assistance by the Organization in respect of privileges and immunities

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

82. Mr. BARTOŠ said that article 66 bis was very useful, because practice had shown that an organization often had to intervene with its member States to secure the enjoyment of some of the recognized rights of permanent observer missions.

83. Mr. YASSEEN said there seemed to be a discrepancy in article 66, between the words *dans le cadre de sa législation*, in the French version, and the words "in accordance with its laws", in the English version.

⁶ For resumption of the discussion see 1132nd meeting, para. 127.

⁷ For previous text and discussion see 1104th meeting, para. 76 *et seq.*

84. Mr. TESLENKO (Deputy Secretary to the Commission) said that the wording in question was taken from article 21 of the Vienna Convention on Diplomatic Relations.⁸

85. The CHAIRMAN said that if there were no objections he would take it that the Commission provisionally approved articles 66 and 66 *bis* as proposed by the Drafting Committee.

*It was so agreed.*⁹

ARTICLES 67¹⁰ and 67 *bis*

86. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made no change in article 67. Article 67 *bis* made the provisions of article 27 *bis*¹¹ applicable to Part III of the draft. The wording of both articles would probably have to be changed when Parts II and III of the draft were combined.

87. The texts proposed for articles 67 and 67 *bis* read:

Article 67

Privileges and immunities of the permanent observer mission

The provisions of articles 25, 26, 27, 29 and 38, paragraph 1 (a), shall apply also in the case of permanent observer missions.

Article 67 bis

Entry into the territory of the host State

The provisions of article 27 *bis* shall apply also in the case of members of the permanent observer mission and members of their families forming part of their respective households.

88. The CHAIRMAN said that if there were no objections he would take it that the Commission provisionally approved articles 67 and 67 *bis* as proposed by the Drafting Committee, pending examination of the texts to be submitted to it after Parts II and III of the draft had been combined.

*It was so agreed.*¹²

The meeting rose at 6.00 p.m.

1123rd MEETING

Tuesday, 22 June 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagnendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168/Add.4 and 5; A/CN.4/L.173)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 68

1. The CHAIRMAN invited the Commission to continue consideration of the draft articles proposed by the Drafting Committee, starting with article 68, on freedom of movement (A/CN.4/L.168/Add.4).

2. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made no change in article 68, the text of which read:

Article 68

Freedom of movement

The provisions of article 28 shall apply also in the case of members of the permanent observer mission and members of their families forming part of their respective households.

*Article 68 was provisionally approved.*¹

ARTICLE 69

3. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made no change in article 69, the text of which read:

Article 69

Personal privileges and immunities

1. The provisions of articles 30, 31, 32, 35, 36, 37 and 38, paragraphs 1 (b) and 2, shall apply also in the case of the permanent observer and the members of the diplomatic staff of the permanent observer mission.

¹ For resumption of the discussion see 1133rd meeting, para. 8.

⁸ United Nations, *Treaty Series*, vol. 500, pp. 106-107.

⁹ For resumption of the discussion see 1132nd meeting, para. 130.

¹⁰ For previous discussion see 1104th meeting, para. 80 *et seq.*

¹¹ For text and previous discussion see 1113th meeting, para. 13 *et seq.*

¹² For resumption of the discussion see 1133rd meeting, para. 3, and 1135th meeting, para. 64.

2. The provisions of article 40, paragraph 1, shall apply also in the case of members of the family of the permanent observer forming part of his household and the members of the family of a member of the diplomatic staff of the permanent observer mission forming part of his household.

3. The provisions of article 40, paragraph 2, shall apply also in the case of members of the administrative and technical staff of the permanent observer mission, together with members of their families forming part of their respective households.

4. The provisions of article 40, paragraph 3, shall apply also in the case of members of the service staff of the permanent observer mission.

5. The provisions of article 40, paragraph 4, shall apply also in the case of the private staff of members of the permanent observer mission.

Article 69 was provisionally approved.²

ARTICLE 70

4. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made no change in article 70, the text of which read:

Article 70

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 members of the permanent observer mission and persons on the private staff who are nationals of or permanently resident in the host State.

Article 70 was provisionally approved.³

ARTICLE 71

5. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had brought the title of article 71 into line with that of article 33 as provisionally approved by the Commission.⁴ Article 71, which referred back to article 33, might perhaps be merged with that article.

6. The text proposed for article 71 read:

Article 71

Waiver of immunity

The provisions of article 33 shall apply also in the case of persons enjoying immunity under article 69.

Article 71 was provisionally approved.⁵

ARTICLE 72

7. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made no change in article 72, the text of which read:

Article 72

Exemption from laws concerning acquisition of nationality

The provisions of article 39 shall apply also in the case of members of the permanent observer mission not being nationals of the host State and members of their families forming part of their household.

Article 72 was provisionally approved.⁶

ARTICLE 73

8. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made no change in article 73, the text of which read:

Article 73

Duration of privileges and immunities

The provisions of article 42 shall apply also in the case of every person entitled to privileges and immunities under the present section.

Article 73 was provisionally approved.⁷

ARTICLE 74

9. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made no change in article 74, the text of which read:

Article 74

Transit through the territory of a third State

The provisions of article 43 shall apply also in the case of the members of the permanent observer mission and members of their families, and the couriers, official correspondence, other official communications and bags of the permanent observer mission.

Article 74 was provisionally approved.⁸

ARTICLE 75

10. Mr. AGO (Chairman of the Drafting Committee) said that the wording of article 75 was identical with that of article 44. The positions of those articles in the final text of the draft had not yet been settled.

11. The text proposed for article 75 read:

Article 75

Non-discrimination

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

12. Mr. YASSEEN said that article 75 should undoubtedly be placed among the general provisions.

13. Mr. KEARNEY said he saw no valid reason for using the expression "as between States"; the same

² For resumption of the discussion see 1133rd meeting, para. 14.

³ For resumption of the discussion see 1133rd meeting, para. 50.

⁴ See 1113th meeting, paras. 69-70.

⁵ For resumption of the discussion see 1133rd meeting, para. 26.

⁶ For resumption of the discussion see 1135th meeting, para. 40.

⁷ For resumption of the discussion see 1133rd meeting, para. 53.

⁸ For resumption of the discussion see 1135th meeting, para. 70.

meaning could be expressed by the shorter form "between States".

14. Mr. AGO (Chairman of the Drafting Committee) said that Mr. Kearney's comment applied only to the English text; he would leave it to the English-speaking members of the Commission to settle the point. Article 75 reproduced the wording of article 44, the article on non-discrimination in Part II of the draft.

15. Sir Humphrey WALDOCK said that the only explanation for the use of the expression "as between" was that it had already been used in the corresponding articles of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on Special Missions.

16. Mr. YASSEEN said that if there were no other justification for their use, he would suggest that the words "as between" be replaced by the word "between".

17. Mr. ROSENNE said he fully agreed that article 75 could be moved into the group of general provisions applicable to the whole draft.

18. He was not at all certain, however, that the proposed text reflected the meaning intended. The original purpose of the two separate provisions in articles 44 and 75, on non-discrimination, had been to state, first, that in the application of all the articles on permanent missions, there must be no discrimination between those missions, and secondly, that in the application of all the articles on permanent observer missions there must be no discrimination between those missions. Care should be taken not to couch the proposed general provision in language which might suggest that there would be no differentiation between permanent missions and permanent observer missions in regard to the non-discrimination rule.

19. Mr. AGO (Chairman of the Drafting Committee) said there could be no question of including in the general provisions a text which might be misconstrued as suggesting that member States and non-member States would be treated in the same way.

20. Mr. KEARNEY said that Mr. Rosenne had raised a valid point, but the opening words of article 75: "In the application of the provisions of the present articles..." would seem to afford sufficient protection, since those provisions did establish a number of differences between the various types of mission. The rule on non-discrimination was only concerned with the application of the provisions of the various draft articles.

21. Mr. ROSENNE said that the point was a difficult one. For his part, he would be satisfied if it could be considered by the small Working Group, in order to ensure that the provision on non-discrimination clearly stated the intended meaning.

22. Sir Humphrey WALDOCK said that the point was not a new one. The general understanding in the matter was along the lines indicated by Mr. Kearney. It would certainly be borne in mind in the final retouching of the articles, when the rule on non-discrimination would be made to cover a considerable number of different provisions.

23. The CHAIRMAN said he noted that the Commission was prepared to approve article 75 provisionally in the form proposed by the Drafting Committee, subject to final retouching and to the general harmonization of the draft articles; the word "as" would be provisionally retained in the English version.

*Article 75 was provisionally approved.**

ARTICLE 76

24. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made no change to article 76, which was likely to be merged with the corresponding provision in Part II.

25. The text proposed for article 76 read:

Article 76

Conduct of the permanent observer mission and its members

The provisions of articles 45 and 46 shall apply also in the case of permanent observer missions.

Article 76 was provisionally approved.⁹

ARTICLE 77

26. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made no change in article 77 which, like the previous article, was likely to disappear at a later stage.

27. The text proposed for article 77 read:

Article 77

End of functions

The provisions of articles 47, 48 and 49 shall apply also in the case of permanent observer missions.

Article 77 was provisionally approved.¹⁰

PART IV. Delegations of States to organs and conferences

ARTICLE 81

28. The CHAIRMAN invited the Commission to consider articles 81 to 86 as proposed by the Drafting Committee (A/CN.4/L.168/Add.5). In article 81, the words "the sending State may appoint a head" had been replaced by the words "the sending State shall appoint a head". The permissive formula, "may appoint", appeared in article 9 of the 1969 Convention on Special Missions¹² and was justified in that Convention, but in the present case it should be replaced by a mandatory formula. A delegation to an organ or to a conference needed

⁹ For resumption of the discussion see 1135th meeting, para. 78.

¹⁰ For resumption of the discussion see 1135th meeting, para. 46.

¹¹ For resumption of the discussion see 1133rd meeting, para. 56.

¹² See General Assembly resolution 2530 (XXIV), Annex.

a head who would be responsible for the activities of the delegation.

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

Article 81

Composition of the delegation

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

30. Mr. USHAKOV, referring to a remark by Mr. Ustor,¹⁸ said that the general question of the status of delegations to organs needed clarification.

31. Although the wording of article 78, dealing with the use of terms in the articles on delegations, was only provisional, it should be noted that according to subparagraph (c), a "delegation to an organ" meant "the delegation designated by a State member of the organ to represent it therein". That wording did not appear to cover the case of the delegation of a State member of an organization which was invited to participate in the work of an organ of which it was not a member, as sometimes happened in the Security Council of the United Nations. In his view, the articles in Part IV should apply to such cases.

32. The Drafting Committee or the Working Group should therefore consider the possibility of widening the scope of the definition of a "delegation to an organ". No such widening was needed for the definition of a "delegation to a conference".

33. Mr. ROSENNE said he had some misgivings about article 81, especially after the Commission's discussion on articles 117 and 118 at the previous meeting.

34. He could not accept the change made in the first sentence of article 81, replacing the words "may appoint" by the words "shall appoint".

35. He was also uneasy about the whole concept of representation as it appeared in article 81. The discussion at the previous meeting had revolved round the distinction between representation and participation in the light of the Vienna Convention on the Law of Treaties. Reference had been made to cases which were not at all rare in which a State sent a person to be present at a meeting or conference, with instructions not to participate in it. It would therefore be going too far to say in article 81 that the sending State "shall appoint" a head of delegation.

36. For those reasons, he reserved his position on article 81 and would ask that the provisions on the various types of delegation, contained in articles 78 and 117, be examined thoroughly.

37. Mr. REUTER said he agreed with Mr. Ushakov's remarks. Everything connected with the organs of an

organization was governed by the relevant rules of the organization.

38. Notwithstanding the general reservation in article 3, the question arose whether the group of articles under consideration did not deal with a case which, although the most frequent, was also a very special one. The members of the delegation of a State to an organ were not always representatives of the State; they were not always appointed by the State and did not necessarily constitute a government delegation provided with a head.

39. It would be interesting to know what was the practice followed by the International Labour Organisation (ILO), for example, where the tripartite character of delegations hardly seemed to fit the provisions under consideration.

40. Mr. AGO (Chairman of the Drafting Committee) said that it was important to take account of the case mentioned by Mr. Ushakov, in which a State member of an organization sent a delegation to an organ of which it was not a member. For example, when States members of the United Nations which were not members of the Economic and Social Council participated in a meeting of that Council, they were not in the same position as States which participated in such a meeting but were not Members of the United Nations.

41. Speaking as a member of the Commission, in reply to Mr. Reuter's question, he explained that at an International Labour Conference, the delegation of each State consisted of two representatives appointed by the government, one representative appointed by the employers' organization, and one representative appointed by the workers' organization. As a body, those four representatives constituted the delegation of the State, to which the articles now under consideration would apply. The situation with regard to the ILO Governing Body was rather different. The persons appointed to the Governing Body by the employers and by the workers did not represent the sending State, but the whole employers' group and the whole workers' group respectively. That situation, however, was peculiar to the ILO and the reservation in article 3 was sufficient to cover it.

42. With regard to the question of the head of the delegation, one of the two government representatives on a delegation to an International Labour Conference was normally senior to the other; but that did not make him the head of the delegation over the employers' and workers' representatives. That was also a peculiarity of the ILO, due to the fact that some members of the delegation were not appointed by the government.

43. Those questions, like many others, arose from the analogies established between Parts II and III of the draft on the one hand, and Part IV on the other.

44. Mr. EUSTATHIADES said he was not sure that the Drafting Committee had been right in making the appointment of a head mandatory for delegations to organs and conferences. While such an appointment appeared to be normal in the case of an international conference, it seemed less consistent with the practice concerning organs of an organization. A delegation to

¹⁸ See previous meeting, para. 45.

an organ might consist of only two persons and the sending State might not wish one of them to be regarded as the superior of the other. Moreover, the obligation to appoint a head of delegation was emphasized by article 86, on the acting head of the delegation.

45. He therefore suggested that the Commission should either restore the former wording of article 81 and merely provide for the faculty to appoint a head of delegation, or make a distinction between delegations to conferences and delegations to organs.

46. Mr. USHAKOV said he believed it was quite usual to appoint a head of delegation, both for delegations to organs and for delegations to conferences. The former wording, "the sending State may appoint a head", had been in conflict with the following articles of the draft, most of which were based on the assumption that there was a head of delegation. Hence the present wording of article 81 was acceptable; it was in conformity with the general practice, subject to the reservation regarding the particular rules of organizations.

47. Mr. REUTER said that while he had no objection to the Commission's continuing to consider the articles in Part IV in the form proposed, he was not in favour of adopting common provisions for delegations to organs and delegations to conferences. The articles proposed were quite satisfactory for conferences, but where organs were concerned the law of the organization should prevail. Assimilating the meeting of an organ to a conference gave the impression that such a meeting constituted a small conference, which might perhaps be true of principle organs, but not of subsidiary organs.

48. Mr. YASSEEN said that the proper functioning of a delegation logically required the appointment of a head. Logic, however, was not sufficient to justify a legal rule. While it was true that there was no customary rule which made such an appointment compulsory, the practice was certainly widespread. In the United Nations, when a head of delegation was not expressly appointed, it was even assumed that the first name on the list of members of the delegation was that of the head, unless otherwise indicated.

49. The present wording of article 81 did not reflect the real position exactly, but it could nevertheless contribute to the progressive development of international law.

50. Mr. CASTRÉN said that, by making it compulsory to appoint a head of delegation, the Drafting Committee had formulated a rule which would contribute to the satisfactory operation of organs and conferences. That rule did not have any drawbacks and was consistent with the general practice. There were exceptions to that practice, but they should not be encouraged. The proposed text of article 81 was therefore quite satisfactory.

51. Mr. AGO (Chairman of the Drafting Committee) said that Mr. Reuter's comments were very apt; he agreed with him and Mr. Ushakov that it was not possible to place conferences and organs on an equal footing, particularly organs with a small membership. In the case of the International Labour Conference or the

World Health Assembly, which had the characteristics of conferences, it was almost mandatory to appoint a head from among the members of each delegation, because it was necessary in certain circumstances for a single person to represent the delegation. On the other hand, for such organs as councils and committees, delegations to which generally consisted of only one person, it was less appropriate to provide for the appointment of a head or to refer to the staff of a delegation.

52. Hence it might perhaps be advisable for the Working Group to try to find more adequate wording.

53. Mr. USTOR said the discussion had shown that there was a considerable difference in kind between a conference and a meeting of an organ. The different situations would have to be kept clearly in mind when drafting the various articles.

54. In the draft, the Commission had been concerned exclusively with delegations appointed by States; it had thus excluded organs consisting of persons who did not act as representatives of States, such as the International Law Commission itself.

55. At a conference of representatives of States, the situation was comparatively simple; the participating States played a full role in the conference, as distinct from the observers. A meeting of an organ, however, could be attended by representatives both of member States and of non-member States. At the previous meeting, he had referred to the case of the Council for Mutual Economic Assistance, in which certain non-members participated with full rights, on a par with the representatives of the member States.

56. There were two kinds of observer at meetings of organs: first, an observer for a State not a member of the organization, and second, an observer for a State which was a member of the organization, but not of the organ in question. Those facts should be borne in mind when drafting definitions and other provisions.

57. Sir Humphrey WALDOCK said he hoped the Commission would not try to include in the draft any provisions on the subject of persons who were members of an organ but did not act as representatives of States. The Commission had adopted the title "Relations between States and international organizations" for the express purpose of putting some limitation on the investigation; its work on that topic was designed to establish a bridge between diplomatic law and the law of international organizations.

58. The intention was to deal with the representation of States. Apart from members of organs who acted in their personal capacity, there were other persons who participated in the work of an international organization. To give one example, in the United Nations individuals had been summoned to give their opinions or to state facts. The participation of such individuals in meetings of the Organization raised important problems. Any attempt to cover all those situations would lead the Commission too far; for example, it would not be possible to exclude consideration of the case of judges of the International Court of Justice, who had a special position as members of the highest judicial body of the Organization.

59. On the subject of the different kinds of participation, he thought the Commission would become involved in difficult problems if it tried to cover every conceivable case. It should deal with the main categories, without being unduly concerned if certain particular cases were not covered. Considerable care would have to be exercised, however, with regard to terminology; it might even be necessary to convert the term "observer" into a term of art. For example, the representative of a member State who participated in the meeting of an organ of which his State was not a member and who took part in the discussion without the right to vote, was not an observer in the sense in which that term was used in the present draft.

60. Mr. USTOR said he agreed that some limits had to be set to the Commission's work on the present topic. He had not made any formal proposal, but had merely enlarged upon an idea put forward by Mr. Reuter. It was obvious that at the present stage it would be very difficult to extend the scope of the Commission's work on the item under study.

61. The CHAIRMAN observed that the Chairman of the Drafting Committee had himself suggested that the wording of article 81 be re-examined and his suggestion had received wide support; he therefore proposed that the Commission refer article 81 back to the Drafting Committee for review in the light of the opinions expressed during the discussion.

*It was so agreed.*¹⁴

ARTICLE 82

62. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that article 82 corresponded to article 16, on the size of the permanent mission. In order to align those parts of the text which were common to both articles, the Committee had made two changes in article 82: it had replaced the expression "a delegation" by "the delegation", and the expression "reasonable or normal" by "reasonable and normal".

63. Article 16 referred to "the functions of the Organization"; article 82 had previously referred to "the tasks of the Conference". In the commentary to article 82,¹⁵ it was stated that "The Commission was of the opinion that the word 'tasks' was more appropriate than 'functions' in relation to conferences". The Drafting Committee, too, thought that the same term could not be employed for organizations and for conferences, but it considered that in the case of conferences it was preferable to replace the word "tasks" by "object".

64. The Committee had also moved the words "as the case may be" to make the text read easily. Lastly, it had slightly changed the drafting of the French and Spanish versions.

65. The text proposed by the Drafting Committee for article 82 read:

Article 82

Size of the delegation

The size of the delegation to an organ or to a conference shall not exceed what is reasonable and normal, having regard, as the case may be, to the functions of the organ or the object of the conference, as well as the needs of the particular delegation and the circumstances and conditions in the host State.

66. Mr. EUSTATHIADES said he approved of the changes made by the Drafting Committee.

67. With regard to the substance of the article, it should be clearly understood that, in drafting the provisions relating to delegations to organs and to conferences, the Commission had in many cases been prompted by a desire to simplify and unify the draft as a whole. Thus each provision did not necessarily correspond to a need, and in the particular case of article 82, which the Commission had wished to align with the corresponding article on permanent missions, there was some danger of lack of clarity, in particular as to what was "reasonable and normal" for the size of the respective delegations of different States, depending on the importance they attached to the meeting or conference. It was important that clear explanations should be given in the commentary.

68. Mr. ROSENNE said he found it difficult to accept article 82 in its present form; in his opinion, it was far too closely aligned with article 16. What was "reasonable and normal" could be understood in connexion with article 16, but he did not see how those words could be used with reference to a conference, which might meet only once in a human lifetime, or with reference to the meetings of an organ which, like the Economic and Social Council, might meet three or four times a year, for a different purpose on each occasion. While the word "reasonable" might be retained, he suggested that it would be better to delete the words "and normal".

69. Mr. CASTRÉN said that, in principle, he was opposed to the provision contained in article 82, particularly the condition imposed by the words "having regard... to... the circumstances and conditions in the host State", which could lend themselves to any interpretation. However, in the interests of uniformity he was prepared to accept the article, on condition that, as Mr. Eustathiades had requested, it was made clear in the commentary how the provisions should be interpreted in practice.

70. Mr. USHAKOV, speaking on behalf of the Drafting Committee said that in the phrase "reasonable and normal", to which Mr. Rosenne objected, the two adjectives were more or less synonymous, so that there was no reason why they should not be used side by side.

71. Speaking as a member of the Commission, he said he had doubts about the reservations relating to "the needs of the particular delegation" and, particularly, "the circumstances and conditions in the host State", since a State did not invite an organ or a conference to meet in its territory unless the circumstances and conditions were appropriate. Those points were of minor importance, however, and he could accept the article as drafted.

¹⁴ For resumption of the discussion see next meeting, para. 4.

¹⁵ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

72. Mr. ROSENNE said that if the words "reasonable" and "normal" were synonymous, the present expression was a mere pleonasm and the words "and normal" should be deleted.

73. Mr. SETTE CÂMARA said he had always maintained that those words were not synonymous. He suggested that the expression be amended to read "reasonable or normal"; alternatively, some clarification should be provided in the commentary.

74. Mr. KEARNEY said he could see little difference between the expressions "reasonable and normal" and "reasonable or normal". The only purpose of article 82 was to balance article 81, and if the latter article was accepted, he felt that article 82 should be retained as it stood.

75. Mr. USHAKOV said that both in article 16 of the draft and in article 11 of the Vienna Convention on Diplomatic Relations it was the word "and" that was used, and it was by mistake that the word "or" had been used in the former version of article 82.

76. Mr. ALBÓNICO said that the fundamental idea in article 82 was that the size of the delegation should not exceed what was necessary for performing the functions of the organ or for the object of the conference. Anything in addition to the word "necessary" was therefore superfluous and should be deleted.

77. Sir Humphrey WALDOCK said that the present formulation was to be found in the Vienna Conventions on diplomatic and consular relations, but not in the Convention on Special Missions. It was true that the word "reasonable" overlapped in some degree with the word "normal". But the latter word did seem to introduce an additional criterion, which was perhaps even more valid in multilateral than in bilateral diplomacy; for "normality" could be measured by reference to the general practice of the member States as a whole. He therefore thought that the Commission could retain the present wording of article 82 without too many difficulties.

78. Mr. BARTOŠ said he was in favour of retaining the two words "reasonable" and "normal". Not only had they been used in previous conventions, but they were used in the present case to take account of the fact that staffing requirements for any given conference varied from one State to another, depending on how important the conference was both in general ("normal") and to each State ("reasonable"). The Commission should not allow itself to be guided by purely aesthetic considerations and should not hesitate to use particular terms if they covered general needs and the special needs of the States concerned.

79. Mr. NAGENDRA SINGH said it was true that delegations to conferences were of a different nature from permanent missions and there was considerable force in the argument that while the word "reasonable" might be applicable to them the word "normal" was not, since conferences were essentially *ad hoc* by nature and there was no normality about them. However, conferences were now being convened very frequently, so that

a norm might develop for them too. On the whole, therefore, he was inclined to think that the present text of article 82 should be accepted.

80. Mr. REUTER said that article 82 was a compromise which could not completely satisfy any member of the Commission. But as the articles constituting Part IV of the draft would apply only to organs which resembled conferences, he was prepared to accept it.

81. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 82 as proposed by the Drafting Committee, on the understanding that the opinions which might throw light on its meaning would be mentioned in the commentary.

It was so agreed.¹⁶

ARTICLE 83

82. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that with a view to improving the drafting of article 83 without changing the substance, the Committee proposed that it should read:

Article 83

Principle of single representation

The delegation of a State to an organ or to a conference may represent only that State.

83. The Drafting Committee thought it would be useful to stress in the commentary that the principle stated in article 83 was subject to the general reservations in articles 3, 4, 79 and 80 and hence did not affect the multiple representation practices mentioned by several governments in their written observations.

84. The Committee had noted that Parts II and III of the draft contained no provisions corresponding to article 83. It considered that there would be less objection to multiple representation in the case of a permanent mission or a permanent observer mission than in the case of a delegation to an organ or to a conference. In the latter case, however, it was possible to derogate from the general principle by virtue of the rules of procedure of the organ or conference.

85. The Drafting Committee's proposals thus related more to the commentary than to the text of the article.

86. Mr. REUTER said he could accept the text of article 83, but for different reasons in the two different cases of delegations to organs and delegations to conferences. In the first case, there was no other possible solution and the article expressed a very important rule of law, which was indisputable as a general principle. In the second case, he also accepted that rule because the question of a delegation representing several States raised very delicate political problems and what had weighed with the Drafting Committee had been the description of the practice followed by the United

¹⁶ For resumption of the discussion see 1133rd meeting, para. 105.

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

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

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

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

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

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

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

93. Mr. USTOR said he thought the Commission could accept article 83, provided that it was stated explicitly in the commentary that the Commission was fully aware of the reasons why the article departed from the corresponding articles of the Vienna Conventions on diplomatic and consular relations.

94. Alternatively, the article might be amended to read: "The delegation of a State to an organ or to a conference shall in principle represent only that State."

95. Sir Humphrey WALDOCK said he feared that article 83 in its present form was too strict and would not be accepted by States. He would prefer some such wording as "The delegation of a State to an organ or to a conference may represent more than one State if the rules of the organ or the conference so admit".

96. Mr. NAGENDRA SINGH said he agreed with

Sir Humphrey Waldoack that article 83 in its present form would not be acceptable to States. It would be better to leave the matter to be decided in accordance with the rules of the organ or conference.

97. Mr. USHAKOV said his impression from the discussion was that members were not divided on the substance of article 83 so much as on how to express the idea it contained.

98. The principle that the delegation of a State could represent only that State was incontestable, but there were possible exceptions, provided for in article 80 which the Commission had not yet examined since it was a general provision under which the provisions of article 83 were subject to the rules of procedure of a conference. Moreover, article 3 made the application of the draft articles as a whole subject to the relevant rules of the organization. He saw no objection to referring back to the provisions of articles 3 and 80 in article 83, though it seemed to be a needless repetition. In his view, the Commission could accept the article as it stood.

99. Mr. EUSTATHIADES said he thought the discussion showed that the provision was too rigid. Various amendments had been proposed. Personally, he was in favour of using a positive rather than a negative formulation and saying "The delegation of a State to an organ or to a conference shall represent only one State".

100. In addition, it should be explained in the commentary that the word "delegation" meant a delegation as a whole, but that some of its members could represent another State; that would make for more flexibility and take account of the exceptional cases.

101. The CHAIRMAN observed that the differences of opinion did not relate to the substance of the article, but several drafting changes had been proposed. If there were no objection he would take it that the Commission wished to refer article 83 back to the Drafting Committee for reconsideration in light of the proposals made.

*It was so agreed.*¹⁸

The meeting rose at 1.15 p.m.

¹⁸ For resumption of the discussion see next meeting, para. 19.

1124th MEETING

Friday, 25 June 1971, at 10.15 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldoack, Mr. Yasseen.

¹⁷ See 1105th meeting, para. 54 *et seq.* and 1106th meeting.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168/Add.5 and 6; A/CN.4/L.170/Add.3)

[Item 1 of the agenda]

(continued)

1. Mr. ALBÓNICO said that as the present meeting was the last meeting of the Commission that he would be able to attend, he wished to take the opportunity of placing on record his thanks to the members of the Commission for the kindness they had shown him and of wishing them every success in their future work.
2. The CHAIRMAN said he was sure he had the support of the whole Commission in thanking Mr. Albónico for his valuable co-operation.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

3. He then invited the Commission to consider article 81 as adopted by the Drafting Committee on second reading (A/CN.4/L.170/Add.3).

ARTICLE 81

4. Mr. AGO (Chairman of the Drafting Committee) said that the main question raised by article 81 was whether the appointment of a head of delegation should be optional or compulsory. At the first reading, the Drafting Committee had replaced the words "the sending State may appoint a head" by the words "the sending State shall appoint a head", but some members of the Commission had objected to that change.¹ Having thought the matter over, the Drafting Committee had decided to maintain that amendment. It considered that the host State and the organization ought to know at all times who was the person responsible for the delegation. If no head of delegation was appointed, certain provisions of the draft could not be applied, for example, the provision in article 94 relating to the consent of the head of delegation to entry of the premises in case of some disaster that seriously endangered public safety.
5. The text proposed by the Drafting Committee for article 81 accordingly read:

Article 81

Composition of the delegation

A delegation to an organ or to a conference shall consist of one or more representatives of the sending State from among whom the sending State shall appoint a head. It may also include diplomatic staff, administrative and technical staff and service staff.

6. Mr. ROSENNE said that his position on article 81 remained unchanged. The responsible person in an emergency was clearly the permanent representative, not the

head of the delegation. Since the premises of a delegation would normally form part of the premises of the permanent mission, in the event of fire, for example, the authorities would undoubtedly have to contact the head of the permanent mission, not the head of the delegation.

7. Mr. USHAKOV said it was essential, not only for practical reasons, but also to preserve the logic of the draft articles, to provide that there must be a head of delegation, since several provisions in the draft, in particular article 86, on the acting head of the delegation, and article 94, on the inviolability of the premises, would otherwise lose some of their meaning.

8. As the question was of secondary importance and as a State which did not wish to appoint a head of delegation would not in any event be obliged to do so, there was no danger that governments would not accept that provision, so there was no reason why the Commission should not approve article 81.

9. Mr. AGO, referring to Mr. Rosenne's remarks, said that the premises of a delegation were not necessarily the same as those of the permanent mission; that applied, for example, to some delegations to the Committee on Disarmament, which enjoyed complete autonomy.

10. Again, the head of the permanent mission was not necessarily head of the delegation and it was the latter who was solely responsible for everything that concerned the delegation.

11. Mr. BARTOŠ said he shared Mr. Ushakov's opinion.

12. He also agreed with Mr. Ago. Although it was true that in many cases the permanent mission and a delegation to an organ or to a conference were one and the same, that was not always the case and the Drafting Committee had therefore been right to try to keep the two questions separate.

13. Mr. ROSENNE said that the main point at issue was that the text proposed by the Drafting Committee made it mandatory for the sending State to appoint a head of delegation, in contrast to the former draft, which had been in permissive form. In his view, the former draft would meet all the points of view expressed.

14. In normal cases, a head of delegation would be appointed, but there might be particular reasons that would make it difficult to do so. It was a question which should be left to States to decide for themselves. Where a delegation had separate premises, the sending State would obviously appoint someone to be in charge. Furthermore, it could not be argued that the appointment of a head of delegation was essential for purposes of communication, since communication with a delegation as such was a normal form of diplomatic communication. He believed, therefore, that it would be preferable to retain the previous wording of article 81.

15. Mr. NAGENDRA SINGH said that there were three basic reasons why the Drafting Committee had maintained its proposal. First, State practice required that, if a delegation consisted of more than one person, a head of delegation should be appointed. Secondly, there

¹ See previous meeting, para. 28 *et seq.*

was the problem of communication. The need to enter the premises of a delegation in the event of fire was a very rare occurrence, but communication between a member State and the organization or the conference secretariat was an everyday occurrence. Consequently, if a delegation consisted of several members, it was essential that a head should be appointed for communication purposes. Thirdly, as Mr. Ushakov had pointed out, there were references to the head of the delegation in other articles, and the draft would be incomplete if provision was not made for the appointment of a head of the delegation in the article dealing with its composition.

16. Where a delegation consisted of only one member, the question clearly did not arise, but where a head of delegation was needed, the mandatory form proposed by the Drafting Committee was preferable. He therefore supported the text proposed by the Drafting Committee.

17. Sir Humphrey WALDOCK said he too thought that, on balance, it would be better to retain the mandatory form.

18. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved the text of article 81 as adopted on second reading by the Drafting Committee.

It was so agreed.²

ARTICLE 83 (Principle of single representation)

19. The CHAIRMAN invited the Chairman of the Drafting Committee to explain the Drafting Committee's recommendation (A./CN.4/L.170/Add.3) concerning article 83 (A./CN.4/L.168/Add.5).

20. Mr. AGO (Chairman of the Drafting Committee) said that article 83, which stated the principle of single representation, had been criticized by some members of the Commission³ and by several governments, which had cited many instances of multiple representation.

21. After due consideration, the Drafting Committee had reached the conclusion that the article mainly concerned the procedures by which organizations and conferences took their decisions in particular voting which came under the internal law of organizations and conferences, rather than relations between States and international organizations. The Committee therefore recommended that article 83 be deleted and that the decision be clearly explained in the commentary.

22. Mr. YASSEEN supported that recommendation. Since the principle of single representation was not part of positive international law, the Commission should not prejudge the settlement of that question by taking a definite position.

23. Mr. EUSTATHIADES said that he too supported the Drafting Committee's recommendation. It might

perhaps be better to deal with the question in the commentary to article 81 by saying that one delegation could not represent more than one State, but that that did not prevent one or more of its members from being attached to another delegation.

24. It should also be made clear that the Commission had not wished to give formal approval to the principle of multiple representation. However, the solution proposed was flexible enough to allow extreme cases to be settled by the rules of procedure of the organ or the conference.

25. Sir Humphrey WALDOCK said he supported the proposal to delete article 83, but for reasons slightly different from those advanced by the Chairman of the Drafting Committee. Although the question of single representation had a certain interest in the context of the diplomatic law of relations between States and international organizations, it was of much greater interest in the context of the general law of international organizations, more especially in connexion with voting. Consequently, if the principle was to be codified, it would be preferable to do so in that more general context.

26. Mr. CASTRÉN endorsed Mr. Yasseen's opinion.

27. Mr. USHAKOV said that, in his view, it was a well-established principle of contemporary international law that the delegation of a State could represent only that State. It was on the basis of that principle that the Commission had drawn up its draft articles, which presupposed that each permanent mission, each permanent observer mission, and each delegation to an organ or to a conference, represented one State.

28. Derogation from that principle was permitted if the rules of the organization or the rules of procedure of the conference did not provide otherwise, so there was no reason why the rule should not be stated, so long as it was made subject to that reservation. The principle remained, however, and the situation would be unchanged even if article 83 were deleted. Consequently, he would not press for its retention.

29. Mr. SETTE CÂMARA said he supported the recommendation that article 83 be deleted. The Drafting Committee and the Commission itself had considered many different formulations stating the principle of single representation, but including a reservation which in many cases was tantamount to a denial of the principle. It would be better, therefore, to leave the question to the practice of international organizations.

30. It might prove useful at some time in the future to recognize the principle of multiple representation, since international organizations would be increasingly faced with the problem of proliferation of membership in the form of micro-States.

31. The CHAIRMAN said that if there were no objection he would take it that the Commission approved the Drafting Committee's recommendation to delete article 83.

It was so agreed.

² For resumption of the discussion see 1133rd meeting, para. 102.

³ See previous meeting, para. 82 *et seq.*

ARTICLE 84

32. Mr. AGO (Chairman of the Drafting Committee) said that in article 84, the Committee had made only a few drafting changes in the Spanish version. The text proposed read:

*Article 84**Appointment of the members of the delegation*

Subject to the provisions of articles 82 and 85, the sending State may freely appoint the members of its delegation to an organ or to a conference.

33. Mr. EUSTATHIADES said he wished to draw attention to the weakness of the content of article 84, which amounted to nothing more than a reservation concerning articles 82 and 85. The principle of the freedom of choice accorded to the sending State in the appointment of the members of its delegation was so self-evident a fact that it added nothing essential to the text. Thus the mention of that principle was justified only by the desire for uniformity with the other parts of the draft.

34. Mr. USTOR said that Mr. Eustathiades's point was a valid one, but article 84 should be looked at in the context of existing instruments or conventions, all of which contained a similar article. It would not be advisable to drop it altogether.

35. Mr. YASSEEN said he agreed with Mr. Eustathiades. The provision in article 84 added nothing to the draft articles. It was borrowed from the Vienna Convention on Diplomatic Relations,⁴ where it was clearly useful, if only to avoid any misunderstanding over the meaning and scope of the approval of the receiving State, which was in no sense a participation in the appointment of the head of the mission, that being left to the sending State. In the case of delegations, where no *agrément* was required, there was no need for a detailed explanation.

36. Sir Humphrey WALDOCK said that the same criticisms could be made of the text of the Convention on Diplomatic Relations. The main point of the article, which was now a familiar feature of drafts of that kind, was the reference to the restricting articles 82 and 85.

37. Mr. SETTE CÂMARA said he still thought it was useful to reaffirm the principle of freedom of appointment, since it was important to emphasize that there could be no opposition whatsoever to the appointment of members of a delegation.

38. Mr. CASTRÉN said he was in favour of retaining article 84, which laid down a very important principle. To avoid any misunderstanding, that principle should be clearly stated. The presence of the article in the draft could do no harm, whereas its deletion might cause difficulties.

39. Mr. ROSENNE said he shared the view that it was essential to include the principle of free appointment of

the members of the delegation. Although there were other ways in which that principle could have been included in the draft, it was preferable to retain the article as it stood.

40. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 84 as proposed by the Drafting Committee.

It was so agreed.⁵

ARTICLE 85

41. Mr. AGO (Chairman of the Drafting Committee) said that in article 85 the Committee had made only a few drafting changes in the Spanish version. The text proposed read:

*Article 85**Nationality of the members of the delegation*

The representatives and members of the diplomatic staff of a delegation to an organ or to a conference should in principle be of the nationality of the sending State. They may not be appointed from among persons having the nationality of the host State, except with the consent of that State which may be withdrawn at any time.

Article 85 was provisionally approved⁶

ARTICLE 86

42. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made two changes in article 86. In paragraph 1, it had replaced the words "an acting head may be designated" by the words "an acting head shall be designated". Articles 18 and 62 made the designation of a *chargé d'affaires ad interim* obligatory in the absence of a permanent representative or a permanent observer. It therefore seemed logical to adopt a similar provision with respect to the head of a delegation.

43. The Drafting Committee had thought that, in paragraph 2, the words "another person may be designated as in paragraph 1 of this article" were not a happy choice and had replaced them by the words "another person may be designated for that purpose".

44. The Committee had also made some minor drafting changes in the Spanish version.

45. The text proposed for article 86 read:

*Article 86**Acting head of the delegation*

1. If the head of a delegation to an organ or to a conference is absent or unable to perform his functions, an acting head shall be designated from among the other representatives in the delegation by the head of the delegation or, in case he is unable to do so, by a competent authority of the sending State. The

⁵ For resumption of the discussion see 1133rd meeting, para. 76.

⁶ For resumption of the discussion see 1135th meeting, para. 37.

⁴ United Nations, *Treaty Series*, vol. 500, p. 100, article 7.

name of the acting head shall be notified to the Organization or to the conference.

2. If a delegation does not have another representative available to serve as acting head, another person may be designated for that purpose. In such case credentials must be issued and transmitted in accordance with article 87.

46. Mr. ROSENNE said he was opposed to the change from the permissive to the mandatory in paragraph 1, for much the same reasons as in the case of article 81. Once that change had been made, however, it was hard to see the logic of leaving paragraph 2 in the permissive form, since that would allow a delegation to remain without a head.

47. The CHAIRMAN said that Mr. Rosenne's point would be noted. If there were no other objection he would take it that the Commission provisionally approved article 86 as proposed by the Drafting Committee.

It was so agreed.⁷

ARTICLE 87^a

48. Mr. AGO (Chairman of the Drafting Committee) said that the main change made by the Drafting Committee in article 87 was the replacement of the words "if that is allowed by the practice followed in the Organization", in paragraph 1, by the words "if the rules of the Organization so admit". The Committee had also changed the position of that clause so as to make it clear that it referred only to the case in which the credentials were issued by another competent authority of the sending State.

49. The Committee had considered the word "practice" too narrow and had preferred to use the word "rules", which already appeared in articles 6 and 52 as provisionally approved at the present session. In its commentary to article 3, which stated a general reservation regarding the relevant rules of the organization, the Commission had specified that "The expression 'relevant rules of the Organization'... is broad enough to include all relevant rules whatever their source: constituent instruments, resolutions of the organization concerned or the practice prevailing in that organization".⁸

50. The Drafting Committee had inserted the words "the competent organ of" between the words "shall be transmitted to" and "the Organization" in paragraph 1, so as to bring that paragraph into line with the corresponding provisions in articles 12 and 57. However, the Working Group might propose the adoption of the words "and shall be transmitted to the Organization" for all articles, so the Commission would be adopting a provisional text. The same applied to paragraph 2.

51. The text proposed by the Drafting Committee read:

⁷ For resumption of the discussion see 1133rd meeting, paras. 112-114.

⁸ For previous text see 1106th meeting, para. 51, 1133rd meeting, para. 112.

⁹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 198, para. (5).

Article 87

Credentials of representatives

1. The credentials of a representative to an organ shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or, if the rules of the Organization so admit, by another competent authority of the sending State, and shall be transmitted to the competent organ of the Organization.

2. The credentials of a representative in the delegation to a conference shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or, if the rules of procedure of the conference so admit, by another competent authority of the sending State, and shall be transmitted to the competent organ of the conference.

52. Mr. CASTAÑEDA referring to paragraph 1, said it was usual for the credentials of a representative to one of the main organs of the United Nations, such as the Security Council or the General Assembly, to be issued by the Ministry of Foreign Affairs, but in the case of representatives to subordinate bodies, some of which were extremely important politically, credentials were frequently issued by the head of the permanent mission. Although, technically and legally speaking, the phrase "by another competent authority of the sending State" could be interpreted as covering that possibility, he thought it would be preferable to include a specific reference to it in the article. Those considerations did not apply to paragraph 2.

53. Mr. AGO said he thought the words "another competent authority" covered all possible cases, including those in which the credentials were not transmitted, but actually issued, by the permanent representative. The word "credentials" was also sufficiently broad.

54. Mr. ROSENNE said he was inclined to share Mr. Castañeda's misgivings. Some rules of procedure required that credentials should be issued in the form specified in the article, but in other cases there was a great deal more flexibility.

55. The reference to "another competent authority" was somewhat ambiguous, since it was not clear whether it meant competent in the eyes of the sending State, or competent in the eyes of the organization. In the case of organs, it would perhaps be better not to limit the article to credentials, since in most cases all that was required, and the only document produced, was a letter of appointment. Perhaps a sub-paragraph might be included dealing with that practice.

56. Different considerations applied to conferences, and paragraph 2 was correctly formulated.

57. With regard to the comment by the Chairman of the Drafting Committee that the phrase "the competent organ of" might be deleted, he was not sure that that would be correct in the case of paragraph 2. It might, therefore, be preferable to have two separate articles, the first dealing with appointment to organs, distinguishing between principal and other organs, and the second with credentials to participate in a conference.

58. Mr. YASSEEN said that article 87 was well drafted. It had the merit of covering all the possible cases,

including the practice of international organizations. The Commission would be making a mistake if it clung to the ceremonial formulas of nineteenth century diplomacy and dwelt on subtle distinctions between different kinds of credentials. The credentials of a representative were an instrument showing that he was authorized to act on behalf of a State, and even a note from a permanent mission, which represented the sending State, should be sufficient for that purpose.

59. Mr. EUSTATHIADES said he thought that a permanent representative was covered by the words "another competent authority", but the question, which had been raised for the first time in the Commission by Mr. Castañeda, should be clarified, at least in the commentary. The confusion might be due to the use of the words "shall be issued by": credentials did not necessarily show the original source of a representative's authority, but might be a document attesting it, which could be issued by the permanent delegation under powers conferred, for example, by the Ministry of Foreign Affairs, or by virtue of an established practice. Such details were too subtle to be easily reflected in the text of the article. Nevertheless, it would be advisable to include Mr. Castañeda's observations in the Commentary.

60. The CHAIRMAN, speaking as a member of the Commission, said that he understood Mr. Castañeda's concern. The practice he had mentioned did exist and the Commission would be well advised not to minimize unduly the role and functions of permanent representatives, who had very wide powers.

61. Mr. CASTAÑEDA said his sole concern was that what most frequently occurred in practice was precisely the case that was not mentioned in the draft article. He agreed with the Chairman of the Drafting Committee that technically and legally it was covered by the phrase "another competent authority". In using that expression, however, the Commission had mainly had in mind the possibility that other ministries might issue the credentials of representatives to conferences dealing with their particular fields. It was not true to say that the permanent representative merely transmitted credentials; in many cases it was he who decided which member of his mission should act as representative to an organ and he who signed the credentials. Consequently, he still maintained that it was worth mentioning that practice in the article.

62. Mr. KEARNEY said it was quite clear from the discussion in both the Commission and the Drafting Committee that the phrase "by another competent authority of the sending State" was intended to include permanent representatives. It would only confuse the drafting to add a specific reference to permanent representatives and it was unlikely that the present text could be improved upon.

63. Mr. YASSEEN said that the words "another competent authority" certainly referred to permanent missions. There could be no doubt that such missions were competent to attest that the representative designated had in fact been appointed by the sending State.

64. Mr. NAGENDRA SINGH said he entirely agreed with Mr. Castañeda that the permanent representative did actually issue credentials, but in his view the case was adequately covered by the words "another competent authority". The most that could be done was to mention the issue of credentials by permanent representatives in the commentary. Article 87 should be approved as it stood.

65. Sir Humphrey WALDOCK said he agreed that the present text fully covered the situation.

66. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 87 as proposed by the Drafting Committee, on the understanding that Mr. Castañeda's observations would be covered in the commentary.

*It was so agreed.*¹⁰

Co-operation with other bodies

[Item 9 of the agenda]

(resumed from the 1108th meeting)

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

67. The CHAIRMAN invited Mr. Aja Espil, observer for the Inter-American Juridical Committee, to address the Commission.

68. Mr. AJA ESPIL (Observer for the Inter-American Juridical Committee) said that the fruitful co-operation between the Committee and the International Law Commission responded to the aspiration to universality in international law, to which the regional intergovernmental organizations contributed by providing multiple approaches to legal problems.

69. The Inter-American Juridical Committee, with its new structure as one of the main organs of the Organization of American States (OAS) and its expanded membership of eleven, had met for the first time in extraordinary session from 31 August to 6 October 1970 to examine, at the express request of the OAS General Assembly, the question of the formulation of one or more draft inter-American instruments on the subject of kidnapping and other attacks against persons which could affect international relations.

70. The Committee had taken as its starting point a resolution of the OAS General Assembly condemning all acts of terrorism, in particular kidnapping and related acts of extortion, and characterizing them as serious common crimes. The Committee had thus not been called upon to express an opinion on those principles, but merely to formulate them as rules. Nevertheless, bearing in mind the different views expressed in the Committee on the formulation of the draft, its members had placed it expressly on record that that absence of

¹⁰ For resumption of the discussion see 1133rd meeting, para. 79.

unanimity did not affect the general concensus on the repudiation and condemnation of terrorism.

71. The Committee had had to consider a number of preliminary questions, such as whether the acts in question constituted crimes against municipal law or against international law, and whether, in the case of the kidnapping of diplomats, the crime was primarily a matter for the international community or for the national community. The Committee had thus had to consider the problem of internationally wrongful acts, on which it had taken into account the views expressed by certain distinguished members of the International Law Commission.

72. The Committee had noted that, as far as municipal law was concerned, practically all States had adequate provisions in their criminal law to deal with the crimes considered, so that the essence of the problem lay in its international aspects. When kidnapping diplomats, for example, the offenders succeeded in creating an international conflict of interests by inducing the sending State to bring pressure to bear on the receiving State. The sending State was thus faced with the dilemma of choosing between its anxiety to save the life of its ambassador and its concern for the inviolability of the legal order of the receiving State. A process was thus set in motion whereby State authorities were led to contribute to the undermining of the very rule of law.

73. The draft convention prepared by the Committee dealt with two situations: first, acts of terrorism, in particular kidnapping and related acts and, secondly, the perpetration of those offences against the representatives of foreign States. The Committee considered that both categories of offences, although they occurred at the national level, mainly affected the international community and therefore came within the scope of international law. The draft Convention therefore described them as common crimes having international repercussions, but did not go so far as to regard them as international crimes proper. Its approach thus largely coincided with USSR doctrine, which drew a distinction between violations of international law and international crimes such as genocide, which destroyed the very foundations of international law.

74. The central idea of the Committee's draft was the prevention and punishment of acts of terrorism in so far as those acts constituted attacks against the international community and violations of human rights. It should be noted that subsequently, in January 1971 at Washington, the member States of the OAS had adopted a Convention on the subject, though it dealt only with attacks against the life and physical integrity of persons to whom the State had a duty to extend special protection in accordance with international law.

75. The Committee had held its regular session in March and April 1971 and had examined its own draft statute, following the decision of the OAS General Assembly not to adopt an earlier draft prepared by the Committee's predecessor. An interesting problem had arisen over article 2 of the draft statute, which stated that the members of the Committee served in a personal

capacity and did not represent the States which had nominated them for election by the OAS General Assembly. The same provision specified that the members of the Committee enjoyed the privileges and immunities laid down in article 140 of the Charter of the OAS. Since that article referred to the representatives of member States in the organs of the organization, a minority had put forward the view that the members of the Committee did not enjoy those privileges and immunities. The majority, however, had upheld a constructive interpretation of the rule in question and maintained that the members of the Committee, which represented the member States of the OAS as a whole, should enjoy such privileges and immunities.

76. The Committee had also dealt with the review and evaluation of the inter-American conventions on intellectual property. The existing inter-American conventions on patents and industrial designs were based on the same legal principles as the world-wide Paris Convention. Unlike the Paris Union, however, the inter-American system did not have any machinery for revision and therefore lacked the necessary flexibility to keep it abreast of current changes.

77. When the first inter-American conventions on patents had been signed, it had been assumed that all States had the same interest in the reciprocal protection of inventions. At the present time, however, the Latin American countries were in the process of development and lagged behind the more industrialized countries in technology; they were essentially importers of products and techniques invented abroad. Foreign technology had contributed to the welfare and progress of the Latin American States, but had nevertheless created certain situations which conflicted with the public interest. A patent often made it possible to obtain a monopoly of the market for a product and deprived the importing country of any share in the benefits of technological progress. It was therefore necessary to devise some new system for the protection for industrial property that would promote the active transfer of technology, which was vital to the accelerated development of Latin America.

78. The Committee had also examined the question of bills of exchange and cheques, a subject on which it was keeping in close touch with the work of the United Nations Commission on International Trade Law.

79. Lastly, the Committee had begun the study of the law of the sea, concerning which it believed that there were still a number of unsolved problems not covered by the codification of international law on the subject. Moreover, technical progress during the past decade had given a new dimension to the exploitation of the resources of the sea.

80. The first problem faced by the Committee in that connexion was that of determining whether there existed a Latin American position on the law of the sea. A number of principles and rules had been formulated between 1950 and 1956, but the new economic and social approach to the problem in the 1970 Declarations of

Montevideo and Lima had made it necessary to re-examine the whole question. Work had been started on the formulation of a new concept of special sea areas beyond the territorial sea, over which jurisdiction would be exercised for certain purposes by the coastal State. The existence of such areas was now a reality accepted by international law and confirmed by the general practice of States.

81. The next session of the Committee would open at Rio de Janeiro on 9 August 1971 and on the Committee's behalf he had pleasure in extending an invitation to the Chairman of the International Law Commission to attend the session as an observer or to send an observer on his behalf.

82. The CHAIRMAN, thanking the observer for the Inter-American Juridical Committee for his statement, said that the Committee's work was of great value both academically and practically. Like the Commission, the Committee's aim was the establishment of peace and order throughout the world. He hoped that the ties between the two bodies would grow even stronger as the years went by. He asked Mr. Aja Espil to thank the Inter-American Juridical Committee for having appointed an observer to attend the Commission's twenty-third session.

83. In reply to the invitation to send an observer to the Committee's next session, he said that he would very much like to attend it himself, but if that proved impossible, he would appoint a member of the Commission to represent him.

84. Mr. CASTAÑEDA said that, as a member from an American country, he was particularly glad to welcome the observer for the Inter-American Juridical Committee. Co-operation between the Commission had been close for many years and the studies prepared by the Committee had been very useful to the Commission in its work, just as the Committee had not failed to profit from the Commission's studies. A number of subjects, such as the law of the sea and diplomatic privileges and immunities, had been on the programme of work of both bodies.

85. The present occasion was of special significance as it was the first appearance before the Commission of an observer for the Inter-American Juridical Committee since its reorganization as one of the main organs of the OAS with new and broader functions.

86. He expressed the hope that the ties between the two bodies would continue to be strengthened for their mutual benefit and in the interest of the codification of international law.

87. Mr. SETTE CÂMARA said that he too welcomed the observer for the Inter-American Juridical Committee, whose attendance was in keeping with a now long-standing tradition of the Commission.

88. The Committee had dealt with the grave matter of the kidnapping of foreign diplomats and related problems; as a technical body, it could not ignore the appalling reality of that phenomenon. The Committee

had condemned such acts of terrorism as common crimes which had grave repercussions on international relations.

89. The draft convention prepared by the Committee on that subject was a very full instrument, which established all the principles necessary to combat the evil. Despite some difference of opinion in the Committee on questions of detail, its members had been unanimous in condemning crimes of terrorism and in recommending measures to eradicate them.

90. With regard to the new statute of the Committee, he was glad to note that its members, who acted in a personal capacity, would enjoy privileges and immunities. Brazil, his own country, was host to the Committee and was happy to extend privileges and immunities to its members. That precedent was of interest to the Commission.

91. In connexion with the revision of the Inter-American conventions on intellectual property, he noted with satisfaction the Committee's efforts to take into account the special interests of the developing countries.

92. It was also a matter for satisfaction that the Committee had undertaken work on the new aspects of the law of the sea.

93. He associated himself with the hope which had been expressed of continued co-operation between the Committee and the International Law Commission.

94. Mr. AGO warmly welcomed Mr. Aja Espil, who had so ably represented the Inter-American Juridical Committee. That body was studying a number of topics of direct interest to the Commission, particularly the protection of diplomats against kidnapping and the responsibility of States. He hoped that there would be particularly close relations between the Committee and the Commission on the latter subject, to which the Commission intended to devote a large part of its future work.

95. Mr. ROSENNE thanked the observer for his wide-ranging and thought-provoking oral report. When the Commission considered its long-term programme of work, that report should be taken into account.

96. He had been impressed by the observer's comments on the subject of acts of political terrorism directed against foreign diplomats; those comments would be of the greatest value to all who had to deal with that alarming phenomenon, which he hoped the Commission would soon consider.

97. He had noted with interest the observer's penetrating analysis of the component elements of those crimes and of the interests that had to be balanced at the inter-State level.

98. It had always been his feeling that co-operation between the Commission and regional bodies should not be confined to exchanges of information and documentation, and he therefore hoped that the Chairman of the Commission would be able to accept the invitation to attend the Committee's next session.

99. Mr. KEARNEY said that, as a member for one of the countries of the inter-American system, he wished

to commend the observer for his lucid report. He had been interested by the observer's remarks on the subject of political terrorism and the protection of diplomats, and by his profound analysis of the elements of the crime and of the various interests to be considered. Those remarks illustrated the need to give the subject serious and urgent consideration.

100. Mr. USHAKOV said that the Inter-American Juridical Committee was not only one of the oldest intergovernmental legal organizations, but also one of the most important. In its work, the Committee kept fully abreast of legal thought and of matters of world concern, as was shown by its study on political terrorism and, more particularly, the protection of diplomats. The close and fruitful links between the Commission and the Committee would undoubtedly make it easier to find a solution to that serious problem.

101. Mr. Aja Espil deserved the thanks of the Commission for his full and thorough report which was a real tribute to the work of the Inter-American Juridical Committee. He had been pleased to note that the Committee had adopted the Soviet Union concept of crimes with international implications.

102. The CHAIRMAN said that a communication had been received from Mr. Golsong, Director of Legal Affairs of the Council of Europe, to the effect that he would attend the Commission's meetings on 15 and 16 July as observer for the European Committee on Legal Co-operation.

The meeting rose at 1.5 p.m.

1125th MEETING

Monday, 28 June 1971, at 3.10 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Tribute to the memory of Mr. Matine-Daftary

1. On the proposal of the CHAIRMAN, *the Commission observed one minute's silence in tribute to the memory of Mr. Matine-Daftary, the eminent jurist and President of the United Nations Association of Iran, who had been a member of the Commission from 1957 to 1961.*

2. Mr. YASSEEN said he had heard with deep sorrow of the death of Mr. Matine-Daftary, whose merits he had highly appreciated and whose outstanding participation in the work of the Commission he well remembered. He proposed that the Chairman send a message of condolence in the name of the Commission to the family of the deceased.

It was so agreed.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168/Add.6)

[Item 1 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

3. The CHAIRMAN invited the Commission to continue consideration of articles 87 to 101 as proposed by the Drafting Committee (A/CN.4/L.168/Add.6).

ARTICLE 88 (Full powers to represent the State in the conclusion of treaties)

4. Mr. AGO (Chairman of the Drafting Committee) said that the Commission had decided, on the proposal of Sir Humphrey Waldock, to refer article 88 to the Drafting Committee with a request that the Committee should consider whether such an article was appropriate for the draft or whether its subject-matter should be left to the law of treaties or to the topic of treaties concluded between States and international organizations or between two or more international organizations,¹ which was the topic being studied by the Sub-Committee presided over by Mr. Reuter.²

5. The Drafting Committee had considered that article 88 duplicated the relevant provisions of the Vienna Convention on the Law of Treaties.³ It therefore recommended that the article be deleted and that the reasons for its deletion be explained in the commentary.

6. Mr. YASSEEN said he supported the Drafting Committee's recommendation.

7. The CHAIRMAN said that if there were no objection he would take it that the Commission agreed to delete article 88.

It was so agreed.

¹ See 1106th meeting, para. 65.

² See *Yearbook of the International Law Commission, 1970*, vol. 1, p. 146, para. 82.

³ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 290, article 7 (United Nations publication, Sales No.: E.70.V.5).

ARTICLE 89

8. Mr. AGO (Chairman of the Drafting Committee) said that article 89 corresponded to articles 17 and 61 of the draft, with the exception of paragraph 1 (e) which read:

“(e) the location of the premises of the delegation and of the private accommodation enjoying inviolability under articles 94 and 99, as well as any other information that may be necessary to identify such premises and accommodation.”

9. The Drafting Committee considered it essential for the host State to know the exact location of all the premises and private accommodation whose inviolability it was called upon to ensure; the Committee therefore intended to propose to the Commission that, when the whole draft was reviewed, a similar provision be inserted in the article on notifications concerning permanent missions and permanent observer missions.

10. In the text of paragraph 1 (e) the Committee had replaced the words “premises occupied by”, which had been taken from article 11 of the 1969 Convention on Special Missions,⁴ by the words “premises of” the delegation, which corresponded more closely to the expression “premises of the permanent mission” used in article 25.

11. The text now proposed by the Drafting Committee for article 89 read:

Article 89
Notifications

1. The sending State, with regard to its delegation to an organ or to a conference, shall notify the Organization or, as the case may be, the conference of:

(a) the appointment, position, title and order of precedence of the members of the delegation, their arrival and final departure or the termination of their functions with the delegation;

(b) the arrival and final departure of any person belonging to the family of a member of the delegation and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the delegation;

(c) the arrival and final departure of persons employed on the private staff of members of the delegation and the fact that they are leaving that employment;

(d) the beginning and the termination of the employment of persons resident in the host State as members of the staff of the delegation or as persons employed on the private staff enjoying privileges and immunities;

(e) the location of the premises of the delegation and of the private accommodation enjoying inviolability under articles 94 and 99, as well as any other information that may be necessary to identify such premises and accommodation.

2. Where possible, prior notification of arrival and final departure shall also be given.

3. The Organization or, as the case may be, the conference, shall transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

4. The sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

⁴ See General Assembly resolution 2530 (XXIV), Annex.

12. Mr. USHAKOV proposed that article 89 be referred back to the Drafting Committee with the request that its wording be brought into line, not with that of the corresponding article on permanent missions, but with that of article 11 of the Convention on Special Missions, with which it was more closely analogous.

13. The CHAIRMAN said that if there were no objection he would take it that the Commission agreed to refer article 89 back to the Drafting Committee for reconsideration in the light of Mr. Ushakov's proposal.

It was so agreed.⁵

ARTICLE 90

14. Mr. AGO (Chairman of the Drafting Committee) said that article 90, as adopted in 1970,⁶ had laid down that “Precedence among delegations to an organ or to a conference shall be determined by the alphabetical order used in the host State.” But as the Special Rapporteur had pointed out, it was the alphabetical order used in the organization, not that used in the host State, which was generally followed in practice to determine precedence among delegations.

15. In the case of conferences, on the basis of the practice at conferences convened under the auspices of the United Nations and other international organizations, the Drafting Committee had decided to follow the same rule.

16. The text proposed for article 90 read:

Article 90
Precedence

1. Precedence among delegations to an organ shall be determined by the alphabetical order of the names of member States used in the Organization.

2. Precedence among delegations to a conference shall be determined by the alphabetical order of the names of participating States used in the Organization.

17. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 90 in the form proposed by the Drafting Committee.

It was so agreed.⁷

ARTICLE 91

18. Mr. AGO (Chairman of the Drafting Committee) said that at the end of paragraph 1 of article 91 the Committee had deleted the words “on an official visit”, which it considered superfluous.

19. The Committee thought it desirable to explain in the commentary that article 91 related only to privileges

⁵ For resumption of the discussion see 1133rd meeting, para. 108.

⁶ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

⁷ For resumption of the discussion see 1133rd meeting, para. 115.

and immunities of a legal character and not to ceremonial privileges and honours.

20. The text proposed for article 91 read:

Article 91

Status of the Head of State and persons of high rank

1. The Head of the sending State, when he leads a delegation to an organ or to a conference, shall enjoy in the host State or in a third State the facilities, privileges and immunities accorded by international law to Heads of State.

2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a delegation of the sending State to an organ or to a conference, shall enjoy in the host State or in a third State, in addition to what is granted by the present part, the facilities, privileges and immunities accorded by international law.

21. Mr. USHAKOV said that the words "in addition to what is granted by the present part", which appeared in paragraph 2, should also appear in paragraph 1, which would then be clearer and more accurate.

22. Mr. BARTOŠ said he thought the words "on an official visit" ought to be restored, since neither in theory nor in practice were any privileges or immunities recognized for a Head of State on a private visit. The Drafting Committee had, no doubt, believed that a Head of State's capacity as such would confer on him *ipso jure* the special privileges and immunities which the Commission wished a Head of State to enjoy when he led a delegation, but it was not certain that that would always be the case and it was therefore safer to refer to the status of a Head of State on an official visit.

23. Mr. ROSENNE said he wished to place on record his view that the problem with which article 91 ought to deal was quite different; it was the problem of whether the host State was under some higher degree of responsibility with regard to the protection of Heads of State and other persons of high rank than with regard to other members of a delegation.

24. He was thinking, in particular, of the obligation laid down in the last sentence of article 98, on personal inviolability: the duty of the host State to treat delegates with due respect and to "take all appropriate steps to prevent any attack on their persons, freedom or dignity". The question arose whether that provision acquired a special significance for the persons covered by article 91. The subject was one that would ultimately be included in the Commission's study of State responsibility.

25. Mr. KEARNEY said he maintained his view that article 91 was completely unnecessary. Its provisions stated that Heads of State and other persons of high rank would enjoy whatever facilities, privileges and immunities were accorded to them by international law. In fact, those facilities, privileges and immunities would apply whether the provisions of article 91 were included in the draft or not. The article should therefore be dropped.

26. Mr. AGO (Chairman of the Drafting Committee), referring to Mr. Kearney's remark, said that it would no doubt be possible to dispense with article 91, but the Commission had already specified in another article that

a member of an ordinary diplomatic mission continued to enjoy diplomatic privileges and immunities when he became a member of a delegation, and it would look strange to take such precautions for a mere diplomat, but not for a Head of State, Head of Government, or other person of high rank. Hence article 91 should not be deleted.

27. Mr. USHAKOV was right in saying that the words "in addition to what is granted by the present part" should be inserted in paragraph 1.

28. On the other hand, he did not think it was necessary to restore the words "on an official visit", as suggested by Mr. Bartoš. For as head of a delegation, the Head of State was not in the host State in a private capacity; but neither was he on an official visit to the host State, so it would not be fair to impose upon that State the special duties which such a visit entailed.

29. Mr. YASSEEN said he supported the text proposed by the Drafting Committee. No one would deny that Heads of State and the other persons of high rank mentioned in the article enjoyed special facilities, privileges and immunities under international law. The article was useful for the reasons given by the Chairman of the Drafting Committee.

30. The words "in addition to what is granted by the present part" could perhaps be added to paragraph 1, as Mr. Ushakov suggested, but it was not essential. He could accept the article as it stood.

31. Mr. CASTRÉN said he supported Mr. Ushakov's proposal, which would make paragraph 1 clearer and more accurate. Article 91 served a purpose and should be retained.

32. He agreed with Mr. Bartoš that the words "on an official visit" should be restored; they appeared in the corresponding provisions of other conventions prepared by the Commission. It was true that a Head of State was not in the host State in a private capacity when he headed a delegation, but there was a difference between representation as a member of a delegation and representation on an official visit: the facilities, privileges and immunities accorded in the latter case were more extensive. He was therefore in favour of restoring the words "on an official visit". However, if the majority of the Commission were prepared to accept the text proposed by the Drafting Committee, he would be satisfied with an explanation in the commentary.

33. Mr. USHAKOV said he thought the article was useful. It was, perhaps, difficult to specify what were the facilities, privileges and immunities accorded to a Head of State under international law, but among the privileges he should enjoy when in the host State to perform functions in an organization or at a conference, the use of the flag and the right to a suitable residence could be mentioned. It would not impose an unduly heavy obligation on the host State to grant a special status to the persons of high rank mentioned in article 91.

34. Mr. SETTE CÂMARA said he supported the Drafting Committee's decision to delete the words "on

an official visit". Those words appeared in the corresponding provision of the 1969 Convention on Special Missions, but the position in the present instance was different from that of special missions.

35. It was not uncommon for Heads of Government and even Heads of State to attend international conferences. He recalled a session of the General Assembly at which some twenty Heads of Government and several Heads of State had been present. It would be imposing an unduly heavy burden on a host State to expect it to extend to all those visitors the full honours to which their high rank entitled them.

36. Mr. CASTAÑEDA said that article 91 should be retained. If its provisions were not included in the draft, doubts might arise as to whether a Head of State who headed a delegation to an organ or a conference was entitled to enjoy the privileges and immunities normally extended to a Head of State. It might be argued that he was only entitled to the privileges and immunities pertaining to a delegate. Article 91 was useful because it showed that the Head of State did not lose his status as such because he happened to head a delegation.

37. Mr. ROSENNE said that on the whole the provisions of article 91 were useful, but they should be made more general, so as to apply to all categories of representatives to whom the present draft applied. In New York there were cases in which a permanent mission was headed by a person of a higher rank than ambassador. Certain permanent representatives held the rank of Deputy Minister for Foreign Affairs and the permanent representative of the United Kingdom had at one time been a member of the Government of his country.

38. The provisions of paragraph 1 probably applied only to delegations, but those of paragraph 2 should be made broader. They were designed to safeguard the special standing in law of certain persons of high rank and it was not right to limit the application of the paragraph to persons participating in delegations.

39. For those reasons, he suggested that article 91 be referred back to the Drafting Committee with instructions to examine whether the provisions of paragraph 2 should be made applicable to all categories of persons enjoying immunities under the draft articles.

40. Mr. BARTOŠ said that the Commission would have to choose between two alternatives: either to exalt democracy and make no distinction between members of delegations whoever they might be, or to recognize that the participation of a Head of State or some other person of high rank in an international event gave it a special importance, desired either by the organization itself or by the State concerned, in which case it would be wrong not to give the Head of State or other person of high rank a special status in keeping with that rank.

41. Moreover, judging by the security measures taken on the occasion of their visits and the opportunities afforded them to make formal statements, it was clear that United Nations practice recognized that such persons enjoyed special privileges and supported the second alternative.

42. The words "on an official visit" should therefore be retained, because amending a text already in force, to which a certain interpretation had been given, necessarily meant changing its meaning and, in the present case, the Commission would be going against the very point it wished to recognize. As a lawyer, he did not wish to take that responsibility.

43. Mr. AGO (Chairman of the Drafting Committee) said that he would like to reply to the comments of members of the Commission.

44. With regard to the difficult question raised by Mr. Rosenne, it was difficult to envisage a case in which one of the persons of high rank referred to in article 91 would be on a permanent mission. After all, they were persons who, by virtue of the functions they performed in their countries, were entitled *ipso facto* to special privileges and immunities and who could not serve on a permanent mission without abandoning those functions. Moreover, it was necessary to take account of their status as members of a delegation, since the régime provided for that case was not the same as for the head of a permanent mission. Thus the article was justified with respect to delegations, but not with respect to permanent missions.

45. With regard to the observations made by Mr. Bartoš, he thought the Commission need not be afraid to state in the commentary that it had adopted article 91 deliberately, with the intention of making a distinction between an official visit to the host State and a visit to the organization, for which it was necessary to provide privileges and immunities, though not the same ones as for an official visit to the host State, since that would put the latter to unwarranted expense.

46. Mr. REUTER said he was prepared to approve article 91, but he did not see what were the really exceptional privileges and immunities which international law conferred on Heads of State.

47. Mr. KEARNEY said he was still not convinced that there was any need for the provisions of article 91, but he would not object to its retention if other members wished to keep it. He would merely point out that there were no provisions on the status of the Head of State and other persons of high rank in the 1946 Convention on the Privileges and Immunities of the United Nations and other related instruments. Nevertheless, for over twenty years, Heads of State, Heads of Government and other persons of high rank had attended meetings of the General Assembly and no particular problem had arisen.

48. Mr. ROSENNE said that if his suggestion that the provisions of paragraph 2 be made more general was not adopted, it would be necessary to include in the commentary the explanation given by Mr. Ago, who had introduced an important nuance—the fact that the "high rank" referred to the functions of the person concerned in his home State.

49. He himself had had in mind the case of a person who, because of his functions as representative to an international organization, was given by his State a particularly high rank, often very close to that of a

Minister for Foreign Affairs. For instance, a permanent representative in New York was sometimes a "Secretary of State for United Nations Affairs", and he knew of one such representative whose visiting card indicated that he was a "Minister of State", not an ambassador or a permanent representative.

50. Mr. YASSEEN said that the exceptional privileges and immunities mentioned by Mr. Reuter did exist, notably immunity from jurisdiction, to which the Commission had provided for numerous exceptions which were clearly not applicable to Heads of State.

51. In his opinion the scope of the article could not be extended to permanent missions. In bilateral diplomacy, the categories of representation were fixed and well known, and others could not be created at will. The head of the mission had the rank of ambassador and although some heads of mission, like Lord Caradon, held important posts in their own government, they had never yet received different treatment from that accorded to a head of mission.

52. Mr. AGO thanked Mr. Rosenne for his explanation, which he found very much to the point.

53. With regard to the question raised by Mr. Reuter, the essential feature of the special privileges and immunities accorded to a Head of State was, as Mr. Yasseen had said, immunity from jurisdiction, which was complete for Heads of State and Government. The same applied to exemption from taxation.

54. Mr. REUTER said he was not sure that Heads of State enjoyed such complete immunity in French jurisprudence; nor was he sure that there was a rule of international law to that effect.

55. Mr. USTOR said he noted that the point raised by Mr. Rosenne had now been satisfactorily settled by an explanation which would be included in the commentary to article 91.

56. In order to make the record as nearly complete as possible, however, he wished to mention an exceptional case of permanent representatives holding higher rank than that of ambassador, namely, the permanent representatives of the States members of the Council for Mutual Economic Assistance (CMEA). Those permanent representatives were deputy Heads of Government, but they were not resident in the host country, to which they came only to attend meetings of organs of the CMEA and to perform other specific functions. The permanent missions to the CMEA were headed by deputy permanent representatives.

57. That special case was, of course, covered by article 3, which stated that the application of the draft articles was "without prejudice to any relevant rules of the Organization". He could accept article 91 on the understanding that the commentary would explain the position in such special cases.

58. Mr. AGO said that Mr. Ustor's observations were interesting, but the language used in the draft articles was rather unusual. For example, the "permanent representative" in the example mentioned by Mr. Ustor was

called a "delegate". Similarly, the ministers of labour who were permanent representatives on the Governing Body of the International Labour Office were called delegates in the draft articles.

59. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 91 in the form proposed by the Drafting Committee, on the understanding that the discussion would be reflected in the commentary.

*It was so agreed.*⁸

ARTICLE 92 (General facilities, assistance by the Organization and inviolability of archives and documents)

60. Mr. AGO (Chairman of the Drafting Committee) said that the Committee intended to revise the text of article 92, so it would be desirable for the Commission to postpone consideration of that provision.

61. The CHAIRMAN invited the Commission to consider article 93.

ARTICLE 93

62. Mr. AGO (Chairman of the Drafting Committee) said that in the last sentence of article 93, the Committee had inserted the words "or, as the case may be, the conference" after "The Organization", because it was not impossible that in some cases the conference might be in a better position than the organization to intervene with the host State, particularly if the conference was held at a place other than the headquarters of the organization.

63. The proposed text of article 93 read:

Article 93

Premises and accommodation

The host State shall assist a delegation to an organ or to a conference, if it so requests, in procuring the necessary premises and obtaining suitable accommodation for its members. The Organization or, as the case may be, the conference shall, where necessary, assist the delegation in this regard.

64. Mr. ROSENNE said he had the same reservations concerning the personification of the conference in article 93 as he had expressed on an earlier occasion. In his opinion the words "or, as the case may be, the conference" should be deleted.

65. Mr. USHAKOV said that the expression "The Organization or, as the case may be, the conference..." should be understood as meaning that in certain cases the conference could provide assistance at the same time as the organization. It was not intended to establish any opposition between the organization and the conference.

66. Mr. EUSTATHIADES said that a distinction should be made between conferences convened under the auspices of an organization and conferences that were independent of any organization. In its present form,

⁸ For resumption of the discussion see 1133rd meeting, para. 129.

the last sentence in article 93 only covered the case of a conference convened independently of any organization. In order to cover the other case as well, it might perhaps be appropriate to say "The Organization and the conference shall...".

67. Mr. BARTOŠ said that he supported the formula "or, as the case may be, the conference" proposed by the Drafting Committee; but the Commission should explain in the commentary that it considered that a conference possessed a separate legal personality, which made it possible to impose obligations on it. That concept—the theory of the *de facto* legal person—was to be found in Italian positive law, but was not universally recognized, so that the Commission should state its point of view clearly. It was inconceivable that the organization should have an obligation to assist delegations, while the organ of the organization which was best fitted to perform that task, namely, the conference itself, did not have that obligation.

68. Mr. USHAKOV observed that the expression "the delegation", at the end of the article, was just as applicable to a delegation to an organ as to a delegation to a conference, though it was an expression that had not yet been defined. That being so, it would be inadvisable to replace the expression "or, as the case may be", by "and" or "as well as", since in the case of a delegation to an organ, it was only the organization which had to furnish assistance.

69. Whatever the final wording adopted, article 93 should not present any difficulties of interpretation.

70. The CHAIRMAN said that if there were no objection he would consider that the Commission provisionally approved article 93.

*It was so agreed.**

ARTICLE 94

71. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had brought the text of article 94 into line with that of article 25, as provisionally approved by the Commission.¹⁰ In paragraph 1, it had accordingly deleted the provision that the consent of the head of the permanent diplomatic mission might be required before the agents of the host State could enter the premises of the delegation; on that point, the Committee had found it difficult to justify treating delegations differently from permanent missions. In addition, the organs or conferences to which delegations were sent often met in a city which was not the capital of the host State, and in such cases it would complicate matters unnecessarily to require the consent of the head of the permanent diplomatic mission.

72. The text proposed for article 94 read:

Article 94

Inviolability of the premises

1. The premises of the delegation to an organ or to a conference shall be inviolable. The agents of the host State may not enter them, except with the consent of the head of the delegation. Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the head of the delegation.

2. The host State is under a special duty to take all appropriate steps to protect the premises of the delegation against any intrusion or damage and to prevent any disturbance of the peace of the delegation or impairment of its dignity.

3. The premises of the delegation, their furnishings and other property thereon and the means of transport of the delegation shall be immune from search, requisition, attachment or execution.

73. Mr. ALCÍVAR said that he reserved his position on the last sentence of paragraph 1.

74. Mr. EUSTATHIADES said he could support the new wording of article 94, which seemed to be a compromise solution.

75. Mr. KEARNEY said that he too reserved his position on article 94. He still thought that the words "and only in the event that it has not been possible to obtain the express consent of the head of the delegation", in the last sentence of paragraph 1, should be deleted.

76. The CHAIRMAN suggested that the Commission provisionally approve article 94 in its present form.

It was so agreed.¹¹

ARTICLE 95¹²

77. Mr. AGO (Chairman of the Drafting Committee) said that the phrase "To the extent compatible with the nature and duration of the functions performed by a delegation to an organ or to a conference", at the beginning of paragraph 1 of article 95, had been taken from article 24 of the Convention on Special Missions and was not included in article 26 of the draft, on exemption of the premises of the permanent mission from taxation. The Drafting Committee had taken the view that, while such a provision was justified in a convention dealing with missions whose functions were as varied as those of special missions, it was not justified in the case of delegations to an organ or a conference. It had therefore been deleted from article 95.

78. The Committee had also made a number of minor drafting changes in the other provisions of article 95, and had brought the title into line with that of article 26. It had not, however, incorporated the amendment to article 26 adopted by the Commission at its 1113th meeting, which replaced the first part of paragraph 1 by the words "The premises of the permanent mission of which the sending State or any person acting on its

* For resumption of the discussion see 1134th meeting, para. 8.

¹⁰ See 1117th meeting, paras. 31-40.

¹¹ For resumption of the discussion see 1134th meeting, para. 18.

¹² For previous text see 1108th meeting, para. 4.

behalf is owner or lessee shall be exempt. . .". The Committee had taken the view that, as the duration of the functions of most delegations was short, that amendment would have no practical application to delegations.

79. The text proposed for article 95 read:

Article 95

Exemption of the premises from taxation

1. The sending State and the members of the delegation to an organ or to a conference acting on behalf of the delegation shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the delegation, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State or with a member of the delegation.

80. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 95 as proposed by the Drafting Committee.

*It was so agreed.*¹³

ARTICLE 96

81. Mr. AGO (Chairman of the Drafting Committee), said that in article 96, the Committee had merely replaced the words "of a delegation" by the words "of the delegation". The text proposed read:

Article 96

Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure to all members of the delegation to an organ or to a conference such freedom of movement and travel in its territory as is necessary for the performance of the functions of the delegation.

82. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 96 as proposed by the Drafting Committee.

*It was so agreed.*¹⁴

ARTICLE 97¹⁵

83. Mr. AGO (Chairman of the Drafting Committee) said the Committee considered that the wording of paragraph 1 of article 97 was better than that of paragraph 1 of article 29, on freedom of communication of permanent missions. When the draft was revised, it intended to bring paragraph 1 of the article on freedom of communication of permanent missions and permanent observer missions into line with paragraph 1 of article 97.

84. Article 29 did not contain provisions similar to those in paragraph 3 of article 97. The Committee believed that that difference between the two articles was justified, particularly in view of the short duration of the functions of most delegations.

85. The Drafting Committee had brought the rest of article 97 into line with article 29. It had, however, retained, in the last sentence of paragraph 8, the phrase "By arrangement with the appropriate authorities", to which, in order to avoid any ambiguity, it had added the words "of the host State". That phrase, which did not appear in article 29, was taken from article 28 of the Convention on Special Missions, which had followed article 35 of the Vienna Convention on Consular Relations.¹⁶ Although the phrase did not appear in article 27 of the Convention on Diplomatic Relations,¹⁷ the Committee thought that it was useful and was in line with general practice. It therefore intended to propose that the phrase be added to paragraph 1 of the draft article on freedom of communication of permanent missions and permanent observer missions.

86. The text proposed for article 97 read:

Article 97

Freedom of communication

1. The host State shall permit and protect free communication on the part of a delegation to an organ or to a conference for all official purposes. In communicating with the Government of the sending State, its diplomatic missions, consular posts, permanent missions, permanent observer missions, special missions and delegations, wherever situated, the delegation may employ all appropriate means, including couriers and messages in code or cipher. However, the delegation may install and use a wireless transmitter only with the consent of the host State.

2. The official correspondence of the delegation shall be inviolable. Official correspondence means all correspondence relating to the delegation and its functions.

3. Where practicable, the delegation shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission, of the permanent mission or of the permanent observer mission of the sending State.

4. The bag of the delegation shall not be opened or detained.

5. The packages constituting the bag of the delegation must bear visible external marks of their character and may contain only documents or articles intended for the official use of the delegation.

6. The courier of the delegation, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

7. The sending State or the delegation may designate couriers *ad hoc* of the delegation. In such cases the provisions of paragraph 6 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the delegation's bag in his charge.

¹³ For resumption of the discussion see 1134th meeting, para. 26.

¹⁴ For resumption of the discussion see 1134th meeting, para. 32.

¹⁵ For previous text see 1108th meeting, para. 29.

¹⁶ United Nations, *Treaty Series*, vol. 596, pp. 290-292.

¹⁷ *Op. cit.*, vol. 500, pp. 108-110.

8. The bag of the delegation may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the delegation. By arrangement with the appropriate authorities of the host State, the delegation may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

87. Mr. CASTRÉN suggested that in the second sentence of paragraph 1, the word "other" should be inserted between the words "and" and "delegations"; that would bring the text of article 97 into line with the corresponding article on special missions.¹⁸ However, article 29 of the draft, concerning permanent missions, did not contain the word "other", so the Commission had a choice between two models.

88. Mr. USHAKOV said that the Commission should either clarify, in the commentary, the meaning of the words "its functions" at the end of paragraph 2, or delete them altogether. If it kept them, it should state that, in the absence of any provision concerning the functions of the delegation, the words "its functions" meant the general functions of a delegation.

89. Mr. KEARNEY said that Mr. Ushakov had made a good point. He proposed that the words "all correspondence relating to the delegation and its functions" be replaced by the words "all correspondence relating to the delegation and its activities".

90. The CHAIRMAN said that if there were no objection he would take it that the Commission accepted the amendment proposed by Mr. Kearney.

It was so agreed.

91. The CHAIRMAN suggested that the Commission provisionally approve article 97 as proposed by the Drafting Committee and amended by Mr. Kearney.

*It was so agreed.*¹⁹

ARTICLE 98

92. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had confined itself to replacing the words "in a delegation" by the words "in the delegation" in the first line of the article. The text proposed read:

Article 98

Personal inviolability

The persons of the representatives in the delegation to an organ or to a conference and of the members of its diplomatic staff shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

¹⁸ See General Assembly resolution 2530 (XXIV), Annex, article 28.

¹⁹ For resumption of the discussion see 1134th meeting, para. 35.

93. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 98 as proposed by the Drafting Committee.

*It was so agreed.*²⁰

ARTICLE 99²¹

94. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made some minor drafting changes in the title and text of the article so as to bring it into line with article 31. In the French version, the word "*logement*" should not be regarded as final; it might be changed in the final concordance of the draft, as the Working Group seemed to prefer the word "*demeure*".

95. The text proposed for article 99 read:

Article 99

Inviolability of the private accommodation and property

1. The private accommodation of the representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff shall enjoy the same inviolability and protection as the premises of the delegation.

2. Their papers, correspondence and, except as provided in paragraph ... of article 100, their property shall likewise enjoy inviolability.

96. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 99 as proposed by the Drafting Committee.

*It was so agreed.*²²

ARTICLE 100²³

97. Mr. AGO (Chairman of the Drafting Committee) said that at its 1109th meeting the Commission had referred to the Drafting Committee the two versions of article 100 it had adopted in 1970. As there had been no clear majority in the Committee in favour of either version, both were being resubmitted to the Commission. The Drafting Committee suggested, however, that the Commission consider whether the addition to article 101 of a paragraph 5, relating to the settlement of civil actions, did not justify the adoption of alternative A.

98. The texts proposed for the two alternative versions of article 100 read:

Article 100

Immunity from jurisdiction

ALTERNATIVE A

1. The representatives in the delegation to an organ or to a conference and the members of its diplomatic staff shall enjoy

²⁰ For resumption of the discussion see 1134th meeting, para. 41.

²¹ For previous text see 1108th meeting, para. 44.

²² For resumption of the discussion see 1134th meeting, para. 44.

²³ For previous text see 1108th meeting, para. 52.

immunity from the criminal jurisdiction of the host State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the host State unless the person in question holds it on behalf of the sending State for the purposes of the delegation;

(b) an action relating to succession in which the person in question is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the person in question in the host State outside his official functions;

(d) an action for damages arising out of an accident caused by a vehicle used by the person in question outside the exercise of the functions of the delegation where those damages are not recoverable from insurance.

2. The representatives in the delegation and the members of its diplomatic staff are not obliged to give evidence as witnesses.

3. No measures of execution may be taken in respect of a representative in the delegation or a member of its diplomatic staff except in cases coming under sub-paragraphs (a), (b), (c) and (d) of paragraph 1 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person or of his accommodation.

4. The immunity of the representatives in the delegation and of the members of its diplomatic staff from the jurisdiction of the host State does not exempt them from the jurisdiction of the sending State.

ALTERNATIVE B

1. The representatives in the delegation to an organ or to a conference and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the host State.

2. (a) The representatives and members of the diplomatic staff of the delegation shall enjoy immunity from the civil and administrative jurisdiction of the host State in respect of all acts performed in the exercise of their official functions.

(b) No measures of execution may be taken in respect of a representative or a member of the diplomatic staff of the delegation unless the measures concerned can be taken without infringing the inviolability of his person or his accommodation.

3. The representatives and members of the diplomatic staff of the delegation are not obliged to give evidence as witnesses.

4. The immunity from jurisdiction of the representatives and members of the diplomatic staff of the delegation does not exempt them from the jurisdiction of the sending State.

99. The CHAIRMAN said it would not be in conformity with the Commission's traditional methods of work to vote on the alternative texts at that stage. He suggested that the Commission should approve them provisionally and postpone making a choice until the final adoption of the draft, article by article.

100. Mr. USHAKOV said he supported the Chairman's suggestion.

101. Mr. KEARNEY said that, in the discussions on the article in the Commission and in the Drafting Committee, he had always made it clear that he preferred alternative B.

102. As a compromise, however, he would now like to propose the addition of a sub-paragraph (e) to para-

graph 1 of alternative A, which would read: "an action relating to any civil claim that does not arise out of the exercise of official functions by the person in question and that is not settled within two years after its accrual." That language would take care of the major problems which might arise in the case of representatives who might enter the host State for short periods of time, then return to the sending State, and subsequently be sent back to the host State.

103. Mr. CASTRÉN said he still preferred alternative B, which was closer to present practice and to the rules followed in conferences and in most organizations. What was more, the majority of the States which had submitted written observations on the article had chosen that alternative. In view of the temporary nature of meetings of organs and conferences, it was neither necessary nor appropriate to give the delegations and their members such extensive privileges and immunities as those enjoyed by diplomatic missions, permanent missions and permanent observer missions.

104. The compromise proposed by Mr. Kearney showed that the list of exceptions in paragraph 1 of alternative A was incomplete and did not even cover some quite common cases. Under the terms of Mr. Kearney's proposal, immunity from jurisdiction would continue for new cases over a rather long period, so that the person in question would not be disturbed in the exercise of his official functions during his first assignment or assignments in the host State. But continual abuse of that person's immunity from jurisdiction could not be tolerated; the sending State should refrain from sending such a person as its representative. He was therefore in favour of Mr. Kearney's proposal, because it improved alternative A.

105. Mr. USHAKOV said he thought the Commission could accept Mr. Kearney's proposal provisionally, pending a final decision in favour of one of the two alternatives.

106. It should be noted that Mr. Kearney's proposal was against the interests of the host State; it would have the effect of postponing for two years the obligation which paragraph 5 of article 101 imposed on the sending State.

107. Mr. AGO said he had always supported alternative A, because the other alternative introduced inadmissible differences of treatment between members of the permanent mission and members of the delegation. He did not agree with Mr. Castrén that alternative B reflected the practice of States; in particular it did not reflect that of the important host State of Switzerland.

108. The Commission should carefully examine the problems raised by article 100, so as not to have alternative versions in the draft it submitted to the General Assembly. The paragraph 5 added to article 101 should make its task easier.

109. The additional sub-paragraph proposed by Mr. Kearney should be submitted in writing for due consideration. The fears expressed by Mr. Ushakov about the effects of that proposal on the obligation stated

in paragraph 5 of article 101 might be dispelled if it were made clear that the provision proposed by Mr. Kearney was applicable only if a sending State had not discharged its obligation under article 101 within two years.

110. Mr. ROSENNE said he supported Mr. Ago's view that the Commission should finish its work with a single text, which would not be one adopted by a small majority, but would represent the view of the Commission as a whole. He too believed that there was a close connexion between article 100 and paragraph 5 of article 101, which represented a compromise between two radically opposed points of view.

111. He also believed that alternative A, as a matter of law and practice, came much closer to the mark than alternative B, especially in view of the addition of the new paragraph 5 to article 101.

112. He thought Mr. Kearney had made a convincing case for his proposal. That proposal appeared to refer to certain kinds of claim involving specific sums of money, such as hotel, restaurant and shop bills, but he (Mr. Rosenne) had previously drawn attention to a different kind of claim, namely, a continuing and unliquidated claim, arising out of a continuing legal dispute²⁴ and he assumed that Mr. Kearney's proposal did not apply to that. He also hoped that Mr. Kearney would clarify the relationship between his proposal and paragraph 5 of article 101, as well as its relationship with the procedure for consultations envisaged in article 50.

113. Mr. KEARNEY said he did not think that Mr. Ago had represented the position of the Swiss Government quite accurately, since in paragraph 3 on the comments of governments on article 100 in the Special Rapporteur's sixth report (A/CN.4/241/Add.6) it was stated that the governments of Canada, Pakistan, Switzerland, Finland, Japan, the Netherlands, Sweden, the United States, France and Turkey had expressed a preference for alternative B. That paragraph went on to say: "In support of their position the Government of Switzerland drew attention to 'the fairly loose ties delegates have in the host State where their stay is only temporary' and added that 'In the circumstances, this wording of the text ensures adequate protection'". He realized, of course, that the Swiss Government had a variety of arrangements for international organizations, some of which, like the International Labour Organisation, appeared to be in a better position than other of the agencies of the United Nations.

114. On the question whether paragraph 5 of article 101 met the needs of the present draft, he pointed out that it had been taken over from an earlier article on waiver of immunity, which had been couched in even stronger terms. All the States which had expressed their preference for alternative B, many of which were host States, had made their choice in the light of that stronger text.

The meeting rose at 6.10 p.m.

²⁴ See 1108th meeting, para. 82.

1126th MEETING

Wednesday, 30 June 1971, at 10.5 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168/Add.6 and 7; A/CN.4/L.175)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 100 (Immunity from jurisdiction) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of the two alternatives A and B for article 100 submitted by the Drafting Committee (A/CN.4/L.168/Add.6).

2. Mr. AGO (Chairman of the Drafting Committee) said that after considering the question at some length the Drafting Committee had come to the conclusion that it would be better to continue the discussion of the two alternatives in the Commission itself.

3. Several members of the Drafting Committee preferred alternative A, but generally speaking, they did not think they could accept Mr. Kearney's amendment (A/CN.4/L.175) which, in their opinion, would nullify the principle involved and make the article difficult to apply. Other members of the Drafting Committee were in favour of alternative B. They were prepared to accept Mr. Kearney's amendment, but preferred the text of alternative B as it stood.

4. In general, therefore, the Drafting Committee believed that Mr. Kearney's amendment did not provide a solution, so that the choice remained between alternatives A and B, which were already before the Commission.

5. Mr. KEARNEY said he had proposed his amendment to alternative A for article 100¹ merely in the hope that it might help the Commission to achieve a compromise. He himself preferred alternative B. He therefore withdrew his amendment.

¹ See previous meeting, para. 102.

6. Mr. ROSENNE said experience showed that texts adopted in the Commission by only a small majority were not conducive to success in the diplomatic phase of the codification process. Since alternatives A and B were both adequate from a technical point of view, and since the views of members appeared to be evenly divided, he would suggest that, as an exception, the Commission put forward both texts. That would provide a convenient point of departure for the diplomatic phase of the codification work.

7. Sir Humphrey WALDOCK said that, although his first choice was alternative B, he would not hesitate to accept alternative A if there were not enough support for alternative B; his views were probably shared by some others. The position of certain other members, on the other hand, was perhaps the opposite: they would prefer alternative A but, failing its general approval, might be prepared to accept alternative B.

8. Mr. USHAKOV said that if the Commission opted for alternative B, paragraph 5 of article 101 would become pointless.

9. Mr. AGO (Chairman of the Drafting Committee) said that as the Special Rapporteur had proposed alternative A, which was also closer to the corresponding provision on permanent missions, alternative B was a sort of amendment and, as such, should be put to the vote first.

10. He himself was prepared to accept either of the proposed alternatives, but he could not agree that there should be any difference in treatment between permanent missions and delegations. If the Commission adopted alternative B, it would therefore have to amend corresponding provisions relating to permanent missions and permanent observer missions. If it was not prepared to amend those provisions, he thought it had no choice but to adopt alternative A.

11. Mr. USTOR suggested that in order to avoid discussion on the question of priority, successive votes should be taken on the two texts in order to ascertain which had more support; in that way a vote would be taken on alternative B even if a majority pronounced in favour of alternative A.

12. Mr. BARTOŠ said that if the first text put to the vote were adopted, the second would be automatically excluded. The two alternatives were not separate texts which could exist side by side; only one of them could be adopted. It was for the Commission to decide which should be put to the vote first.

13. Mr. CASTRÉN said he was in favour of alternative B. If that alternative were adopted, he did not think it would be necessary to amend the corresponding provision relating to permanent missions, since there was a fundamental difference between permanent missions and delegations.

14. With regard to the order in which the two texts should be put to the vote, alternative B should be voted on first since it was an amendment to the text proposed by the Special Rapporteur.

15. Mr. ROSENNE said he would prefer alternative A, provided that paragraph 5 of article 101 was retained; the provisions of that paragraph were really an integral part of alternative A.

16. Mr. AGO (Chairman of the Drafting Committee) suggested that since, for certain members of the Commission, the choice between alternatives A and B depended on the retention of paragraph 5 of article 101, the best course would be to suspend the discussion on article 100 and pass on to article 101.

17. The CHAIRMAN said that, for the reason given by the Chairman of the Drafting Committee and in view of the absence of some members, it would seem desirable to defer a decision on article 100. Consequently, if there were no objection, he would take it that the Commission agreed to suspend consideration of article 100 for the time being.

*It was so agreed.*²

ARTICLE 101

18. Mr. AGO (Chairman of the Drafting Committee) said that paragraphs 1 to 4 of article 101 were based on article 33, which was the corresponding provision for permanent missions.

19. The Drafting Committee had thought it advisable to add a new provision, paragraph 5, based on the recommendation in resolution II, on consideration of civil claims, adopted by the United Nations Conference on Diplomatic Intercourse and Immunities.³ In the draft articles, the provision was no longer a recommendation, but placed the sending State under a legal obligation, when there was a civil action, either to waive the immunity of the person concerned or to use its best endeavours to bring about a just settlement. Thus, articles 100 and 101, taken together, would guarantee the practical settlement of nearly all civil cases.

20. Furthermore, the legal obligation to seek a just settlement might lead to the initiation of the consultation and conciliation procedure provided for in article 50, to which the host State could have recourse if it considered that the sending State was not really trying to find a means of settlement; and that would provide an additional guarantee of the settlement of civil cases. Thus paragraph 5 was extremely important.

21. The text proposed for article 101 read:

Article 101

Waiver of immunity

1. The immunity from jurisdiction of the representatives of the delegation to an organ or to a conference and members of its diplomatic staff and of persons enjoying immunity under article 105 may be waived by the sending State.

2. Waiver must always be expressed.

3. The initiation of proceedings by any of the persons referred to in paragraph 1 of this article shall preclude them from

² For resumption of the discussion see 1134th meeting, para. 47.

³ United Nations, *Treaty Series*, vol. 500, pp. 218-220.

invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of any of the persons mentioned in paragraph 1 in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

22. Mr. USTOR said that article 32 of the 1961 Vienna Convention on Diplomatic Relations⁴ contained an identical provision on waiver of immunity, but without any title. The corresponding article 45 of the 1963 Vienna Convention on Consular Relations,⁵ however, was entitled "Waiver of privileges and immunities" and stated in paragraph 1 that the sending State might waive "any of the privileges and immunities provided for in Articles 41, 43 and 44" of that Convention. On the other hand, article 41 of the 1969 Convention on Special Missions⁶ was entitled "Waiver of immunity" and made no reference to privileges; it referred specifically to "Waiver of immunity from jurisdiction".

23. Since article 101, like article 41 of the Convention on Special Missions and unlike article 45 of the Vienna Convention on Consular Relations, did not refer in any way to privileges, the waiver of which was not in any case a practical proposition, he proposed that the present title, "Waiver of immunity" be amended to read: "Waiver of immunity from jurisdiction".

24. Mr. AGO (Chairman of the Drafting Committee) said he could accept that proposal.

25. Mr. TAMMES said that in view of the importance attached to paragraph 5, he would like to have some clarification from the Chairman of the Drafting Committee on a specific point. Was it a matter for unilateral decision by the sending State whether it should "use its best endeavours to bring about a just settlement of the case"?

26. It was worth noting that section 14 of the 1946 Convention on the Privileges and Immunities of the United Nations⁷ provided that a Member State was "under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice and it can be waived without prejudice to the purpose for which that immunity is accorded". That language made it clear that the matter was one for the unilateral decision of the Member State concerned and was therefore not open to judgment by a third party in the context of any applicable procedure for the settlement of disputes.

27. Mr. AGO (Chairman of the Drafting Committee) said that the decision whether or not to waive immunity

was clearly unilateral and was left to the discretion of the sending State, which was not obliged to explain its decision to anyone. On the other hand, paragraph 5 imposed an objective obligation on the sending State; the host State would therefore have grounds for complaint if that obligation were not fulfilled and would be free to resort to the consultation or conciliation procedure.

28. Sir Humphrey WALDOCK said he agreed with the Chairman of the Drafting Committee. The provisions of paragraph 5 were also of importance in relation to those of paragraph 1, sub-paragraphs (a), (b) and (c) of alternative A for article 100.

29. The question whether an act should be considered as having been performed in the course of official functions, in other words "on behalf of the sending State", or "outside" the official functions of the person concerned, was a critical factor for determining whether the act was covered by immunity or not. Consequently, on the question of the application of the exceptions set forth in the various sub-paragraphs of alternative A, paragraph 1, a conflict of views could arise between the sending State and the courts of the host State. The sending State could take an extensive view of what constituted the official duties of the person concerned and claim that if the courts of the host State assumed jurisdiction in a particular case, they were violating the terms of the convention that would emerge from the present draft articles. The sending State would thus be claiming that the dispute related to the interpretation of that convention.

30. In his view, paragraph 5 of article 101 had very general importance; for regardless of any dispute on the proper interpretation of the provisions of article 100, the obligation to ensure a just settlement of the case, set forth in paragraph 5 of article 101 would exist.

31. Mr. REUTER said that, in general, he agreed with Mr. Ago. However, paragraph 5 was not so exceptionally important as Mr. Ago believed it to be, unless it was considered from the point of view of procedure rather than substance.

32. With regard to the substance, paragraph 5 did not add anything to the obligations of the sending State, since privileges and immunities were accorded only for the performance of functions, and no one enjoyed them in his personal capacity. In fact, therefore, the sending State was merely required by an obligation of good faith to do everything possible to avoid obstructing the administration of justice.

33. From the procedural point of view, on the other hand, paragraph 5 might be extremely important, but the Commission could not yet say what its effect would be, for two reasons. The first reason was that the present text referred only to a dispute between a representative and a private person, in other words a private dispute and not a dispute between governments. Since private disputes involved delicate questions of judgment, the sending State could not be asked to bring excessive pressure to bear on its representative, so the obligation stated in paragraph 5 could only relate to conduct. If

⁴ *Ibid.*, p. 112.

⁵ *Op. cit.*, vol. 596, pp. 298-300.

⁶ See General Assembly resolution 2530 (XXIV), Annex.

⁷ United Nations, *Treaty Series*, vol. 1, p. 22.

the Commission wished to go further, it would have to amend the text of the paragraph.

34. The second reason was that the Commission had not yet decided what to do about procedures for the settlement of disputes. Paragraph 5 could be of major importance if—and only if—the procedures adopted were sound.

35. Mr. USHAKOV reiterated that if the Commission adopted alternative B for article 100, paragraph 5 of article 101 would be completely pointless.

36. Paragraph 2 (a) of alternative B for article 100 provided for immunity from the civil and administrative jurisdiction of the host State in respect of all acts performed in the exercise of official functions. That meant that the immunity from jurisdiction did not apply where the acts complained of were performed outside the exercise of official functions. Hence it could only be in the case of acts performed in the exercise of official functions that the sending State must either waive immunity or use its best endeavours to bring about a just settlement of the case, as provided in paragraph 5 of article 101. He could not accept a provision to that effect. If the Commission adopted alternative B for article 100 and paragraph 5 of article 101, diplomats would no longer enjoy immunity from civil jurisdiction.

37. Mr. CASTRÉN said that paragraph 5 of article 101 was very valuable and important. He could not agree with Mr. Reuter that it did not impose any obligation on the sending State; the obligation, although not a strong one, did exist.

38. However, the new provision did not provide a complete guarantee of the settlement of disputes, as Mr. Ago had said. There was still the possibility of recourse to consultations and conciliation, which would not guarantee a positive result either. The guarantee was further weakened by the fact that, in both cases, the sending State would be taking a unilateral decision, and unfortunately States were not always objective.

39. He agreed with Mr. Ushakov that the Commission could not adopt both alternative B for article 100 and paragraph 5 of article 101. He would prefer it to adopt alternative B and delete paragraph 5.

40. Mr. ROSENNE said he agreed that the provisions of paragraph 5 of article 101 were essential to alternative A for article 100. Nevertheless, they were also highly desirable, and would have an independent function to perform, if alternative B were adopted.

41. He noted that the word "case", at the end of paragraph 5, was rendered in the French version by the word "*litige*" and in the Spanish version by the word "*litigio*". Bearing in mind the provisions of the corresponding articles on permanent missions and permanent observer missions, the word "case" should be construed in the broad sense of "matter" rather than in the narrow sense of "lawsuit", which was perhaps conveyed by the French "*litige*" and the Spanish "*litigio*". He therefore suggested that the French and Spanish terms be reconsidered.

42. Mr. REUTER explained that he had not said that paragraph 5 did not establish an obligation. On the contrary, it did establish an obligation relating to conduct, which was of some importance.

43. With reference to Mr. Ushakov's comments, he said that in the exercise of his functions a representative was not only covered by immunity from proceedings, but also enjoyed a real irresponsibility. According to alternative A, proceedings could be taken against a representative only for acts committed outside the exercise of his official functions. A representative who travelled by car from his home to the headquarters of the organization was acting in the exercise of his official functions and was therefore covered by immunity from jurisdiction; but if he caused an accident, any State of good faith would consider itself obliged to use its best endeavours to bring about a just settlement of the case.

44. Mr. YASSEEN said that immunity was not synonymous with irresponsibility. Immunity from jurisdiction did not mean that the person concerned was presumed to be irresponsible and that the case must not be settled. The reason why he was reluctant to accept paragraph 5 was that he thought it unnecessary to state a rule prescribing conduct which was in any case required as a matter of good faith between States. In general, States did not hesitate to compensate persons injured by one of their representatives.

45. However, if the Commission adopted alternative A for article 100, he could accept paragraph 5, although it stated an obligation relating to method and not to result, since it might open the way for procedures for the international settlement of disputes.

46. Mr. USTOR said that no doubt there could be differences between the view of the sending State and the pronouncements of the courts of the host State on the question whether a particular act was to be regarded as performed in the exercise of the official functions of the person concerned. That type of difficulty was, however, a general feature of diplomatic law and could arise in connexion with all matters of immunity.

47. With regard to the provisions of paragraph 5, the main issue was the legal nature of the immunity from civil jurisdiction in the case of acts performed in the exercise of official functions. In most of those cases, the immunity belonged to the sending State itself and not to the person concerned. The act in question was an act of the State on whose instructions the person concerned had acted. It was not so much a matter of the diplomatic immunity of an individual as of the absence of jurisdiction over the acts of foreign States.

48. What the drafters of paragraph 5 had had in mind was the case of a person enjoying diplomatic immunity, but acting on his own behalf, not the case of an act of State. There had been no intention to prejudge the question whether a State would be prepared to submit certain of its acts to adjudication by the courts of another State.

49. It was therefore clear that if alternative A were chosen for article 100, it would rule out paragraph 5 of

article 101, because that paragraph had not been intended to apply to acts of State.

50. Mr. KEARNEY said that not all of those who had drafted paragraph 5 had had in mind non-official acts exclusively. As far as he was concerned, he had envisaged such cases as court action resulting from an accident caused by a diplomatic agent in a hurry to attend an official meeting.

51. The point raised by Mr. Rosenne on the meaning of the word "case" raised the important question how far it was necessary to go before the provisions of paragraph 5 went into operation.

52. On a broad interpretation, it might be considered sufficient for the claimant to write to the permanent representative asking him to make arrangements for a waiver of immunity; a refusal by the latter to do so would then bring the provisions of paragraph 5 into play. A second and narrower approach would be to require the claimant to institute court proceedings; if objection were raised by the defendant on grounds of immunity and his objection were upheld by the court, the provisions of paragraph 5 would then operate.

53. Personally, he preferred the first approach. The term "case" should not be taken as a formal requirement; it should be construed in the broad sense of a claim rather than in the narrow sense of a lawsuit.

54. Mr. AGO (Chairman of the Drafting Committee) said he agreed with Mr. Kearney that, to be effective, paragraph 5 had to be interpreted as broadly as possible. The Drafting Committee might examine whether the wording could be improved in that respect.

55. Mr. Reuter had said that paragraph 5 added nothing to the obligations of the sending State. He himself did not share that view. Paragraph 5 imposed on the sending State the obligation to endeavour to find an extra-judicial settlement of a claim. He thought it was the first time that international law had included such an obligation, which went far beyond good faith.

56. Mr. Reuter had also said that paragraph 5 could only refer to actions between private persons. But if the sending State did not use its best endeavours to bring about a just settlement of the case and the host State accused it of having failed to fulfil the obligation provided for in paragraph 5, such an action would become a dispute between States.

57. Mr. Castrén had said he would prefer to drop paragraph 5 of article 101 so as to be able to adopt alternative B for article 100. Actually, when taken together, the provisions of alternative A of article 100 and paragraph 5 of article 101 should lead more frequently to complete settlement of cases than the provisions of alternative B. Because it granted wider immunities, alternative A limited the possibility of recourse to judicial procedures, but the system provided that when an action was brought, it could be settled either by judicial means, if the sending State chose to waive immunity, or out of court if it did not, inasmuch as the sending State was under an obligation to seek means of reaching a practical settlement.

58. On the other hand, while alternative B of article 100 did not grant such extensive immunities, it provided no guarantee that the victim would be adequately compensated after winning a case, since representatives of States also enjoyed immunity from measures of execution. Consequently, the end in view was better achieved by the combination of alternative A for article 100 and paragraph 5 of article 101.

59. Mr. CASTRÉN said he maintained his position despite the explanations given by the Chairman of the Drafting Committee.

60. Mr. REUTER suggested that the words "*du litige*" in the French version of paragraph 5, be replaced by the words "*de l'affaire*".

61. In reply to Mr. Ago, he said that the whole of his own previous statement had been based on the distinction between obligations of substance and obligations of procedure. So far as substance was concerned, he entirely agreed with Mr. Yasseen. When a State had recourse to immunity from measures of execution contrary to equity and good faith, it violated a fundamental rule of public international law.

62. Mr. AGO (Chairman of the Drafting Committee) said he accepted Mr. Reuter's suggestion.

63. Mr. USHAKOV said that the only possible interpretation of the provisions under consideration was that civil jurisdiction operated only with respect to acts committed outside the exercise of official functions, so that paragraph 5 of article 101 could refer only to acts committed in the exercise of official functions. Those provisions were not concerned with immunity from measures of execution.

64. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 101 as proposed by the Drafting Committee, subject to a possible amendment of the title and to the replacement, in the French version, of the word "*litige*" by the word "*affaire*". A similar change should be made in the Spanish version.

*It was so agreed.**

65. The CHAIRMAN invited the Commission to consider articles 102 to 108 as proposed by the Drafting Committee (A/CN.4/L.168/Add.7).

ARTICLE 102

66. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that article 102 was based on article 34 of the Vienna Convention on Diplomatic Relations,⁹ article 33 of the Convention on Special Missions¹⁰ and article 36 of the present draft. The only difference of substance between articles 102 and 36 related to sub-paragraph (f). In article 36 that sub-paragraph read: "registration, court or record fees, mortgage dues and stamp

* For resumption of the discussion see 1134th meeting, para. 56.

⁹ United Nations, *Treaty Series*, vol. 500, p. 114.

¹⁰ See General Assembly resolution 2530 (XXIV), Annex.

duty, with respect to immovable property, subject to the provisions of article 26". The clause "with respect to immovable property" appeared both in article 34 of the Vienna Convention and in article 33 in the draft on Special Missions as adopted by the Commission in 1967,¹¹ but it had been deleted from the Convention on Special Missions as a result of the adoption, by 24 votes to 23, with 39 abstentions, of an oral amendment proposed by the representative of France in the Sixth Committee.¹² The clause had not been included in paragraph (f) of article 102, because in 1970 the International Law Commission had followed the Convention on Special Missions.

67. But if the clause were now omitted from article 102 and retained in article 36, the result would be that permanent missions would have to pay registration, court or record fees, mortgage dues and stamp duty with respect to movable property only, whereas delegations would have to pay them on all property, movable and immovable. The practical effect of such a difference in treatment would be very small, since such charges rarely applied to movable property. The Drafting Committee therefore proposed that permanent missions and delegations should be treated on an equal footing in that respect, the clause in question being retained in article 36 and added to article 102.

68. A minor change had been made at the end of sub-paragraph (c): since the Drafting Committee had made article 109 into paragraph 4 of article 108, the reference had been amended accordingly.

69. The text proposed for article 102 read:

Article 102

Exemption from dues and taxes

The representatives in the delegation to an organ or to a conference and the members of its diplomatic staff shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the delegation;

(c) estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 108;

(d) dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State;

(e) charges levied for specific services rendered;

(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 95.

70. Mr. EUSTATHIADES said that the insertion of the words "with respect to immovable property" had

the effect of exempting the persons concerned from taxes on movable property. In view of the relatively short duration of the functions of delegations, it might not be appropriate to grant them such exemption. Possibly the Commission had been too liberal in its draft on Special Missions.

71. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee was simply proposing that the Commission return to the position it had taken with regard to special missions. The French amendment submitted in the Sixth Committee had only been adopted by the barest majority and in the present case it might well be that the Commission's point of view would be endorsed by the Conference of Plenipotentiaries.

72. The drafting of sub-paragraph (f) had been complicated by the fact that, with respect to movable property, it contained an exception to an exception. That exception had been included because taxes on movable property were generally payable by the person concerned, whereas taxes on immovable property were borne by the State.

73. Mr. REUTER said he considered article 102 acceptable. In fact, the exception to the exception contained in sub-paragraph (f) related only to very rare eventualities, such as the case of a lien on a ship. Hence the change made by the Drafting Committee was of only minor practical significance.

74. Instead of choosing that solution, the Drafting Committee could have left sub-paragraph (f) applicable to all property, movable and immovable, which would have been slightly more advantageous to the host State. The most important question was which wording would make the convention more acceptable.

75. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 102 as proposed by the Drafting Committee.

*It was so agreed.*¹³

ARTICLE 103

76. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had brought article 103 into line with article 38 of the draft. In doing so, it had eliminated a number of differences in drafting, the main one being at the beginning of paragraph 1, where the phrase "Within the limits of such laws and regulations as it may adopt" had been replaced by the phrase "in accordance with such laws and regulations as it may adopt". The Committee had considered the two phrases to be very similar. The first appeared in article 35 of the Commission's 1967 draft on Special Missions, while the second was used in article 38 of the present draft and in article 36 of the Vienna Convention on Diplomatic Relations. In its commentary to the draft Convention on Special Missions, the Commission had not indicated why it had not followed the wording of the

¹¹ See *Yearbook of the International Law Commission, 1967*, vol. II, pp. 362-363.

¹² See *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda item 87, document A/7799*, paras. 47-49.

¹³ For resumption of the discussion see 1134th meeting, para. 63.

Vienna Convention, thereby implying that the difference between the two phrases was not significant.

77. The Drafting Committee had not inserted in paragraph 1 (b) the phrase "including articles intended for his establishment", which appeared in the corresponding sub-paragraph 38; since article 103 dealt with delegations, whose functions were generally of short duration, that phrase would be out of place.

78. The text proposed for article 103 read:

Article 103

Exemption from customs duties and inspection

1. The host State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

(a) articles for the official use of the delegation to an organ or to a conference;

(b) articles for the personal use of a representative in the delegation or a member of its diplomatic staff.

2. The personal baggage of a representative in the delegation or a member of its diplomatic staff shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemption mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. In such cases, inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

79. Mr. EUSTATHIADES said he would like the commentary to contain an explanation of how the first phrase in paragraph 1 was to be understood.

80. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 103 as proposed by the Drafting Committee, subject to Mr. Eustathiades's remark concerning the commentary.

*It was so agreed.*¹⁴

ARTICLE 104 (Exemption from social security legislation, personal services and laws concerning acquisition of nationality)

81. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had placed article 104 in square brackets, because the Working Group was considering making it a general provision. The Committee therefore proposed that the Commission defer consideration of the article for the time being.

82. The CHAIRMAN said that if there were no objection he would take it that the Commission accepted the Drafting Committee's proposal,

*It was so agreed.*¹⁵

¹⁴ For resumption of the discussion see 1134th meeting, para. 69.

¹⁵ For resumption of the discussion see 1134th meeting, para. 60.

ARTICLE 105

83. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had slightly changed the wording of the first two paragraphs of article 105¹⁶ so as to bring them into line with article 40, but had left intact those differences which it considered justified. In particular, the Committee had thought it necessary to retain the distinction between the members of the family who accompanied members of delegations, in article 105, and the members of the family forming part of the household of members of permanent missions, in article 40. The verb "accompany" was appropriate in article 105, because of the temporary character of delegations.

84. In paragraph 1, the Drafting Committee had retained the words "or permanently resident in the host State". Thus the paragraph applied to members of the family of a representative in a delegation or of a member of the diplomatic staff of a delegation on two conditions: that such members of the family were neither nationals of the host State nor permanently resident in the host State. Those words were not included in paragraph 1 of article 40, since that provision applied to the members of the family of a permanent representative or of a member of the diplomatic staff of a permanent mission on condition only that such members of the family were not nationals of the host State. The Committee had considered that the difference in treatment thus established between delegations and permanent missions was justified, in view of the short time spent by members of delegations in host States. If they joined a member of their family permanently resident in the host State, there seemed to be no reason why that person should enjoy the privileges and immunities referred to in article 105, paragraph 1, for the duration of the delegation's functions.

85. In paragraphs 3 and 4 of article 105 the Commission had not, in 1970, reproduced the clause "who are not nationals of or permanently resident in the host State". In the corresponding paragraphs of article 40, that clause concerned members of the service staff of permanent missions and private staff; it was unnecessary there because the point was covered by article 41, which dealt with members of permanent missions and persons on the private staff who were nationals of or permanently resident in the host State. Since article 106 specified that the provisions of article 41 applied also in the case of delegations, the Drafting Committee had not included that clause in article 105; it also intended to propose that the clause be deleted from article 40 when the draft articles were revised.

86. The title of article 105 had been brought into line with that of article 40.

87. The last sentence of paragraph 4 of article 105 had been slightly changed in the French version, in order to provide a better rendering of the idea expressed in the

¹⁶ For previous text see 1109th meeting, para. 62.

English. The Drafting Committee intended to make the same change in the French version of article 40.

88. The text proposed for article 105 read:

Article 105

Privileges and immunities of persons other than the representatives in the delegation to an organ or to a conference or than the members of its diplomatic staff

1. The members of the family of a representative in the delegation to an organ or to a conference who accompany him and the members of the family of a member of the diplomatic staff of the delegation who accompany him shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 98, 99, 100, 102, in paragraphs 1(b) and 2 of article 103 and in article 104.

2. Members of the administrative and technical staff of the delegation, together with members of their families who accompany them and who are not nationals of or permanently resident in the host State, shall enjoy the privileges and immunities specified in articles 98, 99, 100, 102 and 104, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 100 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1 (b) of article 103 in respect of articles imported at the time of their entry into the territory of the host State to attend the meeting of the organ or conference.

3. Members of the service staff of the delegation shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment, and the exemption from social security legislation provided for in article 104.

4. Private staff of members of the delegation shall be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the delegation.

89. Mr. EUSTATHIADES, referring to paragraph 2, said he must reiterate his doubts about the advisability of granting the privileges and immunities referred to in articles 98 and 99, 100, 102 and 104 to members of the families of the administrative and technical staff of delegations to an organ. Such privileges and immunities could only be justified by the need to ensure the regular performance of functions.

90. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the phrase, in paragraph 2, "except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 100 shall not extend to acts performed outside the course of their duties" had been drafted in case the Commission adopted alternative A for article 100. It would have to be revised if alternative B were adopted.

91. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 105 as proposed by the Drafting Committee.

*It was so agreed.*¹⁷

¹⁷ For resumption of the discussion see 1135th meeting, para. 14.

ARTICLE 106

92. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had made no change in article 106, the text of which read:

Article 106

Nationals of the host State and persons permanently resident in the host State

The provisions of article 41 shall apply also in the case of a delegation to an organ or to a conference.

*Article 106 was provisionally approved.*¹⁸

ARTICLE 107 (Privileges and immunities in case of multiple functions)

93. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had placed article 107 in square brackets, because the Working Group intended to make it a general provision. The Commission therefore proposed that the Commission defer consideration of the article for the time being.

94. The CHAIRMAN said that if there were no objection he would take it that the Commission accepted the Drafting Committee's proposal.

*It was so agreed.*¹⁹

ARTICLE 108

95. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that in the text adopted by the Commission in 1970, article 108 had consisted of three paragraphs, corresponding to the first three paragraphs of article 42.²⁰ Article 109 had had two paragraphs, the provisions of which corresponded to those of paragraph 4 of article 42. In order to bring articles 108 and 109 as closely into line with article 42 as possible, the Drafting Committee had converted article 109 into paragraph 4 of article 108. For the last sentence of that paragraph it had, however, preferred the wording adopted by the Commission in 1970 for article 109, paragraph 2, although it differed slightly from the corresponding provisions of article 42 of the draft and article 39 of the Vienna Convention on Diplomatic Relations. When the draft was reviewed, the Committee intended to use the same wording for article 42.

96. The text proposed for article 108 read:

Article 108

Duration of privileges and immunities

1. Every person entitled to privileges and immunities under the provisions of this part shall enjoy such privileges and immunities from the moment he enters the territory of the host State on the occasion of the meeting of an organ or conference, or,

¹⁸ For resumption of the discussion see 1135th meeting, para. 19.

¹⁹ For resumption of the discussion see 1135th meeting, para. 43.

²⁰ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

if he is already in its territory, from the moment when his appointment is notified to the host State by the Organization, by the conference or by the sending State.

2. When the functions of a person entitled to privileges and immunities under this part have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the delegation to an organ or to a conference, immunity shall continue to subsist.

3. In case of the death of a member of the delegation, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the delegation not a national of or permanently resident in the host State or of a member of his family accompanying him, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property which is in the host State solely because of the presence there of the deceased as a member of the delegation or of the family of a member of the delegation.

*Article 108 was provisionally approved.*²¹

The meeting rose at 1 p.m.

²¹ For resumption of the discussion see 1135th meeting, para. 22.

1127th MEETING

Thursday, 1 July 1971, at 4.15 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Alcívar, Mr. Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey 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 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168/Add.7)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

1. The CHAIRMAN invited the Commission to consider the texts of articles 110 to 116 *bis* as proposed by the Drafting Committee (A/CN.4/L.168/Add.7).

ARTICLE 110

2. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that article 110¹ corresponded to article 43 of the draft. The essential difference between the two articles had lain in the provisions of paragraph 4 of article 110, which were not included in article 43 or in the corresponding article 40 of the Vienna Convention on Diplomatic Relations.² Those provisions had read:

“4. The third State shall be bound to comply with its obligations in respect of the persons mentioned in paragraphs 1, 2 and 3 of this article only if it has been informed in advance, either in the visa application or by notification, of the transit of those persons as members of the delegation, members of their families or couriers and has raised no objection to it.”

3. On the other hand, the opening sentence of paragraph 1 of article 43, which was based on article 40 of the Vienna Convention on Diplomatic Relations, contained a clause not included in article 110, reading: “which has granted him a passport visa if such visa was necessary”. A similar clause was to be found in paragraph 3 of article 43 where it applied to couriers of the permanent mission.

4. There was thus a major difference of substance between article 43 of the draft and article 40 of the Vienna Convention on the one hand, and article 110 on the other. Under the terms of the first two articles, it was sufficient that the third State should have been asked for a visa, if a visa was necessary. Under the terms of article 110, even if a visa was not necessary, the third State had to be informed of the transit in advance, so that it could object if need be.

5. The Drafting Committee had noted that the provisions of paragraph 4 of article 110 were based on paragraph 4 of article 42 of the Convention on Special Missions³ and had considered that while they might be justified in the case of special missions in view of the great variety of their functions and nature, such provisions were hardly justified in the case of delegations to an organ or a conference. It had therefore deleted paragraph 4 of article 110 and had inserted the clause relating to a visa in paragraphs 1 and 3.

6. In the French version of paragraph 3, the Committee had departed slightly from the wording of the Vienna Convention on Diplomatic Relations in order to bring paragraph 3 into line with paragraph 1. It intended to do the same in article 43.

7. For the rest, the Committee had modelled article 110 as closely as possible on article 43. In the interests of clarity and concision, however, in the second sentence of

¹ For previous text see 1109th meeting, para. 83.

² United Nations, *Treaty Series*, vol. 500, pp. 118-120.

³ See General Assembly resolution 2530 (XXIV), Annex.

paragraph 1 it had replaced the words "the person referred to in this paragraph" by the personal pronoun "him", and intended to make a similar change in article 43.

8. The Drafting Committee had also noted that in the English version of paragraph 4 of article 43, the expression "whose presence in the territory of the third State is due to *force majeure*" was questionable from a grammatical point of view, because the word "whose" referred not only to persons but also to things; so although that expression was used in article 40 of the Vienna Convention on Diplomatic Relations, the Committee had preferred a different form of words, reading "when they are present in the territory of the third State owing to *force majeure*". It intended to use the same wording for article 43 when the draft was revised.

9. The text proposed for article 110 read:

Article 110

Transit through the territory of a third State

1. If a representative in the 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, which has granted him a passport visa if such visa was necessary, while proceeding to take up his functions 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 the members of his family enjoying privileges or immunities who are accompanying him, 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 passage of members of the administrative and technical or service staff of the delegation, and of members of their families through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the host State. They shall accord to the couriers of the delegation, who have been granted a passport visa if such visa was necessary, and to the bags of the delegation in transit the same inviolability and protection as the host State is bound to accord.

4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to the official communications and bags of the delegation when they are present in the territory of the third State owing to *force majeure*.

10. Mr. EUSTATHIADES said that article 110, in its new form, said nothing about the case in which the third State was informed of the transit of the persons concerned in advance, by notification. That case was covered both in the former paragraph 4, which had been deleted, and in article 42 of the Convention on Special Missions. The commentary to article 110 should make it clear whether the obligation imposed on the third State was subject to notification if that State did not require a visa.

11. Mr. BARTOŠ said he agreed. It was useful for States which did not require a visa to be informed, by notification, of all movements of diplomats. Article 110 did not require such notification, but the commentary

should emphasize its desirability. If a third State which did not require a visa had been informed of the arrival in its territory of a member of a delegation, the sending State was in a better position to request it to show that person consideration of a kind which would not be shown to a mere tourist.

12. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had studied the matter and had found that neither of the two Vienna Conventions—on diplomatic relations and on consular relations—made the obligation of the third State conditional on notification. In reality, States were free to require or not to require prior notification; some did, others did not. The presence or absence of a clause requiring notification would not alter the situation in any way. Moreover, States could always object to the transit.

13. Mr. BARTOŠ said he was glad to have that explanation but, contrary to what the Drafting Committee had assumed, a number of States did require to be notified of movements in the diplomatic and consular corps. Furthermore, both the Vienna Conventions contained express provisions on notifications of that kind. If notification was required in the case of diplomatic missions and consular posts, it should be equally required for missions to international organizations.

14. Without going so far as to make notification compulsory, the Commission should emphasize its desirability in the commentary and point out that the absence of notification might give rise to disputes.

15. Sir Humphrey WALDOCK said that Mr. Ushakov had given a very clear explanation, with which he associated himself. It was to be emphasized that article 110 dealt exclusively with the problem of transit through a third State. The Drafting Committee had considered that problem at length and had come to the conclusion that an absolute requirement of prior notification as a condition for privileges and immunities would be too strict, and that in view of modern travel conditions such a condition would be unrealistic. For those reasons the Drafting Committee had considered that the rule laid down in the Vienna Conventions on diplomatic and consular relations was to be preferred, in the present draft, to the rule in the Convention on Special Missions. Of course, a diplomat whose transit had not been notified would run the risk of not being accorded his privileges and immunities until he had satisfied the authorities of the transit State that he was entitled to them. But it would be going too far to deny them to him altogether, once he had established status.

16. Mr. BARTOŠ said that many States did not follow the practice mentioned by Sir Humphrey Waldock. For example, the United Kingdom always asked the reasons for a journey. Hence notification was an indirect condition for the enjoyment of privileges and immunities. Although States were quite free in that matter, it was desirable that the commentary should stress the advantages of notification.

17. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally

approved article 110 as proposed by the Drafting Committee; due account would be taken of the views expressed with regard to the commentary.

*It was so agreed.*⁴

ARTICLE 111 (Non-discrimination),

ARTICLE 113 (Professional or commercial activity) and

ARTICLE 115 (Facilities for departure)

18. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Working Group and the Drafting Committee intended to make general provisions of articles 111, 113 and 115, which had accordingly been placed in square brackets. The Drafting Committee proposed that consideration of those articles be deferred.

19. The CHAIRMAN said that if there were no objection he would take it that the Commission accepted the Drafting Committee's proposal.

*It was so agreed.*⁵

ARTICLE 112

20. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had brought article 112 into line with the text provisionally adopted by the Commission for article 45.⁶ The text proposed for article 112 read:

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 jurisdiction, the sending State shall, unless it waives the immunity of the person concerned, recall him, terminate his functions with the delegation to an organ or to a conference or secure his departure, as appropriate. The sending State shall take the same action in case of grave and manifest interference in the internal affairs of the host State. The provisions of this paragraph shall not apply in the case of any act that the person concerned performed in carrying out the functions 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.

21. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally

⁴ For resumption of the discussion see 1135th meeting, para. 70.

⁵ For resumption of the discussion see 1135th meeting, paras. 49, 67 and 78.

⁶ See 1114th meeting, para. 51 and 1115th meeting, paras. 19-22.

approved article 112 as proposed by the Drafting Committee.

*It was so agreed.*⁷

ARTICLE 114

22. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had brought article 114 into line with article 47. In particular, it had changed the title of the article, which previously had referred to the end of the functions of any member of a delegation irrespective of his category A consequential change had been made in the text of the article.

23. The text proposed for article 114 read:

Article 114

End of the functions of a representative in the delegation to an organ or to a conference or of a member of the diplomatic staff

The functions of a representative in the delegation to an organ or to a conference or of a member of its diplomatic staff shall come to an end, *inter alia*:

(a) on notification of their termination by the sending State to the Organization or the conference;

(b) upon the conclusion of the meeting of the organ or the conference.

24. Mr. EUSTATHIADES asked whether the functions of a representative in the delegation to an organ or to a conference always came to an end on the conclusion of the meeting of the organ or the conference concerned, as provided in sub-paragraph (b). The commentary should indicate whether they might continue after the conclusion of the meeting in exceptional cases, when certain representatives had to hold an exchange of views, plan a future meeting or complete the work of the conference.

25. Mr. USHAKOV said he thought that Mr. Eustathiades' observation related rather to the duration of privileges and immunities than to the duration of functions. The latter concept was linked to the duration of the conference. Privileges and immunities, on the other hand, did not normally cease until the persons enjoying them had left the territory of the host State, as provided in paragraph 2 of article 108.

26. Mr. ROSENNE said that in the light of Mr. Eustathiades' observations he did not see what practical purpose article 114 was intended to serve at that point in the draft; it only repeated the substance of article 89, paragraph 1 (a).

27. Mr. USHAKOV said that the rule in sub-paragraph (a) followed the corresponding provision in article 43 of the Vienna Convention on Diplomatic Relations. On the other hand, the rule in sub-paragraph (b) was an innovation; it might not be necessary, but it was at least useful.

⁷ For resumption of the discussion see 1135th meeting, para. 46.

28. Mr. CASTRÉN said he accepted the text proposed by the Drafting Committee for article 114.

29. With regard to the eventualities mentioned by Mr. Eustathiades, if some representatives remained in the territory of the host State after the end of a meeting it was usually in a private capacity or in the exercise of other official duties. Moreover, some of the activities mentioned by Mr. Eustathiades were the responsibility of the secretariat of the organ or the conference.

30. Mr. USHAKOV said that the Vienna Convention on Diplomatic Relations contained both an article on regular notifications—article 10—and an article on the end of functions—article 43. It was right that the draft should include two corresponding provisions.

31. Mr. REUTER suggested that the title of the article should be amended to read: "End of the functions of a representative or of a member of the diplomatic staff in the delegation to an organ or to a conference." He would like to hear whether there was any obstacle to such a change.

32. Mr. TESLENKO (Deputy Secretary to the Commission) said that the title proposed by the Drafting Committee was purely provisional.

33. Sir Humphrey WALDOCK said he wished to associate himself with the explanation given by Mr. Ushakov. The purpose of article 114 was to fix the moment at which the functions of a representative came to an end, as had been done in article 43 of the Vienna Convention on Diplomatic Relations. That was essential in connexion with the duration of privileges and immunities.

34. The CHAIRMAN suggested that article 114 be provisionally approved with the amended title proposed by Mr. Reuter.

It was so agreed.⁸

ARTICLE 116

35. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had brought the title of article 116 into line with that of article 49, by adding the word "property" after the word "premises".

36. With regard to the text of the article, the Committee had noted two differences between articles 49 and 116, which it had retained.

37. First, the first sentence of article 116 provided that the host State must respect and protect the premises of the delegation "so long as they are assigned to it". The words "so long as they are assigned to it" were taken from article 46 of the Convention on Special Missions, but did not appear in article 40 of the draft. The Committee had considered that difference justified. Unlike the premises of permanent missions, those of delegations were in most cases occupied only for a short time. In those circumstances, the host State could not be required to protect them when they were no longer assigned to the delegation.

⁸ For resumption of the discussion see 1135th meeting, para. 31.

38. Secondly, the text of paragraph 1 of article 49, as provisionally approved by the Commission,⁹ contained a last sentence which read: "It [the sending State] may entrust custody of the premises, property and archives of the permanent mission to a third State acceptable to the host State". Article 116 contained no corresponding provision. There again, the Committee had considered that the difference between the two articles was justified in view of the short duration of the functions of most delegations.

39. The text proposed for article 116 read:

Article 116

Protection of premises, property and archives

1. When the meeting of an organ or a conference comes to an end, the host State must respect and protect the premises of the delegation so long as they are assigned to it, as well as the property and archives of the delegation. The sending State must take all appropriate measures to terminate this special duty of the host State within a reasonable time.

2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and the archives of the delegation from the territory of the host State.

40. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 116 as proposed by the Drafting Committee.

It was so agreed.¹⁰

ARTICLE 116 bis

41. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that article 116 bis had been added to the draft by the Committee. It was modelled on articles 49 bis and 77 bis, which had been provisionally approved by the Commission.¹¹

42. The words "The establishment or maintenance", at the beginning of paragraph 2, which had been taken from articles 49 bis and 77 bis, were not appropriate for a delegation and should be improved. At a later stage, the Drafting Committee might amend the beginning of paragraph 2 to read: "The sending of a delegation to" or possibly "The participation of a delegation in".

43. The text proposed for article 116 bis read:

Article 116 bis

Non-recognition of States or governments or absence of diplomatic or consular relations

1. The rights and obligations of the host State and of the sending State under the present articles shall be affected neither by the non-recognition by one of those States of the other State or of its government nor by the non-existence or the severance of diplomatic or consular relations between them.

2. The establishment or maintenance of a delegation to an organ or to a conference or any act in application of the present

⁹ See 1115th meeting, para. 52.

¹⁰ For resumption of the discussion see 1135th meeting, para. 34.

¹¹ See 1121st meeting, paras. 43-64.

articles shall not by itself imply recognition by the sending State of the host State or its government or by the host State of the sending State or its government.

44. Mr. ROSENNE said that article 116 *bis* contemplated not only the action of the sending State in sending a delegation, but also that of the host State in receiving that delegation, and the change proposed by Mr. Ushakov should be considered in that light.

45. Sir Humphrey WALDOCK said that the Working Group had envisaged article 116 *bis* as one of the general articles in the draft.

46. The CHAIRMAN suggested that the Commission approve article 116 *bis* provisionally.

*It was so agreed.*¹³

The meeting rose at 5.15 p.m.

¹³ For resumption of the discussion see 1135th meeting, para. 75.

1128th MEETING

Friday, 2 July 1971, at 11.40 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Alcívar, Mr. Bartoš, Mr. Castrén, Mr. Eus-thathiades, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

General Assembly resolution 2669 (XXV) on progressive development and codification of the rules of international law relating to international watercourses

(ST/LEG/SER.B/12; A/5409, A/7991, A/8202;
A/RES/2669 (XXV); A/CN.4/244; A/CN.4/245)

[Item 6 of the agenda]

1. The CHAIRMAN invited the Commission to consider item 6 of the agenda. He reminded members that the legislative texts and treaty provisions referred to in the report on legal problems relating to the utilization and use of international rivers prepared by the Secretary-General (A/5409) in pursuance of resolution 1401 (XIV), had been collected and published *in extenso* by the Secretariat in a volume of the United Nations legislative Series (ST/LEG/SER.B/12).

2. As the Commission had insufficient time to go into details, he asked members to express their views primarily on the action to be taken having regard to General Assembly resolution 2669 (XXV).

3. Mr. RUDA said that throughout the world there was growing concern to prevent the decrease, both

absolute and relative, of the limited resources of drinking water. Practical measures had been taken at the national level, particularly in the industrialized countries, to safeguard water resources and at the international level many bilateral and regional agreements had been concluded to prevent disputes between neighbouring countries.

4. For example, at the beginning of June 1971, the countries of the River Plate basin—Argentina, Bolivia, Brazil, Paraguay and Uruguay—at a meeting of Ministers for Foreign Affairs at Asunción, had adopted a resolution declaring that the utilization of any international river forming the boundary between two States required prior bilateral agreement between the two riparian States concerned, and that where an international river crossed the territories of two or more States successively, each riparian State might make use of the waters according to its needs, provided that it did not cause any appreciable prejudice to any other State on the same river basin. The resolution then provided for the exchange of hydrological, meteorological and cartographic information, and finally declared that each riparian State would strive to ensure the best possible conditions for navigation in its own sector.

5. Later in the same month, Chile and Argentina had signed an important agreement on the subject of international watercourses: the Act of Santiago de Chile.

6. A large number of existing bilateral and multilateral treaties on the subject were reproduced in the volume of the United Nations Legislative Series already mentioned by the Chairman, entitled "Legislative texts and treaty provisions concerning the utilization of international rivers for other purposes than navigation", and much useful information on those treaties was to be found in the Secretary-General's report.

7. Notwithstanding that mass of documentation, the utilization of international watercourses remained largely governed by general principles and rules of customary law. The Institute of International Law and the International Law Association had attempted a systematic formulation of those rules, but their efforts were of a purely private character. The General Assembly, by its resolution 2669 (XXV), had now recommended that the Commission "should, as a first step, take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification". The phrase "as a first step" was, as he saw it, linked with the reference to "non-navigational uses", the implication being that navigational uses would be considered at a later stage.

8. At the same time, the General Assembly had requested the Secretary-General to "continue the study initiated by the General Assembly in resolution 1401 (XIV) in order to prepare a supplementary report on the legal problems relating to the utilization and use of international watercourses". In his view, the Commission would be in a position to begin its own study of the question as soon as the Secretariat had completed the supplementary report requested by the General Assembly. For the time being, the only action which the Com-

mission could take was to include the topic on its general programme of work.

9. Mr. SETTE CÂMARA said that the recommendations in the two operative paragraphs of General Assembly resolution 2269 (XXV) should be reversed. The supplementary report called for in paragraph 2 was an essential preliminary, because the material available was not sufficient to enable the Commission to decide what course of action to take.

10. General Assembly resolution 1401 (XIV) had adopted a more cautious approach, since it had only recommended the initiation of preliminary studies to determine whether the subject was appropriate for codification. But up to the present only five States had supplied information to the Secretariat pursuant to that resolution. The action to be taken by the Secretariat, in accordance with paragraph 2 of resolution 2669 (XXV), to obtain supplementary information was therefore an indispensable first step for carrying out the recommendation in paragraph 1. The subject was a complex one, on which there were more than one hundred bilateral and other treaties in force between States. The Secretariat would have to digest the voluminous existing material in its supplementary report before the Commission could undertake the work of extracting from the fluid mass of State practice any valid rules of international law which might exist.

11. As indicated in the Secretariat working paper "Survey of international law", the view had been expressed during the fourteenth session of the General Assembly "that an attempt to codify the matter would be premature, and that it should be left to the Commission to decide whether the subject was an appropriate one for codification" (A/CN.4/245, para. 286). Since the adoption of resolution 1401 (XIV), twelve years had elapsed before the General Assembly had again expressed interest in the subject. Its renewed interest had been due to the adoption by the International Law Association, at its 52nd Conference in August 1966, of the "Helsinki Rules on the Uses of the Waters of International Rivers".¹ Those "rules" were no doubt a valuable piece of research, but they could only make a subsidiary contribution to the Commission's own work, since private research enjoyed an academic freedom which allowed Utopian ventures into fields which States were extremely wary of entering.

12. Paragraph 1 of General Assembly resolution 2269 (XXV) called on the Commission to "consider the practicability of taking the necessary action" on the "study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification", and to do so "in the light of its scheduled programme of work". Considering the shortage of time which had led the Commission to confine its work during the present session to the completion of the draft articles on relations between States and international organizations, he did not believe that it could

make any progress on the subject of international watercourses. The Commission had in fact been obliged to set aside the recommendations in General Assembly resolution 2634 (XXV) that it complete the first reading of draft articles on succession of States in respect of treaties, make progress in the consideration of succession of States in respect of matters other than treaties, and continue its work on State responsibility.

13. In those circumstances, the Commission could only examine the problem of international watercourses within the framework of its future programme of work. It would be premature even to appoint a working group to study the subject, since such a group could not do any useful work in the short time available before the end of the present session. It remained for the Secretary-General to prepare the supplementary report mentioned in paragraph 2 of resolution 2669 (XXV). The newly elected Commission would then decide, at a future session, what action should be taken on the subject.

14. Mr. USTOR said he greatly appreciated the initiative of the Government of Finland in proposing that the item "Progressive development and codification of the rules of international law relating to international watercourses" be placed on the agenda for the twenty-fifth session of the General Assembly (A/7991). The subject was connected with an important branch of the law, though it was not of the same importance to all countries. Certain island States like Ceylon had little or no interest in it, while at the other extreme were countries like his own—Hungary—95 per cent of whose watercourses were international in character and had their sources outside the national territory. International co-operation in the matter of the rules relating to such watercourses was essential to the latter countries.

15. Fortunately for Hungary, most of its neighbours were socialist countries with which it enjoyed the best possible relations, so that it was able to settle any problems by friendly negotiations. It also entertained very amicable relations with Austria, so that all questions of mutual interest could be settled by negotiation with that country as well.

16. The whole subject of international watercourses was one which naturally attracted great attention in academic and professional circles in Hungary. The Hungarian Lawyers' Association, for example, had set up a committee to study the subject, while the Hungarian water authorities maintained close contact with their counterparts in the neighbouring countries.

17. The rules of international law governing the non-navigational uses of international watercourses were founded on the basic principle of the duty of all States to co-operate with one another under the United Nations charter. The essential problem was how to translate that principle into concrete rules, which might be based on the old Roman law maxim, *Sic utere tuo ut alienum non laedas*.

18. He agreed that the Commission should now decide to place the item on its agenda, leaving it to the next session to decide on any further action.

¹ The International Law Association, *Report of the Fifty-second Conference*, p. 484.

19. Mr. YASSEEN said that the population explosion was making it increasingly necessary to regulate the use of watercourses for purposes other than navigation. The question had been raised on several occasions in the United Nations, and at the twenty-fifth session of the General Assembly the importance which States attached to it had been evident. True, some speakers had argued that there were few principles governing the matter and that the independence of the parties should be unrestricted. But the fact remained that there were many problems which had not been solved and the use of river basins, if it was not regulated, would finally lead to regrettable situations.

20. It was true that the language of the General Assembly resolution was not entirely direct, but having been present at the Sixth Committee's meetings he could say that the General Assembly's intention had been that the question should be examined by the International Law Commission. If the Assembly had not said so expressly, that was because it had not wished to interfere with the Commission's general programme of work or with the priority given to certain important topics such as State responsibility and the succession of States and governments.

21. The method of work to be adopted was, of course, determined by the Commission's Statute. With regard to the use of private work, the General Assembly had not wished to mention certain studies in preference to others, but had recommended that the Commission should derive all the information it needed from all studies, both public and private, which had been made so far.

22. The Commission could not ignore the General Assembly's recommendation, but as the term of office of its members was soon to expire all it could do at present, out of consideration for the new members who would succeed them, was to place the item on its agenda. It would be for the new Commission to decide what place the topic should be given in the programme of work and to take appropriate steps for its consideration.

23. Mr. BARTOŠ said that he too belonged to a country in which transport was largely by river—a country which, being crossed by the Danube, was familiar with the problems mentioned by Mr. Ustor, and whose geographical situation was such that some of its other rivers served as waterway links between neighbouring countries and the sea. He was thus in a position to say that there was a real need for the question of international watercourses to be thoroughly studied and codified by a body such as the International Law Commission.

24. There were certainly a number of régimes in existence governing navigation on international rivers, including the Napoleonic "equality of the flag" régime. Later, the colonial system had appeared, which was based on the 1885 *Acte de navigation du Congo*³ and dominated by imperialist ideas. After the First World War efforts had been made to perfect and regulate inter-

national administration and to secure the participation of the great non-riparian States. Today, international navigation and international administration were two related questions which required further regulation.

25. After the Second World War had come a régime of democratization, with equality of flags for navigation rights, but the right of administration reserved to the riparian States alone—for example, the 1948 Belgrade Convention on the Danube.⁴

26. The question of the development of water power and of the transmission of hydro-electric power to States other than riparian States had gone far beyond the scope of the Geneva Convention of 1923;⁴ and there were also other problems to be settled, such as the problems of acquired rights inherited from the colonial régimes in certain African and Asian countries.

27. The bilateral agreements concluded between riparian States were no doubt in conformity with democratic principles, but the question to be answered was whether navigation on international watercourses should be prohibited, or whether it should be permitted under certain international conditions not prejudicial to the interests of the riparian States. The subject was more extensive than some States would admit, and it should therefore be codified so as to define the principles governing the navigation and use of international watercourses, particularly lakes, which were a frequent source of disputes, not only between riparian States, but also between them and other States which made use, for industrial and agricultural purposes, of hydraulic power from watercourses passing through the lakes.

28. It was also necessary to consider the new aspects of the question as they appeared from current practice and in the light of modern technical developments, such as drought prevention, with which Israel had achieved striking successes, and the diversion of the sea into the interior of a country—a possibility which jurists had never yet considered.

29. As the interests of States differed widely, a study of that kind could only be undertaken by the International Law Commission as part of a universal codification. For the time being, however, the Commission could only place the item on its agenda, giving it the same priority as the topics at present under examination, and request the Secretary-General to continue his studies and provide the Commission with all the information it required for codification of the topic. When the new members were elected, the Commission should appoint a special rapporteur without delay—and perhaps set up a working group—give the special rapporteur a general plan of work and make sure that the study of the topic was completed before the expiry of its term of office. It could not be hoped that the draft prepared would solve all the problems of all countries, but it would state general principles which might satisfy States and serve as a basis for future conventions.

³ See *British and Foreign State Papers*, vol. LXXVI, p. 12.

⁴ United Nations, *Treaty Series*, vol. 33, p. 197.

⁴ League of Nations, *Treaty Series*, vol. XXXVI, p. 77.

30. Mr. ROSENNE said that his views were similar to those expressed by Mr. Sette Câmara. In the light of the discussion in the Sixth Committee, he did not think it was necessary for the Commission to take any substantive action on General Assembly resolution 2669 (XXV) at its present session, although that was, of course, without prejudice to any decision which might be taken by the Commission at a future session.

31. As Mr. Sette Câmara had pointed out, the order of paragraphs 1 and 2 of the resolution should really be reversed, since what had been intended by the General Assembly was that the Secretary-General should be asked to prepare a supplementary report before the Commission could take any substantive action on the topic. The Sixth Committee had been fully aware that the Commission was in process of reconsidering and revising its entire long-term programme of work; it had also been aware of the fact that the terms of office of the Commission's members would expire in 1971 and that it was not customary to expect the Commission to take up new topics under those conditions.

32. He himself had not detected any strong current of feeling in the Sixth Committee in favour of haste in the matter. For example, in paragraph 290 of the Working Paper prepared by the Secretary-General in the light of the decision of the Commission to review its programme of work (A/CN.4/245), it was stated that "During the discussions in the Sixth Committee a variety of views were put forward as to the desirability and feasibility of the progressive development and codification of the law on this topic at the present time, in particular on the question whether the subject was suitable for treatment in a general convention". He wished to draw particular attention to footnote 13 to that paragraph, which read: "It may also be noted that, as part of the material prepared for the first session (22 February-5 March 1971) of the Committee on Natural Resources, the Secretary-General issued a report entitled 'Natural resources development and policies, including environmental considerations', containing an addendum 'Issues of international resources development', E/C.7/2/Add.6".

33. In his opinion, that showed that the Commission could not possibly proceed in isolation, but must co-ordinate its work with many other activities undertaken under the auspices of the United Nations and the specialized agencies, including those of the forthcoming Stockholm Conference.

34. He did not think that either the Sixth Committee or the General Assembly had, in resolution 2669 (XXV), manifested any desire to interfere with the Commission's complete freedom to determine the priority of its current topics and of those on its long-term programme of work. It would therefore be sufficient for the Commission to include in the report on its present session a paragraph to the effect that the topic recommended to it in General Assembly resolution 2669 (XXV) would be considered within the framework of its long-term programme of work.

35. He had an open mind as to whether any action

at all should be taken by the Commission on the substance of the question, and if so what kind of action.

36. Mr. CASTRÉN said he was grateful to those members who had stressed the importance of his country's request concerning the development and codification of the law relating to international watercourses. The importance of the subject had been generally recognized by the General Assembly; it covered both watercourses which formed the boundary between States and those which crossed the territory of two or more States. In both cases, a joint interest of several States could arise simply from the fact that activities in one State had favourable or unfavourable effects on the water which flowed into one or more other States.

37. In the Sixth Committee, several delegations had emphasized the urgency of the matter. Since 1959, when the problem had first been discussed in the General Assembly on the proposal of Bolivia, various studies had been made by private bodies. Notable among them were those of the International Law Association, which had led to the adoption of the Helsinki rules, and those of the Institute of International Law, which had adopted a resolution on the subject almost unanimously at its Salzburg session in 1961.⁵

38. There was thus clearly a need to codify the rules relating to international watercourses. Apart from the many bilateral treaties and other regional rules, there were only two general conventions. But although the practice of States was not uniform, there were rules which were sufficiently general to lend themselves to codification.

39. The urgency of the question was also clear from the terms of the draft resolution submitted by India in the Sixth Committee,⁶ even clearer in fact than from the text which had become General Assembly resolution 2669 (XXV). As to the paragraph which had been inserted in the report of the Sixth Committee to the effect that "intergovernmental and non-governmental studies on the subject, especially those which are of a recent date, should be taken into account by the International Law Commission" (A/CN.4/244, para. 4), it had been adopted in the Sixth Committee without objection. In the plenary Assembly, the Sixth Committee's report had been adopted by 89 votes to 1, with 7 abstentions, and although resolution 2669 (XXV) admittedly contained only a recommendation to the International Law Commission, it was customary to act on such recommendations.

40. As Mr. Sette Câmara had observed, the question of international watercourses was very complex. Nevertheless, it seemed that the studies made by private bodies, and especially the Helsinki rules, would provide a useful basis for work on the subject.

41. As to the priority to be given to the topic, according to paragraph 1 of resolution 2669 (XXV) the Commis-

⁵ See *Annuaire de l'Institut de droit international*, 1961, vol. 49, tome II, p. 381.

⁶ A/C.6/L.814.

sion should "as a first step" take up its study and consider "the practicability of taking the necessary action as soon as the Commission deems it appropriate". Although the Commission's programme of work was very heavy, the question of international watercourses should be added to it, without being assigned any particular priority for the time being. It could be dealt with in conjunction with other topics already being studied, such as State responsibility and the succession of States. It did not seem necessary to wait for the discussion on the Commission's long-term programme, since the General Assembly's recommendation expressly stated that the study should be taken up "as a first step". A special rapporteur could be appointed, either at the Commission's present session or at its next session.

42. With regard to the role of the Secretariat, he would like to know whether supplementary documentation was being prepared and whether the Secretariat intended to request information from governments. Close collaboration between the Secretariat and the special rapporteur, when appointed, should make it unnecessary to set up a working group.

43. Mr. USHAKOV said he associated himself with the tributes paid to the Government of Finland, which had brought the question of international watercourses before the General Assembly. The action taken by Finland had resulted in a resolution adopted by a large majority, both in the Sixth Committee and in the plenary Assembly. The related problem of international rivers had long been on the General Assembly's agenda.

44. In his view, the question of international watercourses should be placed on the agenda for the Commission's next session. That would not prejudice the priority which the Commission might assign, at its next session, to the topic recommended to it by the General Assembly.

45. With regard to documentation, he wished to congratulate the Secretariat on the study (A/5409) it had undertaken in pursuance of General Assembly resolution 1401 (XIV). It was now necessary to complete that documentation, and the Commission should therefore invite the Secretariat to request governments to furnish supplementary information on their practice.

46. Mr. MOVCHAN (Secretary to the Commission) said there were one or two points he would like to clarify. First, in the voting on resolution 2669 (XXV) there had been eight abstentions in the Sixth Committee, while in the General Assembly there had been seven abstentions and one vote against.

47. Next, Mr. Castrén had suggested the appointment of a special rapporteur for the topic of international watercourses. It was, however, the practice of the Commission not to have more than four special rapporteurs working at the same time, partly because of the difficulties inherent in the codification process and partly because of the financial aspect.

48. Lastly, he could assure Mr. Castrén and Mr. Ushakov that the Secretariat would do its best to prepare the material requested by them, but in view of the need

to await the replies of governments, it might take a long time.

49. Mr. RUDA said he hoped that, when the Secretariat had prepared its supplementary report, it would be published in printed form, together with a new edition, also in printed form, of the three volumes of the Secretary-General's report (A/5409). He suggested that the latter report, prepared by the Secretary-General pursuant to General Assembly resolution 1401 (XIV), should also be printed in the *Yearbook of the International Law Commission*.

50. Mr. MOVCHAN (Secretary to the Commission) said that the three volumes of the Secretary-General's report had been issued some years ago and that the United Nations was reluctant to re-issue material which had been published already. Moreover, the report had been issued in English, French and Spanish only, and, in view of a subsequent decision, if it were reissued it would now have to appear in Russian also. He would inquire into the situation, however, and report to the Commission later.

51. Mr. ROSENNE proposed that the Commission include a passage in its report recommending that the material in question be published in the *Yearbook*.

52. The CHAIRMAN, summarizing the discussion, said that apart from some minor differences of opinion, it appeared to be the general view that the Commission should place the question of international watercourses on its programme of work, but reserve the decision on what practical action was to be taken at forthcoming sessions. As suggested by Mr. Ushakov, the Commission might invite the Secretariat to approach governments.

53. Mr. ROSENNE said that what the General Assembly had wished the Secretariat to do was clearly indicated in paragraph 2 (a) of resolution 2669 (XXV). He did not think that at the present stage the Commission should concern itself with the way in which the Secretariat should carry out that mandate.

54. Mr. MOVCHAN (Secretary to the Commission) said that paragraph 2 (a) also referred to resolution 1401 (XIV), in which the General Assembly had requested the Secretary-General to prepare a report containing "information provided by Member States regarding their laws and legislation in force in the matter". He did not see how the Secretariat could provide a new, supplementary report without asking States to provide new, supplementary information.

55. Mr. ROSENNE said that how the Secretariat conducted its inquiry was its own business and the Commission should not express any opinion on the matter.

56. Mr. USHAKOV suggested that the Commission, in its report, should also request the Secretary-General to ask governments to provide supplementary information.

57. The CHAIRMAN said that the Commission appeared to be in agreement on the course to be followed. He requested the Secretariat to prepare a suitable paragraph for the Commission's report.

58. Mr. CASTRÉN said he thought the Commission should show its interest in the question of international watercourses by at least placing it on its general programme of work and, if possible, on the agenda for its next session. It should also indicate that it considered it desirable to consult governments.

The meeting rose at 1.20 p.m.

1129th MEETING

Monday, 5 July 1971, at 3.10 p.m.

Chairman: Mr Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Question of treaties concluded between States and international organizations or between two or more international organizations

(A/CN.4/250; A/CN.4/L.161 and Add.1 and 2)

[Item 5 of the agenda]

1. The CHAIRMAN invited the Commission to consider item 5 of the agenda. It now had before it the report of the Sub-Committee, set up at the previous session, on treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/250). He called on the Chairman of the Sub-Committee to introduce the report.
2. Mr. REUTER (Chairman of the Sub-Committee) said that the Sub-Committee had held two meetings during the present session. In accordance with the decisions taken by the Commission at its previous session,¹ it had had before it a working paper by the Secretariat containing a short bibliography, an historical survey of the question and a preliminary list of the relevant treaties published in the United Nations *Treaty Series* (A/CN.4/L.161 and Add.1 and 2); a questionnaire prepared by the Chairman of the Sub-Committee; members' replies to that questionnaire; and an introduction prepared by the Chairman of the Sub-Committee.
3. Examination of that material had shown the Sub-Committee to be agreed on several points. In the first

place, the Commission itself and the Vienna Conference on the Law of Treaties had thought of including treaties concluded by international organizations in the general study of international treaties, but had finally decided against doing so, partly no doubt because of drafting difficulties, but mainly, it appeared, because of their uncertainty about a problem whose full extent they could not gauge. It had been generally accepted in the Sub-Committee that the future study should be confined to a certain number of points, and in particular that the question of unwritten agreements as such should not be taken up directly, for the same reasons as had led the Commission and the Vienna Conference on the Law of Treaties to leave them aside in dealing with treaties between States, though that would not preclude appropriate consideration of the element of tacit consent as part of the general law of treaties.

4. In addition, the Sub-Committee had thought it advisable to observe the same discretion as the Vienna Convention in regard to questions concerning international responsibility, State succession and the outbreak of hostilities.

5. With regard to the general method to be recommended to the Commission, the members of the Sub-Committee had agreed that the Vienna Convention on the Law of Treaties provided a model for identifying general problems of treaty law and should be taken as a basis, at least in the preliminary exploration of the subject. That did not mean that the Commission would have to confine itself to borrowing the solutions adopted by the Vienna Conference; it must be recognized from the outset that the subject-matter was difficult, that it raised unexpected problems and that the Commission would have to try to identify those elements which distinguished the rules applicable to treaties between States from those applicable to treaties to which international organizations were parties.

6. The Sub-Committee had considered it too early to discuss certain substantive problems raised in the questionnaire, for instance the question of who could be a third party in relation to a treaty concluded by an international organization. Hence those problems were not discussed in the report.

7. With regard to the question what international organizations the study should include, the general opinion in the Sub-Committee had been in favour of establishing rules applicable to all international inter-governmental organizations, though it had fully realized the considerable difficulties that would involve with regard to information and hence the time that would be required; if the future study had to be limited, it would be because of the time factor, rather than anything else.

8. The very title of the subject was already based on a distinction between kinds of treaty. Although it was only a way of describing the subject-matter of the study, it nevertheless raised the question whether a classification of treaties would be desirable. The Sub-Committee had agreed, in general, that the spirit of the Vienna Convention should be followed and that, leaving aside unnecessarily theoretical considerations, an attempt

¹ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter V, para. 89.

should be made to formulate principles which were valid for all treaties.

9. With a view to speeding up that work, the Sub-Committee recommended the Commission: first, to appoint a special rapporteur for the topic; secondly, to confirm the request made to the Secretary-General concerning the preparation of documents for the use of members of the Commission, asking the Secretariat to phase and select items for study in consultation with the special rapporteur within the general framework laid down by the Commission at its previous session;² and thirdly, to request that the working paper prepared by the Secretariat on the question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/L.161 and Add.1 and 2), in particular the part containing the historical survey of the question, be published as a Commission document.

10. Mr. USHAKOV said he approved of the Sub-Committee's conclusions and recommendations. Although at the present stage the Commission should maintain a very general approach to the subject, some questions needed clarification for the guidance of the future special rapporteur.

11. The most important question was what international organizations the future study should include: should it cover not only general organizations, sometimes called "political" organizations, but also organizations that were of more limited scope, though still universal, and "mixed" international organizations of States and non-governmental bodies? The special rapporteur would need precise guidance on that point.

12. The Sub-Committee had expressed the opinion that the work should be confined to written agreements, but it was open to question whether unwritten agreements existed in the case of international organizations. Perhaps the arrangements concluded between States and international organizations were not agreements in international law.

13. He proposed that Mr. Reuter, who was a leading expert on international institutions, should be appointed special rapporteur.

14. Mr. YASSEEN said it was clearly necessary to speed up the work on the subject under consideration, in order to complete the codification of the law of treaties.

15. He approved of the Sub-Committee's preliminary recommendations. In deciding to base its work on the Vienna Convention, the Commission would be emphasizing the link between the law of treaties concluded between States, the law of treaties between international organizations and the law of treaties between States and international organizations. He shared the Sub-Committee's view that the Commission should investigate the essential differences between international treaties and treaties between international organizations, which justified separate treatment of the latter in the codification

of the law of treaties. He also supported the Sub-Committee's recommendation that the Secretariat should continue to collect the necessary information and that in doing so it should co-operate with the special rapporteur to be appointed by the Commission.

16. He warmly supported Mr. Ushakov's proposal of the appointment of Mr. Reuter as special rapporteur. No one was better qualified for the task than that eminent jurist.

17. Mr. AGO said that the task awaiting the Special Rapporteur was far more difficult and delicate than appeared at first sight. As he progressed in his study, he would probably find that it was often necessary to depart from the Vienna system, since the characteristics of treaties concluded between States and of treaties concluded between international organizations or between international organizations and States were very different, not only with respect to the formation of the treaties, but also with respect to the question of their validity and nullity. Consequently, a special rapporteur of exceptional ability was required, and Mr. Reuter was the ideal choice.

18. He approved of the Sub-Committee's recommendations relating to technical details. He wished to thank the Secretariat for the excellent work it had done and would undoubtedly continue to do in the future; the documentation required for the new topic was of particular importance and needed to be as full as possible.

19. He would like next to comment on certain points which had been dealt with in the questionnaire (A/CN.4/250, annex I). In his view, there were unwritten agreements between international organizations and States and, like the members of the Sub-Committee, he thought that they should be excluded from the field of research, as they had been from the codification of treaties between States, since they had not the same importance as written agreements.

20. On the question what international organizations the Commission's proposals would apply to, both the Sub-Committee and its Chairman were of the opinion that it might be better not to make any distinction between organizations. The Vienna Convention made no such distinction and, if the draft articles on relations between States and international organizations applied only to organizations of a universal character, it was because it had been necessary to settle the question of representatives to organizations. In the case of treaties, no distinction should be made between organizations unless practice showed that there were profound differences between the different types of organization; if it was found that the rules were the same in all cases, it would be better to prepare a more ambitious report and to complete what had been done at Vienna, so that the codification might comprise treaties concluded between all sorts of subjects of international law, provided, of course, that the organizations concerned possessed the capacity to conclude treaties.

21. He did not think it would be very useful to deal expressly with certain matters which the Vienna Convention had left aside. That Convention was an excellent starting point, but as he had said at the beginning, the

² See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter V, para. 89.

Commission would certainly find that it had to depart from it and that the task was more delicate than might be supposed.

22. Mr. KEARNEY said that he agreed with the conclusions set forth in the Sub-Committee's excellent report and he was glad to support Mr. Ushakov's proposal that Mr. Reuter be appointed Special Rapporteur for the topic of treaties between States and international organizations. He was confident that under Mr. Reuter's guidance the Commission would be able to make a substantial contribution to the development of international law on a topic which presented many novel ramifications.

23. Sir Humphrey WALDOCK said that he also supported the proposal that Mr. Reuter be appointed Special Rapporteur.

24. At the present stage, he could agree with Mr. Ago that the codification of the law of the treaties of international organizations might involve more departures from the 1969 Vienna Convention on the Law of Treaties than some people had contemplated. On the other hand, he thought that for the most part the similarities would be found to be very close. Thus, there were many parallels with the provisions of the Vienna Convention, even in regard to the procedures of organizations for the conclusion of treaties. In that connexion it was worth noting that article 11 of the Convention, on means of expressing consent to be bound by a treaty, provided that "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed"; the concluding provision of that article was completely open-ended and left room for any special techniques used in the treaties of organizations.

25. With regard to the other parts of the Vienna Convention, there would clearly be occasion for some supplementary and even divergent rules. As the Chairman of the Sub-Committee had pointed out, the question of treaties involving third States was a branch of international law to which particular attention would have to be paid, and some points might arise even in connexion with questions of invalidity.

26. He agreed with Mr. Ago that the important question of the organizations to be covered should be decided empirically in the light of the study by the future special rapporteur. In principle, he thought that the Commission should aim at a general work of codification like the Vienna Convention, and should therefore cover all organizations; in particular, it would be a pity if regional organizations possessing a considerable body of practice, such as the Organization of American States, the Council of Europe, the Council for Mutual Economic Assistance and the Organization of African Unity, were regarded as being outside the scope of the Commission's study.

27. Lastly, as a member of the Sub-Committee, he hoped to produce a supplementary memorandum which could, if the Commission so decided, be annexed to the Sub-Committee's report.

28. The CHAIRMAN suggested that the Commission

agree to include Sir Humphrey Waldock's supplementary memorandum in the Sub-Committee's report.

It was so agreed.

29. Mr. EUSTATHIADES said that the Commission could not appoint a special rapporteur more highly qualified than Mr. Reuter and he joined the previous speakers in supporting his nomination.

30. On the question of parallels between the draft to be prepared and the Vienna Convention on the Law of Treaties, he endorsed the comments of Sir Humphrey Waldock and Mr. Ago. In the last analysis, there were general principles of law and of logic which emerged from the subject of treaties, whether concluded between States or between international organizations or between States and international organizations, but it would certainly be necessary to depart from the Vienna Convention on some points.

31. As to the organizations to be covered by the study, there was no need to distinguish between organizations of a universal character and regional organizations. It was rather the functions and aims of the organizations which defined the categories from the viewpoint of the law of treaties. Some articles of the future draft would apply to certain organizations only and would have no relevance for others.

32. Mr. BARTOŠ said that Mr. Reuter, who was a specialist on international institutions, particularly European organizations, would be an ideal special rapporteur for the present topic. For more than ten years, Mr. Reuter had been studying the very thorny question, generally neglected by jurists, of the effects on third States of agreements concluded between international organizations and their member States—for example, the effects which the entry of the United Kingdom into the Common Market would have on Australia. Moreover, he had already given proof of his experience in the matter by drafting the questionnaire submitted to the members of the Sub-Committee and he had the realistic approach which was one of the essential qualities of a special rapporteur. He therefore warmly supported Mr. Reuter's nomination for the post.

33. Mr. EL-ERIAN said that he wished to place on record his appreciation of the work done by the Chairman of the Sub-Committee and of the studies prepared by the Secretariat. He, too, supported Mr. Ushakov's proposal that Mr. Reuter be appointed special rapporteur for the important, intricate and difficult topic of treaties between States and international organizations.

34. He agreed with Mr. Ago that the Commission should not limit its work to international organizations of a universal character, but should attempt to formulate rules which would apply to all international organizations, including regional organizations, and thus complement and complete the Vienna Convention on the Law of Treaties.

35. Mr. USTOR said he warmly supported the nomination of Mr. Reuter for the office of special rapporteur for the present topic.

36. The leading principle of contemporary international law was the principle that States had a duty to co-operate with one another in accordance with the Charter of the United Nations. Treaties were the tool most frequently employed for the purposes of such co-operation, whence the importance of the codification of the law of treaties achieved by the Commission and the 1968-1969 Vienna Conference. From the principle of the duty of States to co-operate with one another, solemnly proclaimed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, annexed to General Assembly resolution 2625 (XXV), it followed that States were bound to establish only international organizations intended for purposes of real co-operation between them, and not organizations directed against other States.

37. The time would soon come when it would be possible to speak of the duty of States to co-operate with organizations established in the general interest of humanity, and also of the duty of organizations to co-operate with each other. Seen in that light, the topic of treaties concluded between States and international organizations, or between two or more international organizations, acquired a special significance. The Commission's decision to deal with the topic was therefore very timely and, for his part, he had been particularly glad to participate in the preparatory work of the Sub-Committee.

38. Mr. RUDA said he too welcomed the nomination of Mr. Reuter for the office of special rapporteur for the new topic. His appointment would ensure that the Commission's work on the topic would be fruitful and would lead to concrete conclusions within a reasonable time.

39. He had only a few preliminary comments to offer on the Sub-Committee's report. First, there was an obvious need for an extensive study of the voluminous existing practice. The topic was a new one and it was desirable that the Commission should cover not only organizations of a universal character, but also regional organizations. The task was not easy, but the Commission's work should apply to all intergovernmental organizations.

40. On the question of method, he agreed that the Vienna Convention on the Law of Treaties should constitute the basis for the Commission's work on the topic. As he understood it, that did not mean that the work would consist of a mere adaptation of the provisions of the Vienna Convention; moreover, the work undertaken should not weaken that Convention in any way.

41. He also agreed that it would be premature to consult international organizations before a preliminary study had been submitted by the special rapporteur.

42. Mr. ELIAS said he associated himself with the remarks of previous speakers regarding the proposed appointment of Mr. Reuter.

43. At the Vienna Conference on the Law of Treaties, the discussion in the Committee of the Whole on draft

article 4, on "treaties which are constituent instruments of international organizations or which are adopted within international organizations"³ had shown that there was general agreement on the need for separate treatment of the subject of treaties concluded between States and international organizations or between two or more international organizations. The article had been adopted by the Conference as article 5 of the Vienna Convention on the Law of Treaties, entitled "Treaties constituting international organizations and treaties adopted within an international organization".⁴

44. When the Commission had considered the topic at its previous session,⁵ it had been decided to set up a sub-committee, with Mr. Reuter as Chairman, rather than appoint a special rapporteur at that stage. He was glad to see that the plan then adopted had worked out satisfactorily and he congratulated the members of the Sub-Committee who had helped to formulate its report.

45. He endorsed the Sub-Committee's recommendation (A/CN.4/250, paragraph 8) that the study should include all organizations and not be confined to organizations of a universal character.

46. The hard core of the law of treaties had been codified in the 1969 Vienna Convention. In the work on the new topic, careful attention would have to be paid to the delicate balance achieved on many questions by that Convention. The codification of the law of treaties achieved at Vienna had gained very wide acceptance and the work on the new topic would complete that codification. It was therefore difficult to overestimate the importance of the undertaking. The Commission would be fortunate to be guided by Mr. Reuter, who had done such outstanding work on European organizations.

47. Mr. ALCÍVAR said that as he had been a member of the Sub-Committee he would confine his remarks to placing on record his warm support for the nomination of Mr. Reuter as special rapporteur and his full concurrence with the conclusions contained in the Sub-Committee's report.

48. Mr. BEDJAOUÏ said that he associated himself with the well-deserved tribute which previous speakers had paid to the Sub-Committee and its Chairman for their valuable work, which had gone far beyond an exploratory approach. Everything pointed to Mr. Reuter, with his wide theoretical knowledge and practical experience as a jurist, as the ideal special rapporteur for the topic.

49. Mr. ROSENNE said that the work of the Sub-Committee and the present discussions confirmed that the Commission had been right, in its work on the law of treaties, to confine itself to treaties concluded between States.

³ *United Nations Conference on the Law of Treaties, First session, 1968, Official Records*, pp. 42-58 and 147-148 (United Nations publication, Sales No.: E.68.V.7).

⁴ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 290.

⁵ See *Yearbook of the International Law Commission, 1970, vol. I*, pp. 146-147, paras. 82-85.

50. The present discussion had also confirmed his belief that item 5 of the agenda was an entirely new topic, neither the scope nor the implications of which were as yet clearly discernible. The work to be done would not consist merely of adapting the provisions of the Vienna Convention on the Law of Treaties to other types of agreement. Much applied research would be necessary and many difficulties would have to be faced and surmounted. It would take a great deal of time and the rate of progress would depend on the availability of information, as was stressed in the penultimate sentence of paragraph 8 of the Sub-Committee's report, for what the Commission was now taking up was an independent topic, not a mere appendix to something else.

51. Having been a member of the Sub-Committee under the able guidance of Mr. Reuter, it gave him great pleasure to see his unanimous nomination for the office of special rapporteur—the second occasion in the history of the International Law Commission on which a prominent representative of French legal culture had been selected for such a post.

52. The CHAIRMAN suggested that the Commission approve the report of the Sub-Committee (A/CN.4/250).

The Sub-Committee's report was approved.

53. The CHAIRMAN suggested that the Commission appoint Mr. Reuter special rapporteur for the topic of treaties concluded between States and international organizations or between two or more international organizations.

Mr. Reuter was appointed by acclamation.

54. Mr. REUTER (Chairman of the Sub-Committee) said he assumed that approval of the Sub-Committee's report implied approval of the recommendations in paragraph 15, sub-paragraphs (ii) and (iii).

55. He willingly accepted the post of special rapporteur, provided always that he was re-elected to the Commission after the expiry of his present term. In any event, he wished to thank the members of the Commission for the friendship and esteem they had shown him.

56. He was quite willing to adopt an empirical approach to the question of the scope of the work. He thought it would be normal, however, for the special rapporteur to start with the United Nations and its specialized agencies, not only because the Commission was an organ of the United Nations, but also for a practical reason: it was on those organizations that the Secretariat could most quickly provide the necessary information.

57. Lastly, in accepting the post of special rapporteur, he was aware that, in the performance of his task, national and personal standpoints must often give way to those of the Commission. In that respect, he would try to follow the high example set by former special rapporteurs, notably Sir Humphrey Waldock for the Law of Treaties.

58. The CHAIRMAN confirmed that the Commission had indeed approved the recommendations in paragraph 15 of the report.

59. Mr. USHAKOV said that, although those recommendations had been approved in principle, they would have to be more precisely formulated in the Commission's report to the General Assembly.

60. The CHAIRMAN said that the General Rapporteur would bear that comment in mind.

The meeting rose at 5.45 p.m.

1130th MEETING

Tuesday, 6 July 1971, at 10.20 a.m.

Chairman: Mr Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 to 3; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.174 and Add.1 and 2)

[Item 1 of the agenda]

(resumed from the 1127th meeting)

FIRST AND SECOND REPORTS OF THE WORKING GROUP

1. The CHAIRMAN said the Commission would remember that on 25 May its officers had recommended that a working group be set up to prepare, on the basis of the texts already approved by the Commission, a set of consolidated draft articles on relations between States and international organizations. The officers of the Commission had also recommended that the group should consist of Mr. Kearney, as Chairman, Mr. Ago, Mr. Ushakov and Sir Humphrey Waldock. Those recommendations had been approved by the members of the Commission then present at Geneva.¹ The Working Group had now submitted its first and second reports to the Commission (A/CN.4/L.174 and Add.1 and 2) and he invited Mr. Kearney to introduce them.

2. Mr. KEARNEY (Chairman of the Working Group) said he would like to make a few comments on the Working Group's method of approach, partly as a supplement to the written introduction (A/CN.4/L.174 and

¹ See 1106th meeting, para. 85.

Add.1) and partly to explain how the Group had arrived at the structure of the consolidated draft of 81 articles now before the Commission (A/CN.4/L.174/Add.2).

3. The Working Group had decided at the outset that it was not possible to handle all the different parts of the draft at one time and that the only reasonable approach was to deal with the various problems as they arose. It had begun by considering the introductory articles; next, it had examined the question whether it was possible to combine the articles on permanent missions with those on permanent observer missions; and lastly, it had considered the possibility of consolidating the articles on delegations with those on permanent observer missions.

4. The Commission had found that it was possible to combine the articles on permanent missions with those on permanent observer missions, but that the differences between the articles on missions and those on delegations to organs and conferences were so wide that a consolidation of those groups was not practicable. The Working Group, however, had found a sufficient number of articles that applied generally to both missions and delegations and had therefore placed them in a separate part entitled "General Provisions". As a result, the articles as now submitted consisted of Part I: Introduction, containing articles 1 to 4; Part II: Missions to international organizations, containing articles 5 to 40; Part III: Delegations to organs and conferences, containing articles 41 to 70; and Part IV: General provisions, containing articles 71 to 81.

5. The Group had come early to the conclusion that by using an adequate set of definitions it could greatly facilitate the work of consolidation and it had therefore relied heavily on that device. The resulting set of 81 draft articles was probably as short and as reasonable an arrangement as could be achieved, though the question of a clause on the settlement of disputes was still outstanding. In connexion with the work of consolidation, he wished to reiterate the Working Group's tribute to the devoted service of its Secretary, Mr. Valencia-Ospina.

6. He would suggest that the Commission begin its consideration of the draft articles with article 1, because an examination of that article was a necessary prerequisite for an understanding of how the remainder of the draft functioned.

7. Mr. USHAKOV, Sir Humphrey WALDOCK and Mr. AGO associated themselves with the tribute paid to the Secretary of the Working Group for his contribution to the work.

8. Mr. EL-ERIAN (Special Rapporteur) said he was very grateful to the Working Group and its Chairman for the admirable work they had accomplished.

9. Mr. YASSEEN said he supported the suggestion that the Commission should begin immediately with article 1; it had reached a late stage in its work and members now had sufficiently precise ideas on the meanings to be given to the various terms.

10. Mr. BARTOŠ said that thanks to the successful efforts of the Working Group the Commission could now tackle the final stage of its work on the draft articles and thus complete its task of codification in four parts: diplomatic relations, consular relations, special missions and relations between States and international organizations.

11. The set of articles now before the Commission was the outcome of a joint endeavour in which the Special Rapporteur, despite his many other duties, the Drafting Committee, the Working Group and the Commission as a whole had all actively participated. Since the Working Group had collaborated with the Drafting Committee, there was no need for the Commission to reconsider certain articles which the Drafting Committee had revised without reference to it; the Commission could proceed directly to the adoption of the text article by article, on the understanding that the spokesman for the Working Group or the Chairman of the Drafting Committee, as appropriate, would give the Commission any explanations it needed concerning differences between the articles proposed by the Working Group and those the Commission had provisionally approved on the recommendation of the Drafting Committee. It would also be helpful for the Commission to know which texts had not been submitted to it by the Drafting Committee, so that it could give them additional attention. Where necessary, the Special Rapporteur could confirm that the ideas expressed in his report and the Commission's decisions concerning them had been duly respected, or ask that the reasons for any changes be explained.

CONSOLIDATED DRAFT ARTICLES PROPOSED BY THE WORKING GROUP

12. The CHAIRMAN invited the Commission to consider the consolidated draft articles proposed by the Working Group (A/CN.4/L.174/Add.2) article by article and to adopt each article finally, if approved.

PART I. *Introduction*

ARTICLE 1²

13.

Article 1

Use of terms

1. For the purposes of the present articles:

- (1) "international organization" means an inter-governmental organization;
- (2) "international organization of universal character" means an organization whose membership and responsibilities are on a world-wide scale;
- (3) "Organization" means the international organization in question;
- (4) "organ" means:
 - (i) any principal or subsidiary organ of an international organization, or
 - (ii) any commission, committee or sub-group of any such organ, in which States are members;

² Formerly articles 1, 51 and 78.

- (5) "conference" means a conference of States convened by or under the auspices of an international organization, other than a meeting of an organ;
- (6) "permanent mission" means a mission of permanent character, representing the State, sent by a State member of an international organization to the Organization;
- (7) "permanent observer mission" means a mission of permanent character, representing the State, sent to an international organization by a State not member of the Organization;
- (8) "mission" means, as the case may be, the permanent mission or the permanent observer mission;
- (9) "delegation to an organ" means the delegation sent by a State to represent it in the organ;
- (10) "delegation to a conference" means the delegation sent by a participating State to represent it at the conference;
- (11) "delegation" means, as the case may be, the delegation to an organ or the delegation to a conference;
- (12) "host State" means the State in whose territory:
- (i) the Organization has its seat or an office, or
 - (ii) a meeting of an organ or a conference is held;
- (13) "sending State" means the State which sends:
- (i) a mission to the Organization at its seat or to an office of the Organization, or
 - (ii) a delegation to an organ or a delegation to a conference;
- (14) "permanent representative" means the person charged by the sending State with the duty of acting as the head of the permanent mission;
- (15) "permanent observer" means the person charged by the sending State with the duty of acting as the head of the permanent observer mission;
- (16) "head of mission" means, as the case may be, the permanent representative or the permanent observer;
- (17) "members of the mission" means the head of mission and the members of the staff;
- (18) "head of delegation" means the delegate charged by the sending State with the duty of acting in that capacity;
- (19) "delegate" means any person designated by a State to participate as its representative in the proceedings of an organ or of a conference;
- (20) "members of the delegation" means the delegates and the members of the staff;
- (21) "members of the staff" means the members of the diplomatic staff, the administrative and technical staff and the service staff of the mission or the delegation;
- (22) "members of the diplomatic staff" means the members of the staff of the mission or the delegation who enjoy diplomatic status for the purpose of the mission or the delegation;
- (23) "members of the administrative and technical staff" means the members of the staff employed in the administrative and technical service of the mission or the delegation;
- (24) "members of the service staff" means the members of the staff employed by the mission or the delegation as household workers or for similar tasks;
- (25) "private staff" means persons employed exclusively in the private service of the members of the mission or the delegation;
- (26) "premises of the mission" means the building or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purpose of the mission, including the residence of the head of mission;

(27) "premises of the delegation" means the building or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purpose of the delegation, including the accommodation of the head of delegation.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms in the Charter of the United Nations and other international organizations of universal character.

14. Mr. KEARNEY (Chairman of the Working Group), introducing article 1, said that the text now proposed reflected a number of changes and additions to the sub-paragraphs of article 1 (A/CN.4/241/Add.1) and of the other articles on the use of terms, namely, article 51 (A/CN.4/241/Add.4) and article 78 (A/CN.4/241/Add.5) which had been proposed to the Commission at various stages.

15. The first change was the introduction in paragraph 1, sub-paragraph (6) and (7) of the words "representing the State" to replace the previous reference to the "representative character" of the mission concerned; the order of the words had also been altered so that the reference to the permanent character of the mission now took first place. The purpose of those changes was to align the thought in sub-paragraphs (6) and (7) with the use of the form of words "representing the State" in other articles of the draft. They also served to clarify the meaning of representation in connexion with the provisions on the terms "permanent mission" and "permanent observer mission" in paragraph 1, sub-paragraphs (6) and (7).

16. Paragraph 1 (8) was a new provision, which dealt with the meaning of the term "mission"; it provided the basis of the Working Group's method of consolidating the articles on permanent missions with those on permanent observer missions. In the consolidated Part II, dealing with both types of mission, the term "mission" was used to refer to a permanent mission or to a permanent observer mission as the case might be.

17. Similarly, paragraph 1 (11), on the meaning of the term "delegation", had been introduced to make it possible to use that term in Part III to refer to a delegation to an organ or to a delegation to a conference, as the case might be.

18. The provision on the meaning of the term "host State", which now appeared in paragraph 1 (12), had been reworded so as to make clear the difference in meaning between that term as applied to a mission to an organization and as applied to a delegation to a meeting of an organ or to a conference.

19. Similarly, the provision on the meaning of "sending State", which now appeared in paragraph 1 (13), had been reworded so as to make it clear that there were two different situations: that of the sending State of a mission to an organization and that of the sending State of a delegation to an organ or to a conference.

20. Paragraph 1 (16), on the meaning of the term "head of mission", was a new provision which was necessary because many of the articles stated the obligations, or the rights or privileges, of a permanent representative or a permanent observer.

21. The provision in paragraph 1 (18), on the meaning of the term "head of delegation", had been introduced in order to indicate the manner in which the head of a delegation was designated.
22. The term "delegate", dealt with in paragraph 1 (19), was a new one, which had been introduced in order to avoid the difficulties involved in the use of the term "representative". It served among other things to avoid confusion between a permanent representative and a delegate who represented the sending State in the proceedings of an organ or of a conference.
23. Paragraph 1 (20), on the meaning of the term "members of the delegation", and the following six sub-paragraphs, which dealt with the terms "members of the staff", "members of the diplomatic staff", "members of the administrative and technical staff", "members of the service staff", "private staff" and "premises of the mission", simply consolidated the definitions given in earlier drafts.
24. Lastly, a new provision on the meaning of the term "premises of the delegation" had been introduced as paragraph 1 (27).
25. The fact that there were more than twenty-six sub-paragraphs in paragraph 1 had made it necessary to identify them by numbers instead of letters. Further sub-paragraphs might have to be added if it was decided to include in the draft a section on observer delegations, as a number of additional terms would then have to be dealt with.
26. Paragraph 2 of article 1 was a standard disclaimer clause commonly used in treaty provisions on the use of terms.
27. Mr. USHAKOV proposed that, in paragraph 1, sub-paragraphs (6) and (7) of the French version, the words "*d'une mission ayant un caractère permanent et représentatif de l'Etat*" be replaced by the words "*d'une mission permanente ayant un caractère représentatif de l'Etat*", which corresponded more closely to the original English wording.
28. In paragraph 1 (27), the word "*demeure*" might render the English term "*accommodation*" better than the word "*logement*".
29. Mr. ROSENNE said the Working Group was to be commended for having provided the Commission with an admirable basis for the final stage of its work.
30. With regard to the provision in paragraph 1 (3), he wished to draw attention to the important linguistic observations by the United Nations Secretariat in document A/CN.4/L.162/Rev.1, concerning the use of the term "Organization" with an initial capital letter. He assumed that those observations had been taken into account by the Drafting Committee.
31. There was perhaps some ambiguity in the provision in paragraph 1 (9), on the meaning of the term "delegation to an organ", and he would like to know whether the ambiguity was intentional.
32. The meaning of the term "delegation to a conference" was described in paragraph 1 (10) by reference to "a participating State", the term "participating" having the same meaning as in the Vienna Convention in the Law of Treaties. He noted that there was no corresponding qualification in paragraph 1 (9), which stated that the term "delegation to an organ" meant the delegation "sent by a State to represent it in the organ." If the intention was to limit the scope of that provision to States which were members of the organ in question, that should be stated expressly. If, on the other hand, it was intended to cover also the case of a delegation sent by a State member of the organization which was not a member of the organ, that fact should be clearly indicated.
33. With regard to paragraph 2, he had some doubts about the singling out of the United Nations Charter for specific mention. In addition, he thought that the wording of the paragraph did not state its intention clearly enough. As he saw it, the purpose of paragraph 2 was to make it clear that the provisions contained in paragraph 1, sub-paragraphs (1) to (27), on the use of certain terms, were without prejudice to the meaning given to those terms in the general usage of the organization in question. International organizations had developed their own uses of terms, especially with regard to delegations. In the case of the United Nations, for example, it was not only a question of the application of the Charter; there was also the wider question of the practice of the Organization.
34. The CHAIRMAN invited the Commission to consider article 1 paragraph by paragraph.
35. Mr. CASTRÉN said that he would like first to comment on the title of Part I, "Introduction", which had replaced the former title "General provisions", now given to Part IV. He proposed that the title "General provisions" be restored to Part I, whose four articles were not introductory. Part IV could then be entitled "Common provisions", since the articles it contained applied to permanent missions, permanent observer missions and the various kinds of delegations to organs and conferences. Furthermore, the article on non-discrimination, which had been transferred from Part III of the draft to Part IV, should be placed at the end of Part I as article 5.
36. Mr. EL-ERIAN (Special Rapporteur) said that in his sixth report (A/CN.4/241, para. 31), he himself had suggested the title "Introduction" for Part I of the draft, consisting of articles 1 to 5, so as to reserve the title "General provisions" for the concluding part, which would contain other articles of general applicability. If the title of Part I were now to be changed from "Introduction" to "General provisions", it would be extremely difficult to find a title for the concluding part of the draft.
37. Sir Humphrey WALDOCK said that exactly the same problem had arisen in connexion with the law of treaties. The Commission had formulated two sets of general provisions and had given the first of them the title "Introduction", which was now the title of Part I of the 1969 Vienna Convention on the Law of Treaties,

containing articles 1 to 5 of that Convention.³ The other set of general articles had been placed under the heading "General provisions", which was now the title of Part V, section 1 of the Vienna Convention, containing articles 42 to 45 of that Convention.⁴ The arrangement was a convenient one and was also suitable in the present instance. The separate question could of course still arise whether a particular article belonged in the introduction or in the general provisions.

38. Mr. EUSTATHIADES said that the title of Part I was not very appropriate, as Mr. Castrén had rightly observed, but it could not be called "General provisions" either, since that title was generally used for clauses carried over from one instrument to another. Part IV could be entitled "Common provisions".

39. Mr. AGO said that he did not agree with either Mr. Castrén or Mr. Eustathiades. The contents of Part I showed that it was properly entitled "Introduction", since it did not contain a single rule creating rights or duties, but only provisions relating to the use of terms, the scope of the articles, and the relationship between the articles and other instruments. Hence "Introduction" was the proper term to use there, and the title "General provisions" was certainly suitable for Part IV, which applied to the whole of the remainder of the draft.

40. Mr. CASTRÉN said if the majority of the Commission found the present title acceptable he would not press his proposal.

41. Mr. KEARNEY (Chairman of the Working Group) said that the Working Group had spent a considerable amount of time dealing with the problem raised by Mr. Castrén, but had been unable to find any better title than "Introduction".

42. The CHAIRMAN said that if there were no further comments he would take it that the Commission accepted the title "Introduction".

The title of Part I was adopted.

Paragraph 1 (1)

Paragraph 1 (1) was adopted.

Paragraph 1 (2)

Paragraph 1 (2) was adopted.

Paragraph 1 (3)

43. Mr. ROSENNE said he had already commented on the use of the term "Organization" with an initial capital letter. He hoped its use in that form, both in paragraph 1 (3) and throughout the text of the draft articles, would be given careful consideration.

44. Mr. YASSEEN asked whether the definition in paragraph 1 (3) might not introduce a new element by comparison with the definitions in paragraphs 1 (1) and 1 (2).

45. Mr. AGO, speaking as Chairman of the Drafting Committee, which had drafted the definition, said that

the purpose of paragraph 1 (3) was to indicate that when the word "Organization" appeared in any article with a capital "O", it designated the international organization referred to in that article. By the terms of article 2, which defined the scope of the articles, the organizations in question were always of a universal character.

46. Mr. USTOR suggested that that point be explained in the commentary.

47. Mr. EL-ERIAN (Special Rapporteur) said that the definition of the term "Organization" in paragraph 1 (3) was based on a similar provision to be found in a large number of treaties concluded between States and international organizations.

48. The CHAIRMAN said that if there were no further comment he would take it that the Commission accepted paragraph 1 (3) without change.

Paragraph 1 (3) was adopted.

Paragraph 1 (4)

49. Mr. ALCÍVAR suggested that sub-paragraph (ii) be amended to read: "any commission, sub-commission, committee, sub-committee, group or sub-group . . .".

50. In the Spanish version of the same sub-paragraph he found the wording "*en el que Estados sean miembros*" unsatisfactory.

51. Mr. SETTE CÂMARA supported the amendment suggested by Mr. Alcívar.

52. Mr. USTOR said he did not see any good reason for dividing the definition into two sub-paragraphs. To his way of thinking, the bodies referred to in sub-paragraph (ii) were covered by the term "subsidiary organ" in sub-paragraph (i).

53. Mr. KEARNEY (Chairman of the Working Group) said that the Working Group's main task had been to arrange paragraph 1 (4) in such a way as to make it clear that the phrase "in which States are members" modified both sub-paragraphs.

54. With regard to the amendment suggested by Mr. Alcívar, he thought the term "sub-group" was broad enough to include any other possible division, such as "sub-commission" or "sub-committee".

55. Mr. Ustor had criticized the division of paragraph 1 (4) into sub-paragraphs (i) and (ii), but he thought that distinction had a certain utility in view of the great diversity of international organizations. The real question was whether a temporary committee could be regarded as an organ of an organization, and he himself was not sure that the law was sufficiently developed for it to be possible to say definitely what was and what was not an organ of an organization.

56. Mr. ROSENNE suggested that sub-paragraphs (i) and (ii) might be combined in one sentence to read: "'organ' means any principal or subsidiary organ of an international organization, or any commission, committee or sub-group thereof, in which States are members".

57. Mr. REUTER said that, after a good deal of hesitation, he had concluded that the wording proposed

³ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, pp. 289-290.

⁴ *Ibid.*, p. 295.

by the Working Group was a good definition of the term "organ". The conjunction "or" gave it the necessary flexibility.

58. Mr. EUSTATHIADES observed that there were commissions, committees and groups whose members were individuals and not States members of the organization in question. He was thinking of United Nations conciliation and mediation commissions and organs of organizations such as the International Labour Organisation (ILO). The phrase "in which States are members" would seem to exclude such organs from the definition.

59. Mr. TAMMES said it might perhaps be better to delete sub-paragraph (ii), since the bodies it referred to were already covered by the term "subsidiary organ" in sub-paragraph (i). The latter term was well established in United Nations practice, since it was used in Articles 22 and 29 of the Charter, and its meaning had been analysed by the International Court of Justice.

60. Mr. AGO said that it had not been easy to draft paragraph 1 (4). Taking everything into consideration, the wording eventually proposed seemed the safest, although the solution originally adopted had been the one advocated by Mr. Rosenne.

61. The reason why the definition had been divided into two sub-paragraphs was to make it quite clear that the words "in which States are members" applied to both sets of bodies.

62. In reply to Mr. Eustathiades, he pointed out that, even in an international organization like the ILO, the organs included representatives of States as well as non-governmental representatives.

63. He was not against adding to the enumeration in sub-paragraph (ii), though its scope seemed clear enough.

64. Mr. BARTOŠ said he was glad the Working Group had used the word "subsidiary" and not "auxiliary". A subsidiary organ was an organ which, by virtue of a particular instrument, replaced a major organ in the exercise of a specific competence, whereas an auxiliary organ confined itself to carrying out the instructions it received. The terminology employed corresponded to that used in Article 22 of the Charter.

65. Mr. ROSENNE said he could accept the limitation implicit in the words "in which States are members", but the Commission should be clearly aware of that limitation. As paragraph 1 (4) was worded at present, it seemed that it would not apply to the International Court of Justice itself, although it might apply to delegations representing the parties in cases before the Court. It should also be borne in mind that United Nations practice recognized conciliation commissions and investigatory bodies composed of individuals who were not, strictly speaking, representatives of States.

66. Mr. ALCÍVAR said that there were obviously different kinds of organs, not all of which were composed of representatives of States. The Judges of the International Court of Justice, for example, which was the principal legal organ of the United Nations, did not represent the States from which they came. Similarly,

the Commission itself, which was a subsidiary organ of the General Assembly, was composed of twenty-five members who served purely in their personal capacity.

67. He agreed with Mr. Ustor and Mr. Tammes that sub-paragraph (ii) was unnecessary. In particular, the words "in which States are members" should be deleted, since they applied exclusively to that sub-paragraph.

68. Mr. USHAKOV said he was not sure whether paragraph 1 (4), as drafted, could apply to organs other than those composed exclusively of States.

69. Mr. EUSTATHIADES said he recognized that the whole system of the draft excluded organs, commissions and committees whose members were not States, but he thought that at least some mention should be made, in the commentary, of organs of mixed membership and organs consisting solely of members that were not States, since they formed a category which was likely to expand very considerably.

70. Mr. REUTER said that the question raised by Mr. Eustathiades had already been answered: the draft articles were not to apply to organs consisting of independent persons. That being so, the words "in which States are members" were perfectly clear, at least in French. With regard to the example given by Mr. Rosenne, a delegation sent by a State to plead before the International Court of Justice was not a "delegation to an organ" within the meaning of paragraph 1 (9).

71. Mr. YASSEEN said he thought the whole system of the draft showed that it was not intended to apply to organs composed of experts. The proposed text should therefore be retained. The word "sub-group" should be taken to apply to any group of persons and not be given a precise technical meaning.

72. Mr. AGO confirmed that the draft articles related only to representatives of States; consequently, only organs comprising States could be taken into consideration. If such organs included persons other than States, the draft articles would not apply to those persons; they would not apply, for example, to workers, or employers' representatives on the Governing Body of the International Labour Office.

73. Mr. ROSENNE said that when the Commission had inserted the words "in which States are members" in paragraph 1 (4), it had been with a view to preventing the misconception that the draft articles would apply to members of an organ composed only of individuals who were serving in their personal capacity. However, in view of the proliferation, in the United Nations system, of organs which were not composed of representatives of States, the Drafting Committee or the Working Group should be asked to reflect further on the matter. He suggested, therefore, that the Commission adopt paragraph 1 (4) provisionally, subject to reconsideration at a later stage.

74. Mr. KEARNEY said that Mr. Reuter seemed to have implied that the English version of paragraph 1 (4) was possibly unclear as to the scope of the coverage intended. He wished to assure him, therefore, that in his opinion there could be no question but that the words

“in which States are members” modified both sub-paragraph (i) and sub-paragraph (ii). The present formulation perhaps erred on the side of caution by including two sub-paragraphs, since it might be said that everything was covered by sub-paragraph (i), but in order to remove all possible doubt, he thought that sub-paragraph (ii) should be retained.

75. As to Mr. Rosenne's suggestion that the Working Group should reflect further on sub-paragraph (4) in the light of the appearance of new types of organ, he did not think that sufficient background material was available for such a study; in any case, it would be practically impossible for the Working Group to consider the matter at the present session.

76. Mr. ALCÍVAR said that the phrase “in which States are members” was confusing in the Spanish version and that in English it seemed to refer to sub-paragraph (ii). He suggested that those words should be replaced by the words “which are composed of States”.

77. Mr. ELIAS said he wondered whether the Commission's difficulty with paragraph 1 (4) was not due to its division into sub-paragraphs. He suggested that it might be better to return to the substance of the 1968 formulation, which read: “An ‘organ of an international organization’ means a principal or subsidiary organ, and any commission, committee or sub-group of any of those bodies”.⁵

78. Mr. EL-ERIAN (Special Rapporteur) said that the Commission had decided in 1968 to concentrate on representatives of States⁶ and not to deal with persons who served in their personal capacity, such as technical experts and members of conciliation commissions. Mr. Ago had referred to mixed bodies, such as existed in the ILO, but the whole question was primarily one of methodology and the field of application of the draft articles had already been decided at the Commission's twentieth session.

79. Mr. AGO said he thought that the division of paragraph 1 (4) into two parts made it perfectly clear that the words “in which States are members” applied to both the sets of bodies mentioned. He was therefore unable to support Mr. Elias's suggestion.

80. There could be no question of considering the case cited by Mr. Rosenne of representatives of States to organs which did not consist of States. There would be no objection, however, to stating in the commentary that nothing prevented the same rules from being applied to such representatives in practice.

81. Mr. ELIAS suggested that the difficulty might be removed by deleting the numerals (i) and (ii) and inserting the words “in which States are members” after the words “any principal or subsidiary organ of an international organization”.

82. Mr. AGO, replying to Mr. El-Erian, said that the Governing Body of the ILO was usually composed of

representatives of States, but that it had created a subsidiary organ called the “Freedom of Association Committee”, which was composed of individuals who served in their personal capacity. It was necessary, therefore, to make it clear that paragraph 1 (4) applied to both categories of organ.

83. Mr. YASSEEN said that since everyone was agreed on the substance, the only difficulty was the drafting. That was a real problem, though, because a mere error of typographical presentation would prevent the words “in which States are members” from applying to the paragraph as a whole.

84. Mr. USHAKOV suggested that the Languages Division be asked for an opinion on the matter.

85. The CHAIRMAN said that as there appeared to be general agreement on the substance of paragraph 1 (4), he suggested that the Commission adopt it subject to the opinion of the Languages Division.

It was so agreed.

The meeting rose at 1.10 p.m.

1131st MEETING

Wednesday, 7 July 1971, at 10.10 a.m.

Chairman: Mr Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 to 3; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.174 and Add.1 and 2)

[Item 1 of the agenda]

(continued)

CONSOLIDATED DRAFT ARTICLES PROPOSED
BY THE WORKING GROUP
(continued)

ARTICLE 1 (Use of terms) *(continued)*

Paragraph 1 (4)

1. The CHAIRMAN invited the Commission to continue consideration of the consolidated draft articles in

⁵ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 196.

⁶ *Ibid.*, p. 195, paras. 24-25.

the Working Group's second report (A/CN.4/L.174/Add.2). The Secretariat would now inform the Commission of the reply given by the Languages Division to the question put to it at the Commission's request concerning paragraph 1 (4) of article 1.¹

2. Mr. TESLENKO (Deputy Secretary) said the Commission would recall that at the previous meeting some members had questioned whether the text of paragraph 1 (4) made it clear that the concluding words "in which States are members", related to both sub-paragraphs (i) and (ii). The Languages Division had pointed out that in the English, French and Spanish versions, the concluding words were set starting vertically below the figure (4) at the beginning of paragraph 1 (4), whereas sub-paragraphs (i) and (ii) were indented. In its opinion that typographical layout showed that the concluding words referred to both sub-paragraphs, and not only to sub-paragraph (ii).

Paragraph 1 (5)

3. Mr. USTOR said that it should be made clear in the commentary that "conference" meant any kind of conference and not necessarily one of a universal character.

4. Mr. SETTE CÂMARA said he questioned whether the words "other than a meeting of an organ" were really necessary, since there was obviously a difference between a conference held under the auspices of an international organization and a conference convened by an organ.

5. Mr. EUSTATHIADES proposed that the words "other than a meeting of an organ" be deleted, since they were redundant.

6. Mr. KEARNEY said that Mr. Sette Câmara and Mr. Eustathiades had made a very sensible point. Unfortunately, however, practice in the matter was not always sensible and some meetings convened by organs were referred to as "conferences".

7. Mr. EUSTATHIADES said that he saw the force of Mr. Kearney's argument; it would be as well, however, to mention that point in the commentary.

8. Mr. ROSENNE said he supported Mr. Eustathiades's proposal.

9. The CHAIRMAN said that if there were no objection he would take it that the Commission agreed to delete the words "other than a meeting of an organ".

It was so agreed.

Paragraph 1 (5), thus amended, was adopted.

Paragraph 1 (6)

10. Mr. USHAKOV said that in the French version the words "*de l'Etat*" could relate only to the word "*représentatif*" and not to the word "*permanent*".

11. Mr. EUSTATHIADES suggested that the French version be brought into line with the English by amend-

ing it to read "*une mission ayant un caractère permanent, et représentant l'Etat*".

12. Mr. ROSENNE suggested that the final clause be amended to read "sent to the Organization by a member State".

13. Mr. TESLENKO (Deputy Secretary to the Commission) said that the phrase "*ayant un caractère représentatif de l'Etat*" had been used in the Convention on Special Missions,² after long discussion in the Sixth Committee's Drafting Committee.

14. Mr. REUTER said that in that case it would be better to leave the wording as it was.

15. Mr. USHAKOV suggested that it be left to the Languages Division to correct the slight defect which he had pointed out.

Paragraph 1 (6) was adopted on that understanding.

Paragraph 1 (7)

16. Mr. USHAKOV said that the same defect appeared in paragraph 1 (7) as in the previous sub-paragraph, and might be corrected in the same way.

Paragraph 1 (7) was adopted on that understanding.

Paragraph 1 (8)

17. Mr. CASTRÉN said he noted that, wherever the draft articles were intended to refer only to permanent missions or only to permanent observer missions, that was specified. Consequently, when the word "mission" was used without any qualification, it always referred to both permanent missions and the permanent observer missions. Perhaps paragraph 1 (8) should reflect that distinction.

18. Mr. EUSTATHIADES asked whether the word "the" before the word "permanent" should not be replaced by the word "a" in both places.

19. Mr. TESLENKO (Deputy Secretary to the Commission) said that the definite article was used throughout the draft.

20. Mr. EUSTATHIADES said that the indefinite article was nevertheless used in sub-paragraphs (6) and (7) of paragraph 1, which had already been adopted.

21. Mr. TESLENKO (Deputy Secretary to the Commission) said that the use of the indefinite article was justified in those two sub-paragraphs because they defined which of the various missions were to be classed as permanent. Sub-paragraph (8), on the other hand, referred to the mission as defined in the previous two sub-paragraphs.

22. Mr. KEARNEY said that the Working Group had made a special effort to use the definite article "the" in all the substantive articles which referred to permanent missions and to permanent observer missions. He hoped, therefore, that the Commission would agree to retain the definite article for the time being.

¹ See previous meeting, paras. 74-85.

² See General Assembly resolution 2530 (XXIV), Annex, article 1.

23. He also hoped that the Commission would retain the words "as the case may be", which helped to make the text slightly clearer.

24. The CHAIRMAN said that if there were no objection he would take it that the Commission agreed to adopt paragraph 1 (8).

Paragraph 1 (8) was adopted.

Paragraph 1 (9)

25. Mr. KEARNEY said that Mr. Rosenne, in his initial comments on paragraph 1 (9), had asked whether the Working Group had taken into consideration the rather lengthy discussion which had taken place in the Commission about the different kinds of representative who might be present in the organ and their sphere of action.³ The Working Group had considered that matter at length and had concluded that in view of the many different kinds of delegations to organs the definition should be as broad and comprehensive as possible.

26. Mr. ROSENNE said he was satisfied with Mr. Kearney's explanation with respect to paragraph 1 (9), but he had grave doubts as to how it would apply to paragraph 1 (13) in its present form.

27. The text adopted at the previous session had used the words "the delegation designated by a State",⁴ rather than the words "the delegation sent by a State", which appeared in the present text. It might be better to replace the word "sent" by either "designated", "appointed" or "nominated".

28. Mr. KEARNEY said that at the previous session, the Drafting Committee had used the word "designated" rather than the word "sent" because, in view of the presence of the permanent mission in the host State, it could be assumed that the members of the delegation would also be present there. At the present session, the Working Group had decided, in the case of the consolidated articles, to keep to the word "sent", since the delegation could still be said to be "sent" by its State regardless of whether it was sent all the way from that State or merely for the short distance between its mission in the host State and the meeting-place of the organ.

29. Mr. REUTER said that the formulation of the sub-paragraph, and in particular the use of the preposition "in", did not bear out Mr. Kearney's explanation.

30. Mr. USHAKOV said that sub-paragraphs (9) and (10) of paragraph 1 had been drafted by the Working Group in the light of the new article 41, which read: "A State may send a delegation to an organ or to a conference in accordance with the rules and decisions of the Organization".

31. Mr. EL-ERIAN, replying to Mr. Reuter, said that since the word "organ" had been defined in sub-para-

graph (4), sub-paragraph (9) should be interpreted in the light of that definition.

32. Mr. USTOR said that "sent" was the word used in the Convention on Special Missions.

33. Mr. REUTER said that he expressly reserved his position with regard to the use of the preposition "in", because very serious practical consequences were involved.

34. Mr. AGO proposed that the word "in" should be replaced by "at", the word used in sub-paragraph (10).

35. Mr. CASTRÉN said he supported that proposal. It was always as well to use the same construction in the definition as in the expression being defined.*

36. Mr. KEARNEY said that if the Commission was to take up the question of the International Court of Justice and the status of counsel appearing before it on behalf of States, he did not think that a mere change of prepositions would be sufficient. If the basic thesis were accepted that a group of attorneys and agents of a State could constitute a delegation, there could be no doubt that the language used in sub-paragraphs (9) and (19) would encompass the activities of such a delegation. In other words, it would appear necessary to make a policy decision as to whether such groups were to be included or not; if they were to be included, it would be necessary to work out some suitable language.

37. Mr. EL-ERIAN said he supported the view expressed by Mr. Kearney.

38. Mr. AGO said that the International Court of Justice was a bad example to choose, for since it was not composed of States it was not covered by the provisions of the draft articles, though of course that did not affect the possibility that the principles contained in the draft might be applied to the Court in practice.

39. Mr. ELIAS said he agreed with Mr. Ago on the case of the International Court of Justice.

40. He proposed that the words "in the organ" in sub-paragraph (9) be either retained, or replaced by the words "in or at the organ", in order to bring sub-paragraph (9) into line with sub-paragraph (10).

41. He also proposed that sub-paragraph (11) should be moved up to precede sub-paragraphs (9) and (10).

42. Mr. ROSENNE said that he too agreed with Mr. Ago on the case of the International Court of Justice.

43. He wished, however, to draw the Commission's attention to another type of organ. Early in 1949 he had participated in a complex delegation which his country had sent to an organ of the United Nations consisting of only one member, namely Mr. Ralph Bunche, who had officiated as Acting Mediator by virtue of a number of resolutions adopted by the General Assembly and the Security Council. His delegation had functioned as such on the island of Rhodes and *inter alia* had been autho-

* See 1123rd meeting, paras. 30-61.

⁴ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B, article 78.

* In the French version the word "à" would be used in both cases.

ized by the Greek Government to use its own means of communication. Not a single State which had been represented by delegations on that occasion could be said to have been a member of the "organ" in question.

44. The Commission should therefore decide whether it wished to exclude that type of organ from the purview of the draft articles; after all, such organs might be very important for the maintenance of international peace and could not lightly be brushed aside. The retention of the words "in the organ" would definitely exclude that type of organ and delegation, and he was not sure that the situation would be changed by using the words "at the organ".

45. Mr. EL-ERIAN said that he reserved his position concerning the propriety and relevance of the reference to the Rhodes talks of 1949 and the interpretation given to that example by Mr. Rosenne.

46. Mr. KEARNEY said that Mr. Ago's proposal was acceptable to him.

47. With regard to Mr. Elias's proposal that the order of the sub-paragraphs should be changed, there was a certain degree of logic in placing the most commonly used expression first, but that would involve rearranging the order of all the definitions and he did not think the amount of work entailed would be justified.

48. Mr. USHAKOV said that in Russian it would be impossible to use the same preposition for the organ in sub-paragraph (9) as was used for the conference in sub-paragraph (10).

49. The CHAIRMAN suggested that the Commission replace the preposition "in" by "at".

It was so agreed.

*Paragraph 1 (9), thus amended, was adopted.**

Paragraph 1 (10)

*Paragraph 1 (10) was adopted.**

Paragraph 1 (11)

Paragraph 1 (11) was adopted.

Paragraph 1 (12)

50. Mr. ROSENNE said he thought that paragraph 1 (12) could be more closely aligned with the definition adopted in 1968, which read: "The 'host State' is the State in whose territory the Organization has its seat, or an office, at which permanent missions are established".

51. Mr. USHAKOV pointed out that article 5, on the establishment of missions, provided that "Member States may, if the rules of the Organization so admit, establish permanent missions for the performance of the functions mentioned in article 6".

52. Mr. ROSENNE said he did not think that the meaning of "host State" should be sought in article 5.

53. Mr. USHAKOV said that article 41 also provided that a State might "send a delegation to an organ or to a conference in accordance with the rules and decisions of the Organization".

54. Mr. AGO said that, even if the present wording of the definition was ambiguous, it was impossible to revert to the wording adopted in 1968, because the definition now related to the whole draft and not only to permanent missions.

55. Mr. KEARNEY said that he could understand Mr. Rosenne's problem, but he wondered how a State could be a host if it did not have any guests.

56. Mr. ROSENNE said that a State could be a host prior to the arrival of its guests, as was shown in article 18, on the office of the mission, which read: "The sending State may not, without the prior consent of the host State, establish an office of the mission in a locality within the host State other than that in which the seat or an office of the Organization is established". The invitation extended by the host State was implicit in the words "other than that in which the seat or an office of the Organization is established".

57. He suggested, however, that the Commission defer any decision on the point until later.

58. Mr. AGO said that the word "office" really meant a seat of the organization, admittedly a secondary one, but still a seat. The solution might be to use the adjectives "principal" and "secondary".

59. Mr. USHAKOV said that it was for the organization alone to decide whether permanent missions should be sent to an office. The text should not be amended in a way which would restrict the organization's powers in that respect.

60. Mr. ELIAS proposed that the Commission retain paragraph 1 (12) for the time being and explain in the commentary what was meant by the word "office".

It was so agreed.

Paragraph 1 (12) was adopted.

Paragraph 1 (13)

61. Mr. ROSENNE said that paragraph 1 (13) raised some questions concerning the broad meaning of the term "office", which could have a different meaning there from its meaning in paragraph 1 (12). The definition of a sending State might either be shortened or else dispensed with altogether, since it did not seem to be a term of art requiring definition in the article under discussion, but was a well understood term of diplomatic law.

62. The CHAIRMAN suggested that the Commission adopt paragraph 1 (13) as it stood.

Paragraph 1 (13) was adopted.

* In the light of the proposals made by the Working Group in its Fourth Report, the Commission later amended sub-paragraphs 1 (9) and 1 (10). See the 1139th meeting, paras. 1 *et seq.*

Paragraph 1 (14)

63. Mr. ROSENNE suggested that it might be sufficient to say: “‘permanent representative’ means the person appointed by the sending State to be head of the permanent mission”.

64. Mr. KEARNEY said that that would be a sensible amendment, but he would suggest the wording “... the person designated by the sending State as the head of the permanent mission”.

65. Mr. USHAKOV said that he was opposed to any change, because the present wording corresponded to that used in article 1 of the Convention on Special Missions.

66. Mr. ELIAS pointed out that article 1 (a) of the Vienna Convention on Diplomatic Relations read: “the ‘head of the mission’ is the person charged by the sending State with the duty of acting in that capacity”.

67. Mr. EL-ERIAN said that there was no danger of confusion, since the permanent representative was a person charged with the duty of acting in a continuous capacity.

68. The CHAIRMAN suggested that the Commission adopt paragraph 1 (14).

Paragraph 1 (14) was adopted.

Paragraph 1 (15)

69. Mr. ROSENNE said he was not convinced by alleged analogies with the Convention on Special Missions and the Vienna Convention on Diplomatic Relations; he would therefore have to make the same reservation with respect to both sub-paragraph (14) and sub-paragraph (15) of paragraph 1.

70. Mr. RUDA said that he agreed with the view expressed by Mr. Rosenne; sub-paragraphs (14) and (15) involved two entirely different concepts.

71. Mr. USHAKOV said he thought that any change would nullify the efforts the Working Group had made to combine the rules on permanent missions with those on permanent observer missions.

72. Mr. EL-ERIAN, replying to Mr. Ruda, said he did not think that sub-paragraphs (14) and (15) involved a person acting in two different capacities.

73. Mr. RUDA said that there might be temporary heads of mission who were neither permanent representatives nor permanent observers.

74. Mr. EUSTATHIADES said that under the terms of article 16, a *chargé d'affaires ad interim* could act as head of mission. If it were accepted that such a situation could arise not only at the order of the government, but also at the order of the head of mission, the wording of sub-paragraphs (14) and (15) did not seem suitable.

75. Mr. BARTOŠ said that even if a head of mission was competent to appoint a *chargé d'affaires ad interim*, the appointment was made also on behalf of the sending State. He therefore unreservedly approved of the text proposed by the Working Group.

76. Mr. USHAKOV said that articles 1 and 19 of the Vienna Convention on Diplomatic Relations⁵ provided a precedent for the wording proposed.

77. Mr. AGO said that, whereas sub-paragraphs (14) and (15) referred to the person who acted permanently as head of mission, that, by definition, was not the situation with regard to the *chargé d'affaires* referred to in article 16.

78. Mr. ROSENNE said that the Vienna Convention on Diplomatic Relations defined the head of mission and not the permanent representative or permanent observer. He could not believe that a slight reformulation of paragraph 1 (15) would undo the work of the Working Group; on the contrary, it would improve it.

79. Mr. KEARNEY said that the sub-paragraph might contain a slight ambiguity, but that was of no real consequence. He was inclined, therefore, to accept the present text.

80. Mr. USHAKOV said that in the present case there was no hierarchy similar to that reflected in the Vienna Convention on Diplomatic Relations. That was why the only terms used to designate heads of mission were “permanent representative” and “permanent observer”.

81. Mr. ELIAS proposed that the Commission adopt paragraph 1 (15) on the understanding that a suitable explanation would be included in the commentary.

Paragraph 1 (15) was adopted on that understanding.

Paragraph 1 (16)

82. Mr. RUDA said that article 16 specified that a *chargé d'affaires ad interim* acted as head of mission if the post of head of mission was vacant or if the head of mission was unable to perform his functions. Clearly, therefore, there could exist a “head of mission” who was neither a permanent representative nor a permanent observer.

83. The commentary to article 1 should therefore make it clear that the provisions of paragraph 1 (16), and also those of paragraphs 1 (14) and 1 (15), were subject to those of article 16.

84. Mr. EUSTATHIADES supported that suggestion.

85. Mr. ROSENNE said he agreed that some reference should be made in the commentary to the acting head of mission. He noticed that the provisions of article 10, on the credentials of the head of mission, and article 11, on accreditation to organs of the Organization, apparently referred only to an accredited head of mission, whereas those of article 12, on full powers in the conclusion of a treaty with the Organization, referred also to an acting head of mission.

Paragraph 1 (16) was adopted.

Paragraph 1 (17)

Paragraph 1 (17) was adopted.

⁵ United Nations, *Treaty Series*, vol. 500, pp. 96 and 106.

Paragraph 1 (18)

86. Mr. ROSENNE said that he found the provisions of paragraph 1 (18) quite satisfactory, especially when read in conjunction with those of article 47.

Paragraph 1 (18) was adopted.

Paragraph 1 (19)

87. Mr. ROSENNE said he noted the use in paragraph 1 (19) of the word "participate". That term was used in a special sense in the draft articles with reference to conferences, but was not used in the same sense in paragraph 1 (19) with reference to organs. The commentary should clarify that point.

Paragraph 1 (19) was adopted.

Paragraph 1 (20)

Paragraph 1 (20) was adopted.

Paragraphs 1 (21) to 1 (25)

88. Mr. EL-ERIAN (Special Rapporteur) said that the provisions of paragraphs 1 (21) to 1 (25) had been taken from the Vienna Convention on Diplomatic Relations and should be dealt with together.

Paragraphs 1 (21) to 1 (25) were adopted.

Paragraph 1 (26)

Paragraph 1 (26) was adopted.

Paragraph 1 (27)

89. Mr. KEARNEY said that the text of paragraph 1 (27), and to a lesser degree than that of paragraph 1 (26), could be construed as implying any "building or parts of buildings and the land ancillary thereto" used by the delegation or mission, as the case might be. In fact, in an office building or in a hotel there were many common areas, such as corridors, which were also used by other occupiers. The commentary should explain the position in that respect.

Paragraph 1 (27) was adopted.

Paragraph 2

90. Mr. YASSEEN said that the wording of paragraph 2 was based on article 2, paragraph 2 of the Vienna Convention on the Law of Treaties,^{*} which was a saving clause for internal law, and in his opinion it was inappropriate. It would suffice to say that "The provisions of paragraph 1 relate only to the terms used in the present articles".

91. Mr. EUSTATHIADES said he took the same view. The Vienna Conventions on diplomatic relations and consular relations and the Convention on Special Missions did not contain any such clause; its presence in the Vienna Convention on the Law of Treaties was

justified by the need to emphasize the difference between the terms used in that Convention and those employed in the internal law of various countries. But the purpose of article 1 of the present draft was, precisely, to define the terms whose meaning might diverge from, or even conflict with, existing definitions. Paragraph 2 was therefore out of place in article 1.

92. Mr. CASTRÉN said he agreed with Mr. Eustathiades. Paragraph 2 should be deleted. If it was retained, it should at least be amended as suggested by Mr. YASSEEN.

93. Mr. USHAKOV said he disagreed. The paragraph was useful because certain terms, such as "organ", as used in the United Nations Charter and the constituent instruments of other international organizations, had a different meaning from that given to them in the draft articles.

94. Mr. RUDA said that Mr. Yasseen's point was logically correct. The opening words of paragraph 1, "For the purposes of the present articles", made it clear that the meanings given to the different terms in the various sub-paragraphs were intended exclusively for the purposes of the future convention.

95. In the Vienna Convention on the Law of Treaties, the provisions of article 2, paragraph 2, were necessary because such terms as "ratification" and "approval" could have a different meaning in the constitutional law of a country from that stated in the article. The position was not the same with regard to article 1, paragraph 2 of the present draft, which did not refer to the internal law of States.

96. Although paragraph 2 was unnecessary, he could agree to its retention if other members of the Commission attached importance to it. The main problem, however, was the use of certain terms, not so much in the United Nations Charter as in a number of agreements concluded by States with international organizations.

97. Mr. TESLENKO (Deputy Secretary to the Commission) said that the Charter had been singled out for special mention because under the terms of that instrument the United Nations Secretariat and the International Court of Justice were organs, which they were not according to the definition given in article 1 of the draft.

98. Mr. ROSENNE said that paragraph 2 was absolutely indispensable, but its wording should be aligned more closely with that of article 2, paragraph 2, of the Vienna Convention on the Law of Treaties. A suitable reference should be introduced to the internal law of States. The paragraph should state that the provisions of paragraph 1 regarding the use of terms were without prejudice to the use of those terms or to the meanings which might be given to them in the Charter of the United Nations, in other international instruments, in the practice of organizations or in the internal law of any State.

99. The reference to internal law was necessary because a number of countries had their own laws dealing with the method of appointment of representatives to international organizations. In those national laws, the term

^{*} See *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 289 (United Nations publication, Sales No.: E.70.V.5).

“representative” was often used in a different sense from that given to it in the present draft articles.

100. Mr. EL-ERIAN (Special Rapporteur) said that paragraph 2, which had not appeared in his sixth report, but had been added by the Working Group, was a necessary provision. It was true that there was a general saving clause in article 3, on the relationship between the present articles and the relevant rules of international organizations or conferences, but that article was intended to apply to the substantive provisions of the draft. A separate saving clause was needed in article 1.

101. The provisions of paragraph 2 would make the draft more acceptable to States by reassuring them that article 1 did not prejudice in any way the terminology used in the Charter or in other international agreements.

102. With regard to the point raised by Mr. Ruda, he thought the provisions of paragraph 2 should be formulated in a comprehensive manner, so as to cover all agreements concluded by States with international organizations.

103. Mr. YASSEEN said the discussion had clearly shown that paragraph 2 was unnecessary; above all, the article should not mention the Charter, which could only be amended by a special procedure. The scope of the draft articles could not be wider than the subject-matter of the draft itself. If the Commission wished to draw attention to that fact, it should do so directly, in precise and succinct terms, without mentioning the Charter.

104. Mr. USHAKOV said it was not a question of treaty law, which governed the relationship between treaties, but only of the terms employed. Paragraph 2 was designed to render the draft articles acceptable to the Secretary-General of the United Nations and the Directors-General of the other international organizations.

105. Mr. AGO said that any definition, or any explanation of the use of terms, was bound to contain an arbitrary element and in the case of the draft articles it had been carried very far. That was why it was essential to specify that the use of terms in the draft articles did not extend beyond the framework of the draft itself.

106. Thus paragraph 2 was useful, but the concluding words “of universal character” could be deleted, since the sole purpose of the paragraph was to limit the application of the terms employed.

107. He found nothing unacceptable in Mr. Rosenne’s proposal, if the Commission was prepared to approve it.

108. Mr. KEARNEY said that paragraph 2 was really a particular application of the provisions of article 4. Hence it was not absolutely necessary, but it would be preferable to retain it, because of the important point made by Mr. Rosenne regarding the inclusion of a reference to the internal law of States. In the United States of America, there existed municipal legislation called the International Organizations Act and he understood that Switzerland also had legislation on the subject of international organizations. If paragraph 2 were not retained, those States might have to make a reservation precisely on the lines of its provisions.

109. For those reasons, he suggested that paragraph 2 be retained and that its wording be aligned with that of the Vienna Convention on the Law of Treaties, to include a reference to the internal law of States.

110. Mr. EUSTATHIADES said he thought that paragraph 2 should be deleted. But if it was retained, a reservation concerning the use of the terms in internal law should be added and, as Mr. Yasseen had proposed, the reference to the Charter should be deleted.

111. It should also be made clear that the words “other international agreements in force” referred to existing agreements, so as to avoid implying that agreements concluded in the future could use a different terminology. If the Commission thought that certain usages would prevail over the definitions given in the draft articles, it should amend the text accordingly, though he himself believed that, on the contrary, the definitions adopted by the Commission were a prelude to standardization of the terminology of future international instruments.

112. Mr. REUTER said he thought that article 1 should contain a provision such as that in paragraph 2, but that the present wording should be amended to make it broader and simpler. There should be no mention of certain agreements to the exclusion of others, since the paragraph applied to all of them.

113. Mr. EL-ERIAN (Special Rapporteur) said he supported Mr. Reuter’s suggestion that the provisions of paragraph 2 should be made comprehensive, but simpler.

114. The inclusion of a reference to the internal law of States was not absolutely necessary. Municipal law derived the terminology in question from the relevant international agreements. The International Organizations Act of the United States, for example, had been enacted in implementation of the United Nations Headquarters Agreement. The reference in paragraph 2 to the terminology used in international agreements should therefore suffice, since it would cover the terminology derived from those instruments by municipal law.

115. Mr. KEARNEY said that the International Organizations Act of the United States covered matters beyond the terms of the United Nations Headquarters Agreement. It applied to organizations other than the United Nations, such as the International Bank and the International Monetary Fund. Moreover, some of the provisions of the Act amplified those of the Headquarters Agreement. It was therefore desirable to avoid impinging on that type of legislation.

116. Mr. USHAKOV said it was unnecessary to mention internal law, since every State was free to use whatever terminology it chose. On the other hand the saving clause was necessary for international instruments which used different terms.

117. Mr. AGO proposed that paragraph 2 be simplified and broadened by amending it to read: “The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms in other international instruments” That would cover

the United Nations Charter, the constituent instruments of other organizations and any other form of agreement between States or between States and international organizations.

118. Mr. REUTER said he strongly supported that proposal, which would also cover regulations, that was to say instruments which were not agreements, but which used the terms defined in paragraph 1.

119. Mr. YASSEEN said that if the paragraph read: "The provisions of paragraph 1 relate only to the terms used in the present articles", everything else would be excluded. That formula was even more general than a reference to "international instruments", which might give rise to difficulties of interpretation.

120. It might perhaps be advisable to mention internal law in order to avoid any misunderstanding that might result from the controversy over the relationship between internal law and international law.

121. Mr. ELIAS said that paragraph 2, as it now stood, could safely be omitted, since it said no more than the opening words of paragraph 1: "For the purposes of the present articles".

122. The paragraph could be retained, however, if a new idea was brought into it. As far as the wording was concerned, he favoured the suggestion that the concluding portion be replaced by a reference to "other international instruments", but then the term "instruments" should be defined, at least in the commentary, so as to avoid confusion. Care should also be taken to see that the paragraph, as reworded, did not merely repeat the provisions of article 4.

123. Mr. SETTE CÂMARA said he was inclined to support the view that the opening words of paragraph 1 were sufficient to achieve the intended purpose of paragraph 2. But if members wished to retain paragraph 2, the wording proposed by Mr. Ago would be an improvement, subject to the insertion of the words "in force" after the words "other international instruments", so as to limit the scope of the provision to international agreements already in force.

124. Mr. KEARNEY said that the inclusion of a reference to the internal law of any State would be particularly useful for a country like the United States of America where, under the provisions of the Constitution, a treaty, on being ratified, became part of the law of the land, and its provisions prevailed over pre-existing legislative provisions. For unless paragraph 2 were included in the draft; the provisions of the draft articles would thus prevail, in the United States, over those of the International Organizations Act.

125. The CHAIRMAN said it was clear that the majority of the Commission were in favour of retaining the idea which paragraph 2 sought to express, but thought that the paragraph should be worded more simply and in more general terms. It should also include a reference to internal law, since some members desired such a reference and none were expressly opposed to it.

126. He therefore suggested that paragraph 2 of article 1 be referred back to the Working Group for redrafting in the light of those considerations.

It was so agreed.⁷

The meeting rose at 1 p.m.

⁷ For resumption of the discussion see next meeting, para. 1.

1132nd MEETING

Thursday, 8 July 1971, at 10.15 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 to 3; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.174 and Add.1 and 2; A/CN.4/L.177)

[Item 1 of the agenda]

(continued)

CONSOLIDATED DRAFT ARTICLES PROPOSED BY THE WORKING GROUP

(continued)

ARTICLE 1 (Use of Terms) (continued)

Paragraph 2

1. The CHAIRMAN invited the Commission to consider the new text proposed by the Working Group for paragraph 2,¹ which read:

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

2. Mr. CASTRÉN said he accepted the general view that paragraph 2 should be retained, and could agree

¹ For previous text see 1130th meeting, para. 13.

to the new wording proposed by the Working Group, which was great improvement.

3. The CHAIRMAN said that if there were no objection he would take it that the Commission agreed to adopt the new paragraph 2 proposed by the Working Group.

Paragraph 2 was adopted.

4. The CHAIRMAN invited the Commission to vote on article 1 as a whole, on the understanding that a definition of the term "observer" might have to be added later.

Article 1 was adopted by 16 votes to none.

5. Mr. ROSENNE, explaining his vote, said that he had voted in favour of article 1 as a whole, but if separate votes had been taken on the various sub-paragraphs of paragraph 1, he would have abstained or would have voted against the sub-paragraphs on which he had expressed reservations at the two previous meetings or during the first reading.

Article 2³

6.

Article 2

Scope of the present articles

1. The present articles apply to relations of States with international organizations of universal character and to conferences convened by or under the auspices of such organizations.

2. The fact that the present articles do not refer to relations of States with other international organizations is without prejudice to the application to those relations of any of the rules set forth in the present articles to which they would be subject under international law independently of these articles. Likewise, it shall not preclude States from agreeing that the present articles apply to their relations with such other organizations.

3. The fact that the present articles do not refer to conferences convened by or under the auspices of other international organizations is without prejudice to the application to those conferences of any of the rules set forth in the present articles to which they would be subject under international law independently of these articles.

7. Mr. KEARNEY (Chairman of the Working Group) said that the main object of the changes made in article 2 was to bring in conferences.

8. In paragraph 1, the words "and to conferences convened by or under the auspices of such organizations" had been added; in paragraph 2, appropriate minor changes had been made; but the major change had been the addition of a new paragraph 3 which dealt specifically with the subject of conferences. Its provisions repeated, for conferences, the rule previously laid down with respect to other parts of the draft articles. He did not think any of those changes was a change of substance: they were merely part of the process of consolidation.

9. Mr. TAMMES said he noted that a reservation had been introduced into paragraphs 2 and 3 regarding organizations which were not of a universal character and conferences convened by such organizations. It would be logical to introduce a similar reservation in respect of conferences which were not convened by an international organization at all, of which many examples could be given. In the absence of such a reservation, it might be argued that such conferences were not subject to international law, or that the interested States were precluded from agreeing that the present draft articles applied to such conferences.

10. Mr. USTOR said he agreed that it would be logical to introduce such a reservation. His own view, however, was that, if nothing were said in the article, a conference not covered by the draft would still be governed by international law; and the States concerned could always agree to apply the present draft articles to such a conference. Nevertheless, it would be useful to introduce the suggested reservation for the sake of additional clarity, even though it might not be absolutely necessary.

11. Mr. EL-ERIAN (Special Rapporteur) said it was with some reluctance that the General Assembly had accepted the inclusion, in the scope of the draft articles, of conferences convened by or under the auspices of organizations of a universal character; its acceptance had been based on the consideration that such conferences were an extension of the organs of those organizations. There did not seem to be any need to make provision for the possible application of the draft articles to a conference convened by a State and not be an international organization, but for the reasons stated by Mr. Ustor he would be prepared to agree to the inclusion of the proposed reservation.

12. Mr. USHAKOV said that Mr. Tammes and Mr. Ustor were right. In the first part of paragraph 3 the word "other" should be added after the words "refer to" and the words "convened by or under the auspices of other international organizations", should be deleted.

13. Mr. SETTE CÂMARA said he would support the inclusion of the proposed reservation as an additional precaution.

14. Mr. ROSENNE said that the 1968 text of article 2 had referred to "representatives of States to international organizations", which corresponded to the title of the whole draft. That formula had now been replaced by a new one: "relations of States with international organizations", which was much too broad. Such relations embraced a great deal more than the subject-matter of the draft articles. He therefore proposed that the words "relations of States with international organizations", in paragraph 1, be replaced by the words "representatives of States to international organizations" and the consequential changes made in paragraph 2.

15. He also proposed that the concluding words of paragraph 2, "to their relations with such other organizations", be replaced by some such wording as: "to their representatives to other organizations or to other conferences". The question of conferences would then be

³ For previous text see *Yearbook of the International Law Commission, 1968*, vol. II, p. 197.

covered by paragraph 2, and paragraph 3 would be unnecessary.

16. Lastly, he proposed that, in the opening clause of paragraph 2, the word "refer" be replaced by the word "apply". The provisions of the paragraph dealt with the scope of the article and it was therefore more accurate to use the word "apply". The intention was to refer to the application of the draft articles and not to what the articles referred to, a matter which might be difficult to establish.

17. Mr. KEARNEY (Chairman of the Working Group) said that there appeared to be general support for broadening the scope of the provisions, as proposed by Mr. Ushakov. As far as the wording was concerned, he suggested, however, that it would be more precise to say "do not refer to conferences other than those convened by or under the auspices of organizations of universal character".

18. He did not favour Mr. Rosenne's proposal to replace the reference to the relations of States with international organizations by a reference to the representatives of States to international organizations, because that would be far too limited. The draft articles referred to many persons other than representatives, for example, to the members of the technical and administrative staff of a mission; they also referred to missions as a whole, which were treated in some respects as possessing a corporate status distinct from their members; and they also dealt, for certain purposes, with the host State and the sending State as States. The Working Group had therefore felt justified in using the broader language "relations of States with international organizations".

19. He could, however, accept Mr. Rosenne's proposal to replace the word "refer", in paragraph 2, by the word "apply".

20. Mr. USHAKOV said that, for his own amendment, he was prepared to accept Mr. Kearney's reformulation.

21. He too believed that it would not be correct to introduce the concept of "representatives" into paragraph 2. Unlike the 1968 draft, the present draft articles did not refer to "representatives", but to "permanent representatives", "delegations" and "delegates".

22. Mr. BARTOŠ said he felt certain that the rules drawn up by the Commission would have to be applied by international organizations of a universal character and by conferences convened by or under the auspices of such organizations. For if they were not applicable to what were known as regional conferences convened by organizations of a universal character, it was questionable whether they would be applicable in the case of organs of such organizations when the business of those organs concerned regional matters.

23. His own view was that the rules in the draft articles would be applicable to organizations of a universal character and to any conference whatsoever convened by such organizations, since what counted was the universal character of the organization, not the regional character of the conference, and the decisions of the

conference should always be in conformity with universal rules.

24. Where the rules in the draft articles were not applicable automatically, it would be for the States concerned to decide whether they wished to follow them, as was clearly stated in the last sentence of paragraph 2.

25. What was not clear was what was meant by the qualification expressed in paragraphs 2 and 3 by the words under international law. Did those words refer to general international law or to bilateral treaties concluded between the States in question? In his view, they referred to general international law. It should therefore be explained in the commentary that, in that context, the words "international law" were to be understood in their strict sense and that if States were required under the rules of international law to apply any provision of the draft articles, they must do so; that would amount to an indirect application of international law.

26. The point was important, because even though the articles did not relate to conferences convened by international organizations other than those of a universal character, that did not mean that States were free to disregard the rules of international law; it meant that they were free to apply the rules laid down in the draft articles if they wished. Those rules did not permit them to depart from any rules of international law not included in the draft articles which were rules of *jus cogens* or pertinent rules of international law.

27. Mr. ROSENNE, thanking Mr. Kearney for his explanation, which, however, did not fully satisfy him, said that since the expression "relations of States with international organizations" covered a much broader field than the draft articles, the use of that expression would have to be carefully explained in the commentary. A general reservation on that point should be included in the introductory commentary to the whole draft. It was essential not to create the impression that the draft articles purported to exhaust the whole subject of relations between States and international organizations.

28. Mr. USTOR said that, in the light of the explanations given by Mr. Kearney, it was clear that the title of the whole topic, which was at present "Relations between States and international organizations" would have to be reviewed.

29. As far as article 2 was concerned, he suggested that it be referred back to the Working Group for redrafting. The Working Group should consider including in paragraph 3 a provision on the lines of the last sentence of paragraph 2.

30. Mr. AGO said he agreed with Mr. Ustor that article 2 should be referred back to the Working Group.

31. Sir Humphrey WALDOCK concurred.

32. He fully accepted Mr. Tammes' proposal, which could be easily dealt with in the manner suggested by Mr. Kearney.

33. He also accepted Mr. Rosenne's proposal to replace the word "refer" in paragraph 2 by the word "apply".

which was the one used in article 3 of the Vienna Convention on the Law of Treaties,³ on which the present article 2 was largely based.

34. He agreed with Mr. Kearney that it was not desirable to speak of "representatives" and favoured the retention of the reference to "relations", which had the advantage of having already been used in the titles and texts of the Vienna Convention on Diplomatic Relations⁴ and the Vienna Convention on Consular Relations.⁵ An effort would have to be made to find a suitable adjective to qualify "relations" in the present instance.

35. With regard to the reference to international law, mentioned by Mr. Bartoš, it reproduced the language of article 3 of the Vienna Convention on the Law of Treaties and had been the subject of a thorough discussion in the context of the law of treaties.

36. Mr. EL-ERIAN (Special Rapporteur) replying to a point raised by Mr. Bartoš, said that the international organization concerned had to be of a universal character; the activity of the organ or conference, however, could be regional without affecting the legal qualification, which depended on the character of the organization.

37. With regard to the suggested inclusion of an explanation in the commentary, he would draw attention to the explanatory paragraphs included in the introduction to the 1968 draft articles.⁶ Similar explanations would appear in the introduction to the draft articles in the final report.

38. Mr. USHAKOV said that in 1968 the articles had wrongly been entitled "Draft articles on representatives of States to international organizations". The correct title was "Relations between States and international organizations".

39. Mr. BARTOŠ said that, where international law in general was concerned, it was sufficient to refer to the provisions of the Vienna Convention on the Law of Treaties, which laid down rules of international law that took precedence over the provisions of international instruments. He therefore asked that it should be stated in the commentary that the term "international law" had the same meaning in the draft articles as in the Vienna Convention on the Law of Treaties.

40. The CHAIRMAN said that if there were no objection he would take it that the Commission agreed to refer article 2 back to the Working Group.

It was so agreed.⁷

³ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 289 (United Nations publication, Sales No.: E.70.V.5).

⁴ United Nations, *Treaty Series*, vol. 500, p. 96.

⁵ *Op. cit.*, vol. 596, p. 262.

⁶ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 195-196.

⁷ For resumption of the discussion see 1134th meeting, para. 75.

ARTICLE 3

41.

Article 3

Relationship between the present articles and the relevant rules of international organizations or conferences

The application of the present articles is without prejudice to any relevant rules of the Organization or to any relevant rules of procedure of the conference.

42. Mr. KEARNEY (Chairman of the Working Group) said that the only change in the text of article 3 was the addition of the words "or to any relevant rules of procedure of the conference", to cover conferences.⁸

43. The commentary would contain a full explanation of what constituted the "rules" of the organization and of the fact that a well-established practice amounted to such a rule.

44. It had been agreed by the Working Group that, for the purposes of the draft articles, the rules of procedure of a conference should be given the same status as the rules of an organization. There was, however, the implied limitation that a conference could not completely replace the draft articles if they were in force as a treaty between all the States concerned.

45. Mr. EUSTATHIADES asked whether the proviso relating to the rules of procedure of a conference did not amount to giving all conferences the power to derogate from existing treaties, since each conference adopted whatever rules of procedure it chose.

46. Mr. ROSENNE said he had serious misgivings about the proposed text.

47. The concluding proviso concerning the rules to the procedure of a conference, had its origin in article 80. That article, in the form in which the Commission had originally adopted it in 1970,⁹ had specified the articles in Part III from which it was possible to derogate under the rules of procedures of a conference. That restriction had now disappeared, so that the only limitation would be the implication, mentioned by Mr. Kearney, that the rules of procedure could not derogate from a treaty. As he understood it, however, the whole purpose of article 3 was to permit derogation from the rules contained in the draft articles in certain cases.

48. Mr. KEARNEY (Chairman of the Working Group) said he did not believe that a conference could decide by a two-thirds majority to set aside, for example, the rule in article 74 (A/CN.4/L.174/Add.2), which required delegates to respect the laws and regulations of the host State.

49. Sir Humphrey WALDOCK said that there was a limitation implicit in the very notion of "rules of procedure". A rule such as that mentioned by Mr. Kearney could not legitimately be brought under the heading of a rule of procedure.

⁸ Formerly covered by article 80.

⁹ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

50. Mr. AGO said he was surprised at the difficulties raised by article 3, which laid down a perfectly natural rule. None of the rules in the draft articles were peremptory, and States were entitled to substitute other rules. For example, any conference could decide to lay down in its rules of procedure that precedence would be determined by a different criterion from that specified in article 48. There were grounds for believing, however, that no conference would derogate from the rules laid down in the draft articles without precise and specific reasons.

51. The CHAIRMAN put article 3 to the vote.

Article 3 was adopted by 17 votes to none, with 1 abstention.

52. Mr. ROSENNE, explaining his vote, said that he had abstained because his misgivings had not been allayed. Almost anything could be introduced into the rules of procedure of a conference by a majority vote.

53. Mr. KEARNEY (Chairman of the Working Group) said that the concern expressed by Mr. Rosenne could be met by including in the commentary a clear explanation of what was meant by "rules of procedure".

ARTICLE 4

54.

Article 4

Relationship between the present articles and other international agreements

The provisions of the present articles

(a) are without prejudice to other international agreements in force between States or between States and international organizations of universal character, and

(b) shall not preclude the conclusion of other such international agreements.

55. Mr. KEARNEY (Chairman of the Working Group) said that the new article 4 was a combination of the former article 4, on the relationship with other existing international agreements, the former article 5, on the relationship with international agreements which might be entered into in the future, and the former article 79, dealing with both of those questions in relation to conferences.

56. As far as the wording was concerned, sub-paragraph (a) was similar to the former article 4 except that the words "of universal character" had been inserted after the concluding words "international organizations". Sub-paragraph (b) corresponded to the former article 5.

57. Sir Humphrey WALDOCK said that the wording of sub-paragraph (b) was not really adequate. It amounted to a broad and general statement that the draft articles could not prevent the conclusion of future treaties—a statement which seemed hardly worth making. The provision should be made narrower and more precise, so as to make it clear it was intended to safeguard the possibility of concluding agreements on the same subject-matter. The corresponding provision in article 73, paragraph 2, of the Vienna Convention on Con-

sular Relations,¹⁰ for example, spoke of international agreements "confirming or supplementing or extending or amplifying the provisions" of that Convention.

58. Mr. USTOR said that he entirely agreed, except that he would not favour the inclusion in article 4 of wording on the lines of article 73, paragraph 2, of the Vienna Convention on Consular Relations. That provision had given rise to considerable difficulty, as he could testify from his own experience. It did not clearly specify that derogation from the Vienna Convention was permitted, and the language made it possible to argue that a particular bilateral consular agreement conflicted with that Convention because it did not simply confirm, supplement, extend or amplify its provisions, but departed from them.

59. Mr. AGO said it was a difficult point. The use of four different verbs in the corresponding provision of the Vienna Convention on Consular Relations was due to its authors' intention to lay down a minimum régime which should at least be respected in any other conventions that might be concluded. That did not apply to the present draft articles.

60. He agreed that the wording of article 4 should be improved, but he did not think the text of article 73 of the Vienna Convention on Consular Relations could be used.

61. The CHAIRMAN said that if there were no objection he would take it that the Commission agreed to refer article 4 back to the Working Group.

*It was so agreed.*¹¹

PART II. Missions to international organizations

ARTICLE 5

62.

Article 5

Establishment of missions

1. Member States may, if the rules of the Organization so admit, establish permanent missions for the performance of the functions mentioned in article 6.

2. Non-member States may, if the rules of the Organization so admit, establish permanent observer missions for the performance of the functions mentioned in article 7.

3. The Organization shall notify to the host State the institution of a mission, if possible, prior to its establishment.

63. Mr. KEARNEY (Chairman of the Working Group) said that article 5 was a combination of the former articles 6 and 52. Paragraph 1 corresponded to the former article 6; paragraph 2 corresponded to the former article 52; and paragraph 3 was a provision common to both those articles.¹² The only change in the language was in paragraph 3, which referred to notification of the institution of a mission "if possible, prior to its

¹⁰ United Nations, *Treaty Series*, vol. 596, p. 320.

¹¹ For resumption of the discussion see 1135th meeting, para. 1.

¹² See 1118th meeting, paras. 2 and 23.

establishment". That addition brought the paragraph into conformity with certain requirements concerning notification in general.

64. Mr. ROSENNE said that the comma after the words "if possible", in paragraph 3, should be deleted.

It was so agreed.

65. Mr. EUSTATHIADES said he thought the change introduced by the Working Group was useful both to the sending State and to the organization and the host State.

66. The CHAIRMAN put article 5 to the vote as amended.

Article 5, as amended, was adopted by 19 votes to none.

ARTICLES 6 and 7

67.

Article 6

Functions of the permanent mission

The functions of the permanent mission consist *inter alia* in:

(a) ensuring the representation of the sending State to the Organization;

(b) maintaining the necessary liaison between the sending State and the Organization;

(c) negotiating with or in the Organization;

(d) ascertaining activities in the Organization and reporting thereon to the Government of the sending State;

(e) promoting co-operation for the realisation of the purposes and principles of the Organization.

68.

Article 7

Functions of the permanent observer mission

The functions of the permanent observer mission consist *inter alia* in:

(a) ensuring, in relations with the Organization, the representation of the sending State and maintaining liaison with the Organization;

(b) ascertaining activities in the Organization and reporting thereon to the Government of the sending State;

(c) promoting co-operation with the Organization and, when required, negotiating with it.

69. Mr. KEARNEY (Chairman of the Working Group) said that the Working Group had decided not to attempt any consolidation of articles 6 and 7,¹³ which accordingly remained unchanged.

70. Mr. CASTAÑEDA asked whether the word "ensuring", in the English version of each article, was a correct translation of the French word "assurer".

71. Mr. TESLENKO (Deputy Secretary to the Commission) said there was no alternative. In any case, that translation had been used throughout the draft articles.

72. Mr. USTOR said he feared that there would be some criticism of articles 6 and 7 because the functions

of "ensuring the representation of the sending State" and "maintaining the necessary liaison" did not appear in the same sub-paragraph in each article.

73. Mr. KEARNEY (Chairman of the Working Group) said that the Working Group had made no changes in those articles, which had previously been approved by the Commission.

74. The CHAIRMAN put articles 6 and 7 to the vote.

Articles 6 and 7 were adopted by 19 votes to none.

ARTICLE 8

75.

Article 8

Multiple accreditation or appointment

1. The sending State may accredit the same person as head of mission to two or more international organizations or appoint a head of mission as a member of the diplomatic staff of another of its missions.

2. The sending State may accredit a member of the diplomatic staff of the mission as head of mission to other international organizations or appoint a member of the staff of the mission as a member of the staff of another of its missions.

76. Mr. KEARNEY (Chairman of the Working Group) said that article 8 combined the former articles 8 and 54.¹⁴ The only change from the old text had been the replacement of the word "assign" by the word "appoint". The reason for that change was that the word "assign" implied a purely internal decision, whereas "appoint" could be understood in a bilateral or multilateral context.

77. The CHAIRMAN put article 8 to the vote.

Article 8 was adopted by 18 votes to none.

DELETION OF THE FORMER ARTICLE 9

78. Mr. KEARNEY (Chairman of the Working Group) said that the Working Group, in its attempt to consolidate the draft articles, had found that the former article 9¹⁵ which referred to the accreditation, assignment or appointment of a member of a permanent mission and contained four paragraphs, was long and complicated. It had come to the conclusion that the article said nothing which was not already admitted, that it was, in fact, superfluous and that it should be deleted.

79. Mr. BARTOŠ said that the statement in the footnote to article 9 (A/CN.4/L.174/Add.2) that the former article 9 had been deleted, was a decision of the Working Group on which the Commission should now be asked to pronounce.

80. The CHAIRMAN said he would treat the Working Group's decision to delete the former article 9 as a proposal and put it to the vote.

The proposal to delete article 9 was adopted by 18 votes to none.

¹³ Formerly articles 7 and 53. See 1110th meeting, para. 33; 1116th meeting, para. 58; and 1117th meeting, paras. 2 and 19.

¹⁴ See 1111th meeting, para. 6 and 1118th meeting, paras. 30 and 42.

¹⁵ See 1111th meeting, para. 21.

81. Mr. REUTER said that he had agreed to vote on the proposal on the understanding that, in such cases the Commission reserved the right to decide that there was no proposal on which to vote.

ARTICLE 9¹⁶

82.

Article 9

Appointment of the members of the mission

Subject to the provisions of articles 14 and 71, the sending State may freely appoint the members of the mission.

83. The CHAIRMAN put the new article 9 to the vote.

The new article 9 was adopted by 19 votes to none.

ARTICLE 10

84.

Article 10

Credentials of the head of mission

The credentials of the head of mission shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or, if the rules of the Organization so admit, by another competent authority of the sending State and shall be transmitted to the Organization.

85. Mr. KEARNEY (Chairman of the Working Group) said that article 10 was a consolidation of the former articles 12 and 57. No changes had been made.

86. The CHAIRMAN put article 10 to the vote.

Article 10 was adopted by 19 votes to none.

ARTICLE 11

87.

Article 11

Accreditation to organs of the Organization

1. A member State may specify in credentials issued to its permanent representative that he is authorized to act as a delegate of the State in one or more organs.

2. Unless a member State provides otherwise its permanent representative shall represent it in the organs of the Organization for which there are no special requirements as regards representation.

3. A non-member State may specify in credentials issued to its permanent observer that he is authorized to act as an observer of the State in one or more organs when this is admitted.

88. Mr. KEARNEY (Chairman of the Working Group) said that the former article 11, on nationality of the members of the permanent mission, was now one of the general articles in Part IV. The new article 11 was a combination of articles 13 and 57 *bis*.¹⁷ Paragraph 1 was a considerable change from the language of article 13, but no change had been made in paragraph 2. In paragraph 3, which was taken from the former article 57 *bis*, a change had been made, beginning with

the words "issued to its permanent observer", in an attempt to clarify the precise nature of the activities.

89. Mr. AGO proposed that, in order to keep the terminology consistent and in view of the Commission's previous decisions, the words "in one or more organs", in paragraphs 1 and 3, be replaced by the words "to one or more organs", and that the words "in the organs of the Organization", in paragraph 2, be replaced by the words "to the organs of the Organization".

90. Mr. USHAKOV said he was concerned about the formulation of paragraph 2 in the English version, as it seemed to suggest an obligation; perhaps the word "shall" should be replaced by the word "may".

91. Mr. ROSENNE said that the word "credentials", in paragraphs 1 and 3, should be preceded by the definite article "the".

92. He endorsed Mr. Ushakov's comment.

93. He suggested that the words "of the Organization" be added after the word "organs" at the end of paragraph 1.

94. Sir Humphrey WALDOCK, referring to Mr. Ushakov's comment, said that another possibility would be to replace the words "shall represent it", in paragraph 2, by the words "represents it".

95. Mr. ROSENNE suggested that the Working Group be asked to reconsider paragraph 2, with a view to introducing the concept of "delegate".

96. The CHAIRMAN suggested that article 11 be referred back to the Working Group.

*It was so agreed.*¹⁸

ARTICLE 12

97.

Article 12

Full powers in the conclusion of a treaty with the Organization

1. The head of mission in virtue of his functions and without having to produce full powers is considered as representing his State for the purpose of adopting the text of a treaty between that State and the Organization.

2. The head of mission is not considered in virtue of his functions as representing his State for the purpose of signing a treaty, whether in full or *ad referendum*, between that State and the Organization unless it appears from the practice of the Organization, or from other circumstances, that the intention of the parties was to dispense with full powers.

98. Mr. KEARNEY (Chairman of the Working Group) said that article 12 was a combination of articles 14 and 58. It differed from those articles only in the use of the expression "head of mission" in place of "permanent representative" and "permanent observer".

99. The CHAIRMAN put article 12 to the vote.

Article 12 was adopted by 20 votes to none.

¹⁶ Formerly articles 10 and 55.

¹⁷ See 1111th meeting, para. 62 and 1119th meeting, para. 3.

¹⁸ For resumption of the discussion see 1135th meeting, para. 5.

100. Mr. ROSENNE said that the commentary should include a note explaining the precise import of the terms "credentials," "accreditation" and "full powers," as used in articles 10, 11 and 12.

ARTICLE 13

101.

Article 13

Composition of the mission

In addition to the head of mission, the mission may include diplomatic staff, administrative and technical staff and service staff.

102. Mr. KEARNEY (Chairman of the Working Group) said that article 13 was a combination of articles 15 and 59 and contained no changes except the reference to the head of mission.

103. The CHAIRMAN put article 13 to the vote.

Article 13 was adopted by 20 votes to none.

ARTICLE 14

104.

Article 14

Size of the mission

The size of the mission shall not exceed what is reasonable and normal, having regard to the functions of the Organization, the needs of the particular mission and the circumstances and conditions in the host State.

105. Mr. KEARNEY (Chairman of the Working Group) said that article 14 was a combination of articles 16 and 60 and contained no changes except the use of the word "mission" in place of the former references to the two types of mission.

106. The CHAIRMAN put article 14 to the vote.

Article 14 was adopted by 20 votes to none.

ARTICLE 15

107.

Article 15

Notifications

1. The sending State shall notify the Organization of:

(a) the appointment, position, title and order of precedence of the members of the mission, their arrival and final departure or the termination of their functions with the mission;

(b) the arrival and final departure of any person belonging to the family of a member of the mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission;

(c) the arrival and final departure of persons employed on the private staff of members of the mission and the fact that they are leaving that employment;

(d) the beginning and the termination of the employment of persons resident in the host State as members of the staff of the mission or as persons employed on the private staff entitled to privileges and immunities;

(e) the location of the premises of the mission and of the private residences enjoying inviolability under articles 23 and 29,

as well as any other information that may be necessary to identify such premises and residences.

2. Where possible, prior notification of arrival and final departure shall also be given.

3. The Organization shall transmit to the host State the notifications referred to in paragraphs 1 and 2.

4. The sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2.

108. Mr. KEARNEY (Chairman of the Working Group) said that article 15 was a combination of articles 17 and 61 and contained no changes except for consolidation.

109. The CHAIRMAN put article 15 to the vote.

Article 15 was adopted by 20 votes to none.

ARTICLE 16

110.

Article 16

Chargé d'affaires ad interim

If the post of head of mission is vacant, or if the head of mission is unable to perform his functions, a *chargé d'affaires ad interim* shall act as head of mission. The name of the *chargé d'affaires ad interim* shall be notified to the Organization.

111. Mr. KEARNEY (Chairman of the Working Group) said that article 16 was a combination of articles 18 and 62. There were no changes except for the use of the term "head of mission" in place of "permanent representative" and "permanent observer".

112. The CHAIRMAN put article 16 to the vote.

Article 16 was adopted by 20 votes to none.

113. Mr. ROSENNE, explaining his vote, said he had voted in favour of article 16 with some reluctance because the term "*chargé d'affaires ad interim*" was rarely used in the sense now proposed.

ARTICLE 17

114.

Article 17

Precedence

1. Precedence among permanent representatives shall be determined by the alphabetical order of the names of their States used in the Organization.

2. Precedence among permanent observers shall be determined by the alphabetical order of the names of their States used in the Organization.

115. Mr. KEARNEY (Chairman of the Working Group) said that paragraph 1 of article 17 was the former article 19, while paragraph 2 was the former article 62 *bis*.

116. Mr. REUTER asked whether the meaning of the article was that there were two separate orders of precedence, one for permanent representatives and the other for permanent observers.

117. Mr. KEARNEY (Chairman of the Working Group) said that that was correct.

118. The CHAIRMAN put article 17 to the vote.

Article 17 was adopted by 20 votes to none.

ARTICLE 18

119.

Article 18

Office of the mission

The sending State may not, without the prior consent of the host State, establish an office of the mission in a locality within the host State other than that in which the seat or an office of the Organization is established.

120. Mr. KEARNEY (Chairman of the Working Group) said that article 18 was a combination of the former articles 20 and 63; no changes had been made beyond those required for consolidation purposes.

121. Mr. ROSENNE said he wished to draw attention to the ambiguity in the use of the expression "office" of the Organization; further consideration should be given to that point.

122. The CHAIRMAN put article 18 to the vote.

Article 18 was adopted by 20 votes to none.

ARTICLE 19

123.

Article 19

Use of flag and emblem

1. The permanent mission shall have the right to use the flag and emblem of the sending State on its premises. The permanent representative shall have the same right as regards his residence and means of transport.

2. The permanent observer mission shall have the right to use the flag and emblem of the sending State on its premises.

3. In the exercise of the right accorded by this article, regard shall be had to the laws, regulations and usages of the host State.

124. Mr. KEARNEY (Chairman of the Working Group) said that paragraph 1 of article 19 was the same as paragraph 1 of the former article 21, while paragraphs 2 and 3 were the same as the two paragraphs of the former article 64.

125. The CHAIRMAN put article 19 to the vote.

Article 19 was adopted by 19 votes to none.

126. Mr. USTOR said it should be explained in the commentary why permanent representatives and permanent observers were given slightly different treatment with respect to the use of the flag.

ARTICLE 20

127.

Article 20

General facilities

1. The host State shall accord:

(a) to the permanent mission all facilities for the performance of its functions;

(b) to the permanent observer mission the facilities required for the performance of its functions.

2. The Organization shall assist the mission in obtaining those facilities and shall accord to the mission such facilities as lie within its own competence.

128. Mr. KEARNEY (Chairman of the Working Group) said that the first part of the former article 22¹⁹ was in effect contained in paragraph 1 (a) of article 20, and the first part of the former article 65²⁰ was contained in paragraph 1 (b). Paragraph 2 was the provision common to both articles 22 and 65.

129. The CHAIRMAN put article 20 to the vote.

Article 20 was adopted by 20 votes to none.

ARTICLE 21

130.

Article 21

Premises and accommodation

1. The host State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for the mission or assist the sending State in obtaining accommodation in some other way.

2. The host State and the Organization shall also, where necessary, assist the mission in obtaining suitable accommodation for its members.

131. Mr. KEARNEY (Chairman of the Working Group) said that article 21 was a combination of the former articles 23 and 66. The word "latter's", which had preceded the word "mission" in the former article 23,²¹ had been deleted as superfluous.

132. The CHAIRMAN put article 21 to the vote.

Article 21 was adopted by 20 votes to none.

ARTICLE 22

133.

Article 22

Assistance by the Organization in respect of privileges and immunities

The Organization shall, where necessary, assist the sending State, the mission and the members of the mission in securing the enjoyment of the privileges and immunities provided for by the present articles.

134. Mr. KEARNEY (Chairman of the Working Group) said that article 22 was a combination of the former articles 24 and 66. No changes had been made except for the use of the word "mission" in place of "permanent mission".

135. The CHAIRMAN put article 22 to the vote.

Article 22 was adopted by 20 votes to none.

¹⁹ See 1112th meeting, para. 30.

²⁰ See 1122nd meeting, para. 75.

²¹ See 1112th meeting, para. 36.

ARTICLE 23

136.

*Article 23**Inviolability of the premises*

1. The premises of the mission shall be inviolable. The agents of the host State may not enter them, except with the consent of the head of mission. Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the head of mission.

2. The host State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

137. Mr. KEARNEY (Chairman of the Working Group) said that article 23 was the same as the former article 25, except for the use of the word "mission" in place of the "permanent mission", and the words "head of mission" in place of "permanent representative".

At the request of Mr. Alcívar, a vote was taken by roll-call on the last sentence of paragraph 1.

In favour: Mr. Ago, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Sir Humphrey Waldock.

Against: Mr. Alcívar, Mr. Bartoš, Mr. Ushakov, Mr. Ustor.

Abstaining: Mr. Castañeda, Mr. Yasseen.

The last sentence of paragraph 1 was adopted by 14 votes to 4, with 2 abstentions.

138. The CHAIRMAN put article 23 to the vote as a whole.

Article 23 was adopted by 19 votes to none, with 1 abstention.

139. Mr. CASTAÑEDA, explaining his vote, said that since he had abstained from voting on the last sentence of paragraph 1, which was an essential part of the text, he had thought he ought to abstain from voting on the article as a whole.

140. Mr. USHAKOV said that, although he had voted in favour of the article as a whole, he still objected to the last sentence of paragraph 1.

141. Mr. ALCÍVAR said he had voted against the last sentence of paragraph 1, but not against the article as a whole, because it stated the principle of inviolability.

142. He still reserved his position on the last sentence of paragraph 1.

143. Mr. EL-ERIAN said he had voted in favour of the last sentence of paragraph 1 in order to remain

consistent with the position he had adopted as Special Rapporteur. He had voted for that provision, however, on the understanding that it would be applied *stricto sensu* by the host State.

144. Mr. BARTOŠ said that although he had voted for the article as a whole, he was still opposed to the last sentence of paragraph 1.

145. Mr. USTOR said he had voted for article 23 as a whole because it embodied the principle of inviolability. He had voted against the last sentence of paragraph 1, however, because it could be interpreted as weakening that principle.

The meeting rose at 1.5 p.m.

1133rd MEETING

Thursday, 8 July 1971, at 3.30 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 to 3; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.174 and Add.1 and 2)

[Item 1 of the agenda]

(continued)

CONSOLIDATED DRAFT ARTICLES PROPOSED
BY THE WORKING GROUP

(continued)

ARTICLE 24

1. The CHAIRMAN invited the Commission to continue consideration of the consolidated draft articles proposed by the Working Group (A/CN.4/L.174/Add.2), starting with article 24.

2.

*Article 24**Exemption of the premises from taxation*

1. The premises of the mission of which the sending State or any person acting on its behalf is the owner or the lessee shall

be exempt from all national, regional or municipal dues and taxes other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State or any person acting on its behalf.

3. Mr. KEARNEY (Chairman of the Working Group) said that article 24 combined the former article 26 with the relevant provisions referred to in the former article 67. The only change introduced by the Working Group had been to replace the concluding words of the former article 26, paragraph 2,¹ "the permanent representative or another member of the permanent mission acting on behalf of the mission", by the words "or any person acting on its behalf", meaning on behalf of the sending State. That change had been rendered necessary by the adoption for paragraph 1 of a text based on the corresponding article 32, paragraph 1, of the Vienna Convention on Consular Relations.²

4. The CHAIRMAN put article 24 to the vote.

Article 24 was adopted by 13 votes to none.

ARTICLE 25

5.

Article 25

Inviolability of archives and documents

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

6. Mr. KEARNEY (Chairman of the Working Group) said that no changes had been introduced in article 25, except those rendered necessary by the process of consolidating the former article 27 with the relevant provisions referred to in article 67.

7. The CHAIRMAN put article 25 to the vote.

Article 25 was adopted by 13 votes to none.

ARTICLE 26

8.

Article 26

Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure freedom of movement and travel in its territory to all members of the mission and members of their families forming part of their respective households.

9. Mr. KEARNEY (Chairman of the Working Group) said that no changes had been introduced in article 26 except those rendered necessary by the process of consolidating the former articles 28 and 68.

10. The CHAIRMAN put article 26 to the vote.

Article 26 was adopted by 13 votes to none.

ARTICLE 27³

11.

Article 27

Freedom of communication

1. The host State shall permit and protect free communication on the part of the mission 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 mission may employ all appropriate means, including couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the host State.

2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

3. The bag of the mission shall not be opened or detained.

4. The packages constituting the bag of the mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the mission.

5. The courier of the mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the mission may designate couriers *ad hoc* of the mission. In such cases the provisions of paragraph 5 shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the mission's bag in his charge.

7. The bag of the mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a courier of the mission. By arrangement with the appropriate authorities of the host State the mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

12. Mr. KEARNEY (Chairman of the Working Group) said that in paragraph 1 of article 27 the Working Group had rearranged the list of the different types of mission contained in the former article 29⁴ and had added a reference to "delegations". There had been no change of substance in paragraphs 2 to 5. In paragraph 6, the words "of this article" had been dropped after the words "paragraph 5". The Working Group had made a similar change throughout the draft wherever any article contained a reference to one of its own paragraphs. In paragraph 7, the last sentence had been amended so as to bring it into line with the corresponding provision of article 57 (A/CN.4/L.174/Add.2) on delegations.

13. The CHAIRMAN put article 27 to the vote.

Article 27 was adopted by 13 votes to none.

¹ See 1113th meeting, para. 6.

² United Nations, *Treaty Series*, vol. 596, p. 288.

³ Formerly articles 29 and 67.

⁴ See 1113th meeting, para. 23.

ARTICLE 28

14.

*Article 28**Personal inviolability*

The persons of the head of mission and of the members of the diplomatic staff of the mission shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

15. Mr. KEARNEY (Chairman of the Working Group) said that no change of substance had been introduced in article 28, which combined the former article 30 with the relevant provisions of the former article 69.

16. The CHAIRMAN put article 28 to the vote.

Article 28 was adopted by 13 votes to none.

ARTICLE 29

17.

*Article 29**Inviolability of residence and property*

1. The private residence of the head of mission and of the members of the diplomatic staff of the mission shall enjoy the same inviolability and protection as the premises of the mission.

2. Their papers, correspondence and, except as provided in paragraph 3 of article 30, their property, shall likewise enjoy inviolability.

18. Mr. KEARNEY (Chairman of the Working Group) said that no material change had been introduced in article 29, which combined the former article 31 with the relevant provisions of the former article 69.

19. The CHAIRMAN put article 29 to the vote.

Article 29 was adopted by 13 votes to none.

ARTICLE 30

20.

*Article 30**Immunity from jurisdiction*

1. The head of mission and the members of the diplomatic staff of the mission shall enjoy immunity from the criminal jurisdiction of the host State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the host State unless the person in question holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the person in question is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the person in question in the host State outside his official functions;

(d) an action for damages arising out of an accident caused by a vehicle used by the person in question outside the exercise

of the functions of the mission where those damages are not recoverable from insurance.

2. The Head of mission and the members of the diplomatic staff of the mission are not obliged to give evidence as witnesses.

3. No measures of execution may be taken in respect of the head of mission or a member of the diplomatic staff of the mission except in cases coming under sub-paragraphs (a), (b), (c) and (d) of paragraph 1, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of the head of mission or of a member of the diplomatic staff of the mission from the jurisdiction of the host State does not exempt him from the jurisdiction of the sending State.

21. Mr. KEARNEY (Chairman of the Working Group) said that no changes had been introduced in article 30 other than those necessary to consolidate the former article 32 with the relevant provisions of the former article 69.

22. The CHAIRMAN put article 30 to the vote.

Article 30 was adopted by 13 votes to none.

23. Sir Humphrey WALDOCK, explaining his vote, said that he had voted in favour of the proposed text of article 30 because it could attract general agreement. He would have preferred somewhat stricter provisions.

24. Mr. USTOR asked whether the Working Group had considered the possibility of amalgamating the present set of articles on privileges and immunities with the articles on the privileges and immunities of delegations in Part III (A/CN.4/L.174/Add.2). There appeared to be only small differences between the privileges and immunities prescribed for missions in Part II and those provided for in Part III.

25. Mr. KEARNEY (Chairman of the Working Group) said that while the Working Group had found it was feasible to amalgamate the articles on permanent observer missions with those on permanent missions, it had decided against consolidation of the articles on delegations, because that process would have created difficulties in harmonizing the various provisions.

ARTICLE 31

26.

*Article 31**Waiver of immunity*

1. The immunity from jurisdiction of the head of mission and members of the diplomatic staff of the mission and of persons enjoying immunity under article 36 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 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of any of the persons mentioned in paragraph 1 in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

27. Mr. KEARNEY (Chairman of the Working Group) said that the proposed text of article 31 was a consolidation of the former article 35⁵ with the former article 71. Paragraph 5 was, of course, the paragraph which the Drafting Committee had recommended should replace the former article 34; that recommendation had been approved by the Commission at its 1117th meeting.⁶

28. Mr. USTOR said that paragraph 1 of article 31 had its origin in article 32, paragraph 1 of the Vienna Convention on Diplomatic Relations,⁷ which referred to "persons enjoying immunity under Article 37", although in fact certain persons could enjoy immunity under article 38 of that Convention. That lacuna was now reflected in the present article 31, paragraph 1 of which referred to "persons enjoying immunity under article 36" and ignored the fact that the immunities specified in draft article 37 could also be waived by the sending State.

29. He would not propose any amendment to article 31, but suggested that it be explained in the commentary that the wording had been taken from the corresponding provision of the Vienna Convention on Diplomatic Relations, and that article 31 should not be construed as meaning that the sending State could not waive the immunity of the persons mentioned in article 37.

30. Mr. ROSENNE said he noted that the waiving of immunity was expressed as an act of the sending State, but that the invoking of immunity was expressed as an act of the individual concerned. In fact, both were acts of the sending State; the individual concerned acted as an agent of the sending State when he invoked immunity.

31. Sir Humphrey WALDOCK said that, in practice, the first step had to be taken by the individual concerned, who invoked immunity in order to protect his position in the proceedings, although the immunity he was invoking was, of course, that of the State, or in the case of an international official, that of the organization.

32. Mr. ROSENNE said that his remark did not relate to international officials, but to permanent representatives and other persons covered by the present draft. Those persons were invariably agents of their own State and it was his belief that the invocation of immunity went a long way to resolve the problems of imputability when a question of the international responsibility of that State arose from the act in respect of which the immunity was invoked.

33. The CHAIRMAN put article 31 to the vote.

Article 31 was adopted by 15 votes to none.

⁵ See 1113th meeting, para. 69.

⁶ See paras. 20-30.

⁷ United Nations, *Treaty Series*, vol. 500, p. 112.

ARTICLE 32

34.

Article 32

Exemption from social security legislation

1. Subject to the provisions of paragraph 3, the head of mission and the members of the diplomatic staff of the mission shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the host State.

2. The exemption provided for in paragraph 1 shall also apply to persons who are in the sole private employ of the head of mission or of a member of the diplomatic staff of the mission, on condition:

(a) that such employed persons are not nationals of or permanently resident in the host State; and

(b) that they are covered by the social security provisions which may be in force in the sending State or a third State.

3. The head of mission and the members of the diplomatic staff of the mission who employ persons to whom the exemption provided for in paragraph 2 does not apply shall observe the obligations which the social security provisions of the host State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 shall not preclude voluntary participation in the social security system of the host State provided that such participation is permitted by that State.

5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

35. Mr. KEARNEY (Chairman of the Working Group) said that no changes had been introduced in article 32 other than those necessary to consolidate the former article 35 with the relevant provisions of the former article 69.

36. Mr. USTOR said that the commentary to article 32 should explain that its text was based on earlier instruments, but that paragraph 3 also applied to the sending State itself. If the sending State employed non-exempted persons, it had to make such social security contributions as were required by the laws of the host State.

37. The CHAIRMAN put article 32 to the vote.

Article 32 was adopted by 15 votes to none.

ARTICLE 33

38.

Article 33

Exemption from dues and taxes

The head of mission and the members of the diplomatic staff of the mission shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the mission;

(c) estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 38;

(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, mortgages dues and stamp duty, with respect to immovable property, subject to the provisions of article 24.

39. Mr. KEARNEY (Chairman of the Working Group) said that no changes had been introduced in article 33 other than those necessary to consolidate the former article 36 with the relevant provisions of the former article 69.

40. The CHAIRMAN put article 33 to the vote.

Article 33 was adopted by 15 votes to none.

ARTICLE 34

41.

Article 34

Exemption from personal services

The host State shall exempt the head of mission and the members of the diplomatic staff of the mission from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

42. Mr. KEARNEY (Chairman of the Working Group) said that no changes had been introduced in article 34 other than those necessary to consolidate the former article 37 with the relevant provisions of the former article 69.

43. The CHAIRMAN put article 34 to the vote.

Article 34 was adopted by 15 votes to none.

ARTICLE 35

44.

Article 35

Exemption from customs duties and inspection

1. The host State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

(a) articles for the official use of the mission;

(b) articles for the personal use of the head of mission or a member of the diplomatic staff of the mission, including articles intended for his establishment.

2. The personal baggage of the head of mission or a member of the diplomatic staff of the mission shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. In such cases, inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

45. Mr. KEARNEY (Chairman of the Working Group) said that no changes had been introduced in article 35 other than those necessary to consolidate the former article 38 with the relevant provisions of the former articles 67 and 69.

46. The CHAIRMAN put article 35 to the vote.

Article 35 was adopted by 15 votes to none.

ARTICLE 36

47.

Article 36

Privileges and immunities of other persons

1. The members of the family of the head of mission forming part of his household and the members of the family of a member of the diplomatic staff of the mission forming part of his household shall, if they are not nationals of the host State, enjoy the privileges and immunities specified in articles 28, 29, 30, 32, 33, 34 and paragraphs 1 (b) and 2 of article 35.

2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households who are not nationals of or permanently resident in the host State, shall enjoy the privileges and immunities specified in articles 28, 29, 30, 32, 33 and 34, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 30 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1 (b) of article 35 in respect of articles imported at the time of first installation.

3. Members of the service staff of the mission shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption provided for in article 32.

4. Private staff of members of the mission shall be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

48. Mr. KEARNEY (Chairman of the Working Group) said that article 36 combined the former article 40^{*} with the relevant provisions of the former article 69.^{*} The title had been shortened on the pattern of the title of the relevant section of the part of the draft dealing with delegations. In paragraph 2, there had been a slight rearrangement of the wording in the interests of clarity. In paragraphs 3 and 4, the description of the persons concerned as "not nationals of or permanently resident in the host State" had been deleted as unnecessary; the exclusion of those persons was covered by the broad terms of article 37.

49. The CHAIRMAN put article 36 to the vote.

Article 36 was adopted by 16 votes to none.

ARTICLE 37

50.

Article 37

Nationals of the host State and persons permanently resident in the host State

1. Except in so far as additional privileges and immunities may be granted by the host State, the head of mission and any

^{*} See 1114th meeting, para. 28.

^{*} See 1123rd meeting, para. 3.

member of the diplomatic staff of the mission who are nationals of or permanently resident in that State shall enjoy only immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of their functions.

2. Other members of the staff of the mission and persons on the private staff who are nationals of or permanently resident in the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those members and persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

51. Mr. KEARNEY (Chairman of the Working Group) said that no changes had been introduced in article 37 other than those necessary to consolidate the former article 41 with the former article 70.

52. The CHAIRMAN put article 37 to the vote.

Article 37 was adopted by 17 votes to none.

ARTICLE 38

53.

Article 38

Duration of privileges and immunities

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the host State by the Organization or by the sending State.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the mission not a national of or permanently resident in the host State or of a member of his family forming part of his household, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property which is in the host State solely because of the presence there of the deceased as a member of the mission or of the family of a member of the mission.

54. Mr. KEARNEY (Chairman of the Working Group) said that article 38 combined the provisions of the former article 42¹⁰ with those of the former article 73.¹¹ The last sentence of paragraph 4 had been reworded in order to bring it into line with the formula used in paragraph 4 of article 68 in Part III, dealing with delegations (A/CN.4/L.174/Add.2).

55. The CHAIRMAN put article 38 to the vote.

Article 38 was adopted by 17 votes to none.

ARTICLE 39

56.

Article 39

End of the functions of the head of mission or of a member of the diplomatic staff

The functions of the head of mission or of a member of the diplomatic staff of the mission shall come to an end, *inter alia*:

(a) on notification of their termination by the sending State to the Organization;

(b) if the mission is finally or temporarily recalled.

57. Mr. KEARNEY (Chairman of the Working Group) said that no changes had been introduced in article 39 other than those necessary to consolidate the former article 47 with the relevant provisions of the former article 77.

58. The CHAIRMAN put article 39 to the vote.

Article 39 was adopted by 17 votes to none.

ARTICLE 40

59.

Article 40

Protection of premises, property and archives

1. When the mission is temporarily or finally recalled, the host State must respect and protect the premises as well as the property and archives of the mission. The sending State must take all appropriate measures to terminate this special duty of the host State within a reasonable time. It may entrust custody of the premises, property and archives of the mission to a third State acceptable to the host State.

2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and the archives of the mission from the territory of the host State.

60. Mr. KEARNEY (Chairman of the Working Group) said that no changes had been introduced in article 40 other than those necessary to consolidate the former article 49 with the relevant provisions of the former article 77.

61. Mr. USHAKOV said that the words "all appropriate measures" in the second sentence of paragraph 1 were not satisfactorily rendered in the French version by the words "*toutes dispositions*" which, he suggested, should be replaced by the more suitable wording "*les mesures appropriées*".

62. Mr. ALCÍVAR said that the Spanish version was also unsatisfactory; the words "*todas las disposiciones pertinentes*" should be replaced by the words "*las medidas apropiadas*".

63. The CHAIRMAN said that those suggestions would be noted for the final revision of the articles. He then put article 40 to the vote.

Article 40 was adopted by 18 votes to none.

¹⁰ See 1114th meeting, para. 34.

¹¹ See 1123rd meeting, para. 8.

PART III. *Delegations to organs and conferences*

ARTICLE 41

64.

*Article 41**Delegations to organs and to conferences*

A State may send a delegation to an organ or to a conference in accordance with the rules and decisions of the Organization.

65. Mr. KEARNEY (Chairman of the Working Group) said that article 41 was a new article which laid down the principle that a State could send a delegation to an organ or to a conference in accordance with the rules and decisions of the organization concerned. The reference to the "rules and decisions of the Organization" had been made deliberately in order to give as much scope as possible to the organization.

66. Mr. ROSENNE suggested that the words "Delegations to organs and delegations to conferences" be used as the title of Part III, since those were the terms defined in article 1.

67. Mr. ELIAS said he thought the formulation was already sufficiently clear and that it was unnecessary to repeat the word "delegations".

68. Sir Humphrey WALDOCK said he could agree to the words "Delegations to organs and to conferences" for the title of Part III.

69. Mr. REUTER said he supported Mr. Rosenne's suggestion. It would be wrong for Part III to have the same title as article 41.

70. Mr. EUSTATHIADES suggested that articles 41 and 42 be merged under a joint title, unless a new title could be found for article 41.

71. Sir Humphrey WALDOCK said that in the Working Group he had suggested, in order to maintain the parallel with the article on the establishment of permanent observer missions, that the title of article 41 should read "Sending of delegations to organs and to conferences".

72. Mr. BARTOŠ said he was opposed to combining articles 41 and 42, but he supported Sir Humphrey Waldock's suggestion for the title of article 41.

73. Mr. ROSENNE proposed that the title of article 41 be amended to read simply "Sending of delegations", which he thought would be sufficient.

74. The CHAIRMAN said that if there were no objection the word "to" would be added to the title of Part III before the word "conferences", and the title of article 41 would be amended as proposed by Mr. Rosenne.

It was so agreed.

75. The CHAIRMAN put article 41, as amended, to the vote.

Article 41, as amended, was adopted by 15 votes to none.

ARTICLE 42

76.

*Article 42**Appointment of the members of the delegation*

Subject to the provisions of articles 45 and 71, the sending State may freely appoint the members of the delegation.

77. Mr. KEARNEY (Chairman of the Working Group) said that article 42 was based on the former article 84.¹²

78. The CHAIRMAN put article 42 to the vote.

Article 42 was adopted by 15 votes to none.

ARTICLE 43

79.

*Article 43**Credentials of delegates*

The credentials of the head of delegation and of other delegates shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs, or, if the rules of the Organization or the rules of procedure of the conference so admit, by another competent authority of the sending State, and shall be transmitted, as the case may be, to the Organization or to the conference.

80. Mr. KEARNEY (Chairman of the Working Group) said that apart from consolidation of the two paragraphs of the former article 87,¹³ on which article 43 was based, the only change was in the last line, which now provided that the credentials should be transmitted to the organization or to the conference rather than of their competent organs.

81. Mr. USTOR asked why the Working Group had consolidated some articles and not others.

82. Mr. KEARNEY (Chairman of the Working Group) said that there had been consolidation with respect to delegations to organs and to conferences, but that to put as many as four things together in one section was extremely difficult.

83. Mr. USHAKOV asked why the words "shall be issued" had been translated into French by the words "*sont délivrés*" in article 43, and also in article 10, instead of by the verb "*émaner*", as in previous versions. The meaning of the two terms was not identical and a correction seemed necessary.

84. Mr. TESLENKO (Deputy Secretary to the Commission) said that the word "issued" had been translated by "*délivrés*" because it had been impossible, for grammatical reasons, to use the verb "*émaner*" in article 11. In order to keep the terminology consistent, it had seemed preferable to use the same translation in articles 10 and 43 as in article 11.

85. Mr. ROSENNE said that he appreciated Mr. Ushakov's difficulties. However, the expressions in question were time-honoured ones, used in the rules of procedure

¹² See 1124th meeting, para. 32.

¹³ *Ibid.*, para. 51.

of the General Assembly and other bodies, so he thought the Secretariat might be asked to bring the text into line with accepted usage.

86. Mr. REUTER said that in current usage "*délivrer un document*" meant to hand a document over physically, the person handing it over not necessarily being its author, whereas the verb "*émaner*" applied to the author of the document. But it did seem that in diplomatic parlance the verb "*délivrer*" could have the latter meaning as well.

87. Mr. ROSENNE proposed that the words "when required", between commas, be added after the word "shall" in the first phrase of article 43, since credentials were not always required for delegates to organs.

88. Mr. CASTRÉN proposed that in order to simplify the text, which at present consisted of one long sentence, a full stop should be placed after the words "sending State". The article would then resume: "The credentials shall be transmitted . . .".

89. Mr. USTOR proposed that a definition of the term "Conference", with a capital "C", should be inserted in article 1, since that article included a definition of "Organization", with a capital "O", in paragraph 1 (3).

90. Mr. KEARNEY said that since the term "the conference" was used on numerous occasions, and since an effort was being made to make the articles as nearly parallel as possible, Mr. Ustor might be right.

91. Mr. EL-ERIAN said that Mr. Ustor's proposal might help to perfect the draft, although he was not sure that he would go so far as to assimilate the conference to the organization. After all, the conference was convened by the organization.

92. Mr. USHAKOV said that there was less risk of ambiguity with respect to conferences than with respect to organizations. Hence the definition proposed by Mr. Ustor seemed unnecessary.

93. Mr. CASTRÉN said he was opposed to the addition of the definition proposed by Mr. Ustor. Such a definition was justified in the case of organizations, because it was with them that the draft articles were primarily concerned.

94. He was also opposed to the amendment proposed by Mr. Rosenne, because it would change a small obligation into a mere faculty.

95. Mr. ROSENNE said that, in article 87 of the text adopted at the Commission's last session,¹⁴ a distinction had been made between the credentials of a representative to an organ and those of a delegate to a conference. Mr. Castrén had correctly interpreted the intention of his (Mr. Rosenne's) amendment.

96. Mr. ELIAS proposed that the Commission accept the text of article 43 as it stood. In his opinion, Mr. Rosenne's proposal to add the words "when required" would only complicate the article.

97. Mr. KEARNEY supported that view.

98. Sir Humphrey WALDOCK said he was somewhat attracted by Mr. Castrén's idea of placing a full stop after the words "sending State", since the sentence would otherwise be rather ponderous.

99. Mr. USHAKOV said that in his view article 3 already settled the point raised by Mr. Rosenne.

100. The CHAIRMAN suggested that the Commission adopt the proposal made by Mr. Castrén and supported by Sir Humphrey Waldock.

It was so agreed.

101. The CHAIRMAN put article 43, thus amended, to the vote.

Article 43, as amended, was adopted by 17 votes to none.

ARTICLE 44

102.

Article 44

Composition of the delegation

In addition to the head of delegation, the delegation may include other delegates, diplomatic staff, administrative and technical staff and service staff.

103. Mr. KEARNEY (Chairman of the Working Group) said that article 44, formerly article 81,¹⁵ had been slightly changed to bring it into line with the corresponding article on missions (A/CN.4/L.174/Add.2, article 13).

104. The CHAIRMAN put article 44 to the vote.

Article 44 was adopted by 17 votes to none.

ARTICLE 45

105.

Article 45

Size of the delegation

The size of the delegation shall not exceed what is reasonable and normal, having regard, as the case may be, to the functions of the organ or the object of the conference, as well as the needs of the particular delegation and the circumstances and conditions in the host State.

106. Mr. KEARNEY (Chairman of the Working Group) said that article 45, formerly article 82, remained virtually unchanged.

107. The CHAIRMAN put article 45 to the vote.

Article 45 was adopted by 17 votes to none.

¹⁴ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

¹⁵ See 1123rd meeting, para. 29.

ARTICLE 46

108.

Article 46
Notifications

1. The sending State, with regard to its delegation, shall notify the Organization or, as the case may be, the conference of:

(a) the composition of the delegation, including the position, title and order of precedence of the members of the delegation, and any subsequent changes therein;

(b) the arrival and final departure of members of the delegation and the termination of their functions with the delegation;

(c) the arrival and final departure of any person accompanying a member of the delegation;

(d) the beginning and the termination of the employment of persons resident in the host State as members of the staff of the delegation or as persons employed on the private staff entitled to privileges and immunities;

(e) the location of the premises of the delegation and of the private accommodation enjoying inviolability under articles 53 and 59 as well as any other information that may be necessary to identify such premises and accommodation.

2. Where possible, prior notification of arrival and final departure shall also be given.

3. The Organization or, as the case may be, the conference shall transmit to the host State the notifications referred to in paragraphs 1 and 2.

4. The sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2.

109. Mr. KEARNEY (Chairman of the Working Group) said that some changes had been made in the former article 89,¹⁶ which had now become article 46, to bring it into line with the corresponding article on missions (A/CN.4/L.174/Add.2, article 15). Thus paragraph 1 (a) no longer referred to the "appointment" of the members of the delegation, while paragraph 1 (b) was now modelled on the corresponding text in the Convention on Special Missions, as was also paragraph 1 (c), which covered members of the family.¹⁷ Paragraph 1 (d) remained substantially the same, but used the expression "persons . . . entitled to privileges and immunities" rather than the expression "persons . . . enjoying privileges and immunities". Paragraph 1 (e) was basically the same as paragraph 1 (e) of the former article 89. The other paragraphs remained unchanged.

110. Mr. CASTRÉN said that the words "with regard to its delegation" in the first line of paragraph 1 were unnecessary, since the delegation was referred to in each sub-paragraph; he proposed that those words be deleted.

It was so agreed.

111. The CHAIRMAN put article 46, as amended, to the vote.

Article 46, as amended, was adopted by 16 votes to none, with 1 abstention.

¹⁶ See 1125th meeting, para. 11.

¹⁷ See General Assembly resolution 2530 (XXIV), Annex, article 11.

ARTICLE 47

112.

Article 47
Acting head of the delegation

1. If the head of delegation is absent or unable to perform his functions, an acting head shall be designated from among the other delegates by the head of delegation or, in case he is unable to do so, by a competent authority of the sending State. The name of the acting head shall be notified, as the case may be, to the Organization or to the conference.

2. If a delegation does not have another delegate available to serve as acting head, another person may be designated for that purpose. In such case credentials must be issued and transmitted in accordance with article 43.

113. Mr. KEARNEY (Chairman of the Working Group) said that there were no changes in article 47, which had formerly been article 86.

114. The CHAIRMAN put article 47 to the vote.

Article 47 was adopted by 17 votes to none.

ARTICLE 48

115.

Article 48
Precedence

Precedence among delegations shall be determined by the alphabetical order of the names of their States used in the Organization.

116. Mr. KEARNEY (Chairman of the Working Group) said that article 48, formerly article 90,¹⁸ had been aligned with the corresponding article on missions (A/CN.4/L.174/Add.2, article 17).

117. In the expression "the names of their States," the word "their" referred to delegations.

118. Mr. USHAKOV said that he thought the translation of the English words "their States" into French by the words "*des Etats*" must be a mistake.

119. Mr. REUTER said that the possessive adjective was out of place at that point, at least in French.

120. He suggested that the words "their States" be replaced by the words "the sending States".

121. Mr. ROSENNE said that, since the host State could also be a sending State, it would not be out of the way to use the expression "the sending States", which had already been used in articles 6, 7, 8 and 9 in a sense which comprised the host State.

122. Sir Humphrey WALDOCK suggested that the words "the States" might be sufficient.

123. Mr. EL-ERIAN said that if Mr. Reuter's suggestion was adopted, it might convey a false impression that the host State had a privileged position. He suggested that the word "their" simply be deleted.

¹⁸ See 1125th meeting, para. 16.

124. Mr. CASTRÉN said he supported Mr. Reuter's suggestion and endorsed the argument put forward by Mr. Rosenne.

125. Sir Humphrey WALDOCK said he was still convinced that the present expression "their States" was unobjectionable from the point of view of the English language, although the words "the States" were used in the Convention on Special Missions.

126. Mr. KEARNEY said that in the discussion on article 48 in the Working Group, it had been pointed out that some meetings of organs were attended by States which were non-members, so that their names did not appear on the list. He wondered, therefore, if it might not be better to use the expression "names of States".

127. The CHAIRMAN suggested that the words "their States", in the English version of article 48, be replaced by the words "the States" and that the words "*de leurs Etats*" in the French version of article 17 should be replaced by the words "*des Etats*". The words "*de sus Estados*" in the Spanish version of article 48 would accordingly be replaced by the words "*de los Estados*".

It was so agreed.

128. The CHAIRMAN put article 48, thus amended, to the vote.

Article 48, as amended, was adopted by 17 votes to none, with 1 abstention.

ARTICLE 49

129.

Article 49

Status of the Head of State and persons of high rank

1. The Head of the sending State, when he leads the delegation, shall enjoy in the host State or in a third State, in addition to what is granted by the present articles, the facilities, privileges and immunities accorded by international law to Heads of State.

2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a delegation of the sending State, shall enjoy in the host State or in a third State, in addition to what is granted by the present articles, the facilities, privileges and immunities accorded by international law to such persons.

130. Mr. KEARNEY (Chairman of the Working Group) said that the only change introduced in article 49, formerly article 91¹⁹ was the addition of the words "to such persons" at the end of paragraph 2.

131. Mr. RUDA said that the French and Spanish versions of that addition, namely, "*à ces personnalités*" and "*à esas personalidades*", did not mean quite the same thing as the English words "to such persons".

132. Mr. ALCÍVAR suggested that the Spanish version be amended to read "*à esas personas*".

133. Mr. EUSTATHIADES said that if the word "persons" was used in the English and Spanish versions, he thought it could be used in the French version as well.

134. The CHAIRMAN suggested that, in the French version the word "*personnalités*" be replaced by the word "*personnes*" in the title of the article and in paragraph 2, where it appeared twice.

It was so agreed.

135. The CHAIRMAN put article 49, thus amended, to the vote.

Article 49, as amended, was adopted by 16 votes to none, with 1 abstention.

ARTICLE 50

136.

Article 50

General facilities

The host State shall accord to the delegation all facilities for the performance of its tasks. The Organization or, as the case may be, the conference shall assist the delegation in obtaining those facilities and shall accord to the delegation such facilities as lie within their own competence.

137. Mr. KEARNEY (Chairman of the Working Group) said that article 50 raised the fundamental issue of the approach the Commission should adopt to the matter of drafting. It replaced the former article 92,²⁰ which had been based on the principle of referring back to other articles, in that case to articles 22, 24 and 27. The Working Group had decided, in view of the difficulties which might arise in cases of double reference, that it was preferable to set out the articles in full.

138. Mr. ELIAS proposed that, in view of the many implications of article 50, the Commission defer its consideration of it until the next meeting.

It was so agreed.

139. Mr. USTOR asked whether the Working Group would consider the possibility of including a general saving clause concerning privileges and immunities of permanent missions and delegations of the host State. Such a clause would make it clear that the latter's missions and delegations occupied a special position in that they did not enjoy the same privileges and immunities as those of other States.

140. Mr. KEARNEY (Chairman of the Working Group) said that that possibility had not been discussed in the Working Group; it had been referred to on a number of occasions, however, and certainly deserved consideration.

The meeting rose at 6.00 p.m.

¹⁹ See 1125th meeting, para. 20.

²⁰ See 1107th meeting, para. 24.

1134th MEETING

Monday, 12 July 1971, at 3.25 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 to 3; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.174 and Add.1 and 2; A/CN.4/L.177 and Add.1)

[Item 1 of the agenda]

(continued)

CONSOLIDATED DRAFT ARTICLES PROPOSED BY THE WORKING GROUP

(continued)

ARTICLE 50 (General facilities) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of the consolidated draft articles proposed by the Working Group (A/CN.4/L.174/Add.2). At the previous meeting, it had begun to discuss article 50.

2. Mr. AGO, speaking on behalf of the Working Group, said that article 50 was modelled on article 20, the corresponding article relating to missions.

3. Mr. EUSTATHIADES asked why the word "functions", which was used in article 20, had been replaced by the word "tasks".

4. Mr. AGO, speaking on behalf of the Working Group, said that, in view of the temporary nature of delegations and the purpose of their activities, the Working Group had thought it appropriate to use a slightly different term.

5. Mr. USTOR said it would be advisable to state in the commentary that the Commission had deliberately refrained from including an article on the functions of delegations to conferences.

6. Mr. AGO, speaking on behalf of the Working Group, said it should be explained in the commentary that in the case of permanent missions it was easy to define certain basic functions which did not vary, but that the same did not apply to delegations, so that the use of different terms was justified.

7. The CHAIRMAN put article 50 to the vote.

Article 50 was adopted by 15 votes to none.

ARTICLE 51¹

8.

Article 51

Premises and accommodation

The host State shall assist the delegation, if it so requests, in procuring the necessary premises and obtaining suitable accommodation for its members. The Organization or, as the case may be, the conference shall, where necessary, assist the delegation in this regard.

9. Mr. AGO, speaking on behalf of the Working Group, said that in the French version the word "logement" should be in the plural in the title, as it already was in the text of the article.

10. Mr. ALCÍVAR said that observation also applied to the Spanish version.

11. Mr. ROSENNE said that in the English version, the word "accommodation" could remain in the singular.

12. The CHAIRMAN put article 51 to the vote.

Article 51 was adopted by 16 votes to none.

ARTICLE 52²

13.

Article 52

Assistance in respect of privileges and immunities

The Organization or, as the case may be, the Organization and the conference shall, where necessary, assist the sending State, its delegation and the members of the delegation in securing the enjoyment of the privileges and immunities provided for in the present articles.

14. Mr. AGO, speaking on behalf of the Working Group, said that article 52 was modelled on article 22, the corresponding article relating to missions.

15. Mr. CASTRÉN suggested that the words "the Organization and" be deleted. The article would then read more logically: "The Organization or, as the case may be, the conference. . .".

16. Mr. AGO speaking on behalf of the Working Group, said that the repetition of the words "the Organization" was intentional, the Working Group having considered that, in the case of conferences, the assistance function might sometimes be entrusted to the organization, and sometimes to both the organization and the conference.

17. The CHAIRMAN put article 52 to the vote.

Article 52 was adopted by 18 votes to none.

ARTICLE 53³

18.

Article 53

Inviolability of the premises

1. The premises of the delegation shall be inviolable. The agents of the host State may not enter them except with the

¹ Formerly article 93.

² Formerly article 92.

³ Formerly article 94.

consent of the head of delegation. Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the head of delegation.

2. The host State is under a special duty to take all appropriate steps to protect the premises of the delegation against any intrusion or damage and to prevent any disturbance of the peace of the delegation or impairment of its dignity.

3. The premises of the delegation, their furnishings and other property thereon and the means of transport of the delegation shall be immune from search, requisition, attachment or execution.

19. Mr. AGO, speaking on behalf of the Working Group, said that, apart from the necessary substitution of the word "delegation" for the word "mission", article 53 followed exactly the wording of article 23, the corresponding article relating to missions.

20. Mr. ALCÍVAR asked for a separate vote, by roll-call, on the last sentence of paragraph 1.

21. Mr. EL-ERIAN said that a roll-call vote was unnecessary since members were permitted to explain their votes.

22. Mr. ALCÍVAR withdrew his request for a roll-call vote.

23. The CHAIRMAN put the last sentence of paragraph 1 to the vote separately.

The last sentence of paragraph 1 was adopted by 11 votes to 3, with 4 abstentions.

24. The CHAIRMAN put article 53 to the vote as a whole.

Article 53 as a whole was adopted by 17 votes to none, with 1 abstention.

25. Mr. ALCÍVAR, explaining his vote, said he had voted against the last sentence of paragraph 1 for the reasons he had already made known to the Commission on various occasions. He had voted for article 53 as a whole, however, because he did not wish to oppose the principle of inviolability. He reserved his position with respect to the last sentence in paragraph 1.

ARTICLE 54⁴

26.

Article 54

Exemption of the premises from taxation

1. 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 of the delegation other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State or with a member of the delegation.

⁴ Formerly article 95.

27. Mr. AGO, speaking on behalf of the Working Group, said that article 54 was modelled on article 24, the corresponding article relating to missions.

28. The CHAIRMAN put article 54 to the vote.

Article 54 was adopted by 18 votes to none.

ARTICLE 55⁵

29.

Article 55

Inviolability of archives and documents

The archives and documents of the delegation shall be inviolable at any time and wherever they may be.

30. Mr. AGO, speaking on behalf of the Working Group, said that article 55 reproduced the now traditional formula concerning the inviolability of archives and documents.

31. The CHAIRMAN put article 55 to the vote.

Article 55 was adopted by 18 votes to none.

ARTICLE 56⁶

32.

Article 56

Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure to all members of the delegation such freedom of movement and travel in its territory as is necessary for the performance of the tasks of the delegation.

33. Mr. AGO, speaking on behalf of the Working Group, said that article 56 closely followed the text of article 26. In the French version the word "*fonctions*" should be replaced by the word "*tâches*".

34. The CHAIRMAN put article 56 to the vote.

Article 56 was adopted by 18 votes to none.

ARTICLE 57⁷

35.

Article 57

Freedom of communication

1. The host State shall permit and protect free communication on the part of the delegation 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.

⁵ Formerly article 92.

⁶ Formerly article 96.

⁷ Formerly article 97.

2. The official correspondence of the delegation shall be inviolable. Official correspondence means all correspondence relating to the delegation and its tasks.

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 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. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the delegation. By arrangement with the appropriate authorities of the host State, the delegation may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

36. Mr. AGO, speaking on behalf of the Working Group, said that in the second sentence of paragraph 1 the word "other" should have been inserted between the words "and" and "delegations", as had been proposed at an earlier meeting by Mr. Castrén.⁹

37. Mr. ROSENNE asked why that change was considered necessary.

38. Mr. AGO, speaking on behalf of the Working Group, said that the free communication provided for in paragraph 1 was bound to be between the delegation concerned and the other delegations of the sending State.

39. The CHAIRMAN said that if there were no objection he would take it that the Commission agreed to the proposed change.

It was so agreed.

40. The CHAIRMAN put article 57, thus amended, to the vote.

Article 57, as amended, was adopted by 17 votes to none.

ARTICLE 58⁹

41.

Article 58

Personal inviolability

The persons of the head of delegation and of other delegates and members of the diplomatic staff of the delegation 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.

42. Mr. AGO, speaking on behalf of the Working Group, said that article 58 closely followed article 28, the corresponding article relating to missions.

43. The CHAIRMAN put article 58 to the vote.

Article 58 was adopted by 17 votes to none.

ARTICLE 59¹⁰

44.

Article 59

Inviolability of private accommodation and property

1. The private accommodation of the head of delegation and of other delegates and members of the diplomatic staff of the delegation shall enjoy the same inviolability and protection as the premises of the delegation.

2. Their papers, correspondence and, except as provided in paragraph... of article 60 their property shall likewise enjoy inviolability.

45. Mr. AGO, speaking on behalf of the Working Group, said that article 59 was modelled on article 29, the corresponding article relating to missions.

46. The CHAIRMAN put article 59 to the vote.

Article 59 was adopted by 17 votes to none.

ARTICLE 60¹¹

47.

Article 60

Immunity from jurisdiction

ALTERNATIVE A

1. The head of delegation and other delegates and members of the diplomatic staff of the delegation shall enjoy immunity from the criminal jurisdiction of the host State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the host State unless the person in question holds it on behalf of the sending State for the purposes of the delegation;

(b) an action relating to succession in which the person in question is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the person in question in the host State outside his official functions;

(d) an action for damages arising out of an accident caused by a vehicle used by the person in question outside the exercise of the functions of the delegation where those damages are not recoverable from insurance.

2. The head of delegation and other delegates and members of the diplomatic staff of the delegation are not obliged to give evidence as witnesses.

⁹ See 1125th meeting, para. 87.

⁹ Formerly article 98.

¹⁰ Formerly article 99.

¹¹ Formerly article 100.

3. No measures of execution may be taken in respect of the head of delegation or any other delegate or member of the diplomatic staff of the delegation except in cases coming under sub-paragraphs (a), (b), (c) and (d) of paragraph 1 and provided that the measures concerned can be taken without infringing the inviolability of his person or of his accommodation.

4. The immunity of the head of delegation and of other delegates and members of the diplomatic staff of the delegation from the jurisdiction of the host State does not exempt them from the jurisdiction of the sending State.

ALTERNATIVE B

1. The head of delegation and other delegates and members of the diplomatic staff of the delegation shall enjoy immunity from the criminal jurisdiction of the host State.

2. (a) The head of delegation and other delegates 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 the head of delegation or any other delegate or 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 head of delegation and other delegates and members of the diplomatic staff of the delegation are not obliged to give evidence as witnesses.

4. The immunity from jurisdiction of the head of delegation and of other delegates and members of the diplomatic staff of the delegation does not exempt them from the jurisdiction of the sending State.

48. Mr. AGO, speaking on behalf of the Working Group, said that in paragraph 1 (d) of alternative A the words "exercise of the functions" should be replaced by the words "performance of the tasks".

49. It should be noted that there was a close connexion between alternative A and paragraph 5 of article 61, formerly article 101.

50. Mr. USTOR said that the Commission should reflect carefully before changing the expression "outside the exercise of the functions", which was firmly rooted in the tradition of diplomatic law.

51. Mr. AGO, speaking on behalf of the Working Group, said that he understood Mr. Ustor's concern, but the tradition to which he had referred related solely to diplomatic missions or missions ranking as such, not to delegations, with regard to which the Commission was innovating. There was little difference between the expressions "exercise of the functions" and "performance of the tasks", but it was preferable to speak of the performance of tasks in article 60 in order to be consistent with the other articles on delegations.

52. The CHAIRMAN observed that the majority of the members of the Commission appeared to prefer alternative A. He would therefore ask the Commission to vote on alternative A as the text for article 60.

Alternative A for article 60 was adopted by 14 votes to 2, with 1 abstention.

53. Mr. EUSTATHIADES, explaining his vote, said that he had voted for alternative A because alternative B, which he preferred, had been rejected by the majority.

54. Mr. CASTRÉN said that he had voted against alternative A because, in his opinion, it granted too wide an immunity from jurisdiction, thus departing from the practice of the majority of organizations of a universal character. He would have preferred alternative B.

55. Mr. REUTER said that he had voted against alternative A because it did not establish a proper balance between the positions of the host State and the sending State.

ARTICLE 61¹²

56.

Article 61

Waiver of immunity

1. The immunity from jurisdiction of the head of delegation and of other delegates and members of the diplomatic staff of the delegation and of persons enjoying immunity under article 66 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 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.

5. If the sending State does not waive the immunity of any of the persons mentioned in paragraph 1 in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

57. Mr. AGO, speaking on behalf of the Working Group, said that article 61 was modelled on article 31, the corresponding article relating to missions.

58. The CHAIRMAN put article 61 to the vote.

Article 61 was adopted by 17 votes to none.

59. Mr. USTOR said that it should be made clear in the commentary to paragraph 1 that immunity could be waived in respect of persons enjoying immunity under article 67.

ARTICLE 62¹³

60.

Article 62

Exemption from social security legislation

1. Subject to the provisions of paragraph 3, the head of delegation and other delegates and members of the diplomatic staff of the delegation shall, with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the host State.

¹² Formerly article 101.

¹³ Formerly article 104.

2. The exemption provided for in paragraph 1 shall also apply to persons who are in the sole private employ of the head of delegation or of any other delegate or member of the diplomatic staff of the delegation, on condition:

(a) that such employed persons are not nationals of or permanently resident in the host State; and

(b) that they are covered by the social security provisions which may be in force in the sending State or a third State.

3. The head of delegation and other delegates and members of the diplomatic staff of the delegation who employ persons to whom the exemption provided for in paragraph 2 does not apply shall observe the obligations which the social security provisions of the host State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 shall not preclude voluntary participation in the social security system of the host State provided that such participation is permitted by that State.

5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

61. Mr. AGO, speaking on behalf of the Working Group, said that article 62 followed the pattern of article 32, the corresponding article relating to missions.

62. The CHAIRMAN put article 62 to the vote.

Article 62 was adopted by 17 votes to none.

ARTICLE 63¹⁴

63.

Article 63

Exemption from dues and taxes

The head of delegation and other delegates and members of the diplomatic staff of the delegation shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the delegation;

(c) estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 68;

(d) dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State;

(e) charges levied for specific services rendered;

(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 54.

64. Mr. AGO, speaking on behalf of the Working Group, said that article 63 followed the wording of article 33, the corresponding article relating to missions.

65. The CHAIRMAN put article 63 to the vote.

Article 63 was adopted by 15 votes to none, with 2 abstentions.

¹⁴ Formerly article 102.

ARTICLE 64¹⁵

66.

Article 64

Exemption from personal services

The host State shall exempt the head of delegation and other delegates and members of the diplomatic staff of the delegation from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

67. Mr. AGO, speaking on behalf of the Working Group, said that article 64 reproduced the wording of article 34, the corresponding article relating to missions.

68. The CHAIRMAN put article 64 to the vote.

Article 64 was adopted by 17 votes to none.

ARTICLE 65¹⁶

69.

Article 65

Exemption from customs duties and inspection

1. The host State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

(a) articles for the official use of the delegation;

(b) articles for the personal use of the head of delegation or of any other delegate or member of the diplomatic staff of the delegation.

2. The personal baggage of the head of delegation or of any other delegate or member of the diplomatic staff of the delegation shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemption mentioned in paragraph 1, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. In such cases, inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

70. Mr. AGO, speaking on behalf of the Working Group, said that article 65 reproduced the former article 103 verbatim.¹⁷

71. Mr. USTOR said that there seemed to be a slight difference between the English and French versions of the title.

72. Mr. TESLENKO (Deputy Secretary of the Commission) said that the French word "*douanière*" covered both duties and inspection.

73. Mr. SETTE CÂMARA said that while the French "*exemption douanière*" covered both duties and inspection, in English it was necessary to mention them both.

74. The CHAIRMAN put article 65 to the vote.

Article 65 was adopted by 16 votes to none.

¹⁵ Formerly article 104.

¹⁶ Formerly article 103.

¹⁷ See 1126th meeting, para. 78.

CONSOLIDATED DRAFT ARTICLES SUBMITTED BY
THE WORKING GROUP ON SECOND READING

ARTICLE 2

75. The CHAIRMAN invited the Commission to consider the texts of articles 2, 4 and 11 submitted by the Working Group on second reading (A/CN.4/L.177/Add.1), starting with article 2,¹⁹ the proposed text for which read:

Article 2

Scope of the present articles

1. The present articles apply to the representation of States in their relations with international organizations of universal character and to their representation at conferences convened by or under the auspices of such organizations.

2. The fact that the present articles do not extend to other international organizations is without prejudice to the application to the relations of States with such other organizations of any of the rules set forth in the present articles to which they would be subject under international law independently of these articles.

3. The fact that the present articles do not extend to conferences other than those convened by or under the auspices of international organizations of universal character is without prejudice to the application to those conferences of any of the rules set forth in the present articles which would apply under international law independently of these articles.

4. Nothing in the present articles shall preclude States from agreeing that the present articles apply in respect of:

(a) international organizations other than those of universal character, or

(b) conferences other than those convened by or under the auspices of such organizations.

76. Mr. AGO, speaking on behalf of the Working Group, said the question of the scope of the articles was connected with that of the title to be given to the draft as a whole. The Working Group therefore considered that it should now propose a title for the draft articles, which was: "Draft articles on the representation of States in their relations with international organizations". That title retained the word "relations", which it was desired to preserve in order to show that the draft was cognate with the Vienna Conventions on diplomatic relations and consular relations, and at the same time conveyed the limitation imposed by the fact that relations between States and international organizations went far beyond the mere question of representation.

77. Paragraph 1 of the article was worded accordingly, and paragraph 2 was now drafted on the same lines as paragraph 3.

78. Paragraph 3 had been drafted in the light of the discussion which had taken place at the first reading. Thus the formulation "conferences other than those convened by or under the auspices of international organizations of universal character" referred both to conferences convened both by States and to conferences convened by

international organizations which were not of a universal character.

79. Mr. USHAKOV said he did not think the text of paragraph 3 was sufficiently clear. The reference to "those conferences", after the words "without prejudice to the application to", was ambiguous. It should be possible to follow the formulation used in paragraph 2.

80. Mr. ROSENNE said he congratulated the Working Group on the improved text it had submitted for article 2 and on the new title for the draft articles, which considerably simplified the understanding of the whole draft.

81. In paragraph 2, however, he found the reference to "the application to the relations of States with such other organizations" somewhat unsatisfactory. The draft applied to the representation of States, not to the relations of States with international organizations. He suggested that the words in question be replaced by the somewhat heavier, but more precise wording: "the application to the representation of States in their relations with such other organizations". There were relations between States and international organizations other than those dealt with in the present draft articles.

82. Mr. ELIAS said that he would like to know why the word "extend" was used in paragraphs 2 and 3 instead of the word "apply".

83. Mr. AGO said that in the English version the Working Group had preferred the words "do not extend" because of the apparent contradiction between the words "do not apply" and the words "without prejudice to the application", which appeared later in the same sentence.

84. Mr. ROSENNE suggested that the word "extend", in both paragraph 2 and paragraph 3, be replaced by the word "relate", which had been used by the Commission in article 3 of its draft on the law of treaties.¹⁹

85. Mr. EUSTATHIADES said he wondered whether the words "international law" in paragraph 2 did not refer solely to customary international law, since conventional international law was covered by paragraph 4. If that was the case, it should be made clear.

86. Mr. BARTOŠ said that he had already raised the problem of the use of the words "under international law" at the first reading.²⁰ It had then been objected that it was unnecessary to define those words in the draft articles because the problem had been solved by the Vienna Convention on the Law of Treaties. But the Vienna Convention distinguished between *jus cogens* and international law generally applied. That distinction was lacking in the present instance.

87. Unless article 2 specified what was covered by the expression "international law", the door would be left open for different interpretations. As at the first reading, he would therefore be unable to vote for article 2.

88. Mr. AGO speaking on behalf of the Working Group, said that article 2 had been modelled on article 3

¹⁹ For previous text and discussion see 1132nd meeting, paras. 6-40.

¹⁹ See *Yearbook of the International Law Commission, 1966*, vol. II, p. 190.

²⁰ See 1132nd meeting, para. 25.

of the Vienna Convention on the Law of Treaties, which read:

International agreements not within the scope of the present Convention

“The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form shall not affect:

“(a) the legal force of such agreements;

“(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

“(c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.”

89. Mr. USHAKOV said that the words “international law” had already been used without any qualification in article 21 of the Convention on Special Missions.²¹

90. Mr. EL-ERIAN (Special Rapporteur) said he agreed with the explanations given by Mr. Ago and Mr. Ushakov.

91. It was his intention to include in the introduction to the present draft articles a paragraph similar to the one in the introduction to the Commission’s draft articles on the law of treaties, explaining that the present draft constituted both codification and progressive development of international law, and adding: “as was the case with several previous drafts, it is not practicable to determine into which category each provision falls”.²²

92. The provision now under discussion was a saving clause indicating that although the draft articles were intended to serve for organizations of a universal character, regional organizations could be subject to the same rules, in which case the source of those rules would not be draft articles, but general international law.

93. Mr. BARTOŠ said that the text adopted by the Commission for article 21 of the Convention on Special Missions²³ was different from the text which he, as Special Rapporteur, had proposed.²⁴ Moreover, that article referred to the rules of international law on a clearly defined subject, namely, the facilities, privileges and immunities to be enjoyed by Heads of State when leading a special mission and by persons of high rank taking part in such a mission. Since article 2 of the present draft did not relate to a clearly defined area of international law, it might be inferred that there was a general possibility of derogating from any of the rules

in the draft, although the Commission was called upon to codify those rules.

94. Mr. AGO, speaking on behalf of the Working Group, said he wished to reassure Mr. Bartoš. The purpose of the article was not to open up a general possibility of derogating from the rules of the draft; it was merely precautionary, since the content of the draft was already in force in many instances, either through custom or under the provisions of a particular convention. And the custom or provisions concerned would thus continue to apply to cases not covered by the draft even after it had entered into force. That was the meaning of paragraph 2.

95. Mr. EUSTATHIADES said that article 3 of the Vienna Convention on the Law of Treaties, which Mr. Ago had read out, dealt separately with the application of its rules under international law, sub-paragraph (b), and their application under international agreements, sub-paragraph (c), to cases outside the scope of the Convention. It therefore seemed necessary to explain, at least in the commentary, that the expression “international law”, as used in paragraph 2 of article 2, meant general international law, that was to say customary law and the general principles of law.

96. Mr. AGO, speaking on behalf of the Working Group, said that there were really three cases to be covered; future conventions extending the scope of the draft to cases other than those with which it was concerned, existing conventions, and customary law. Consequently, since paragraph 4 of article 2 related solely to conventions subsequent to the draft articles, the expression “international law” as used in paragraph 2 referred both to customary international law and to existing conventional rules.

97. Mr. BARTOŠ said that he approved the contents of paragraph 4, which reflected the principle of independence of will, whereby the rules of the draft could be extended to cases outside its scope. But in view of the explanations which had been given, the intended meaning of the words “international law” in paragraph 2 should be clearly stated, at least in the commentary. Otherwise, everyone would be free to interpret the rule as he wished, and that would nullify its effect. If necessary, he would be content with a reference in the commentary to the Vienna Convention on the Law of Treaties; failing that he would vote against the article.

98. Mr. ROSENNE said he hoped Mr. Bartoš would not insist on the inclusion in the commentary of a definition of the words “under international law” because all definitions were dangerous.

99. He accepted the explanation given by Mr. Ago that the last part of paragraph 3 was based on the language of article 3 of the Vienna Convention on the Law of Treaties.

100. It should be noted, however, that the words “under international law” did not appear in the Commission’s original draft article 3 on the law of treaties.²⁵ Sub-

²¹ See General Assembly resolution 2530 (XXIV), Annex.

²² See *Yearbook of the International Law Commission, 1966*, vol. II, p. 177, para. 35.

²³ *Op. cit.*, 1967, vol. II, p. 359.

²⁴ *Ibid.*, p. 77 (article 17 *quater*).

²⁵ *Op. cit.*, 1966, vol. II, p. 190.

paragraph (b) of that article safeguarded the application to international agreements outside the scope of the draft articles of any of the rules set forth in the draft articles to which those agreements "would be subject independently of these articles". It was the Vienna Conference on the Law of Treaties which had introduced the words "under international law" into sub-paragraph (b) of article 3, in the phrase "to which they would be subject under international law independently of the Convention", which appeared in the final text of the Convention.²⁶

101. Since the Commission would indicate in the commentary to article 2 that the concluding words of paragraph 3 had their origin in article 3(b) of the Vienna Convention on the Law of Treaties, any attempt to define the words "under international law" in the commentary might be misconstrued as an attempt to interpret article 3 of the Vienna Convention.

102. In fact, the Commission was not concerned either with the meaning of the expression "under international law" or with the relation between codified and non-codified international law. It was concerned only with the interpretation to be given to the reservation contained in paragraph 3 of article 2. The Commission's intention could be explained briefly in the commentary to that article.

103. Mr. USHAKOV said that the words "international law" were used without any qualification in the Preamble and in Article 13 of the United Nations Charter.

104. Mr. YASSEEN said he thought that paragraph 2 should be interpreted in the following manner: since the Commission had decided to restrict the scope of the draft articles to organizations of a universal character, it had derived a number of rules from international customs and from existing bilateral and multilateral conventions, but that did not mean that it intended the scope of those rules to be restricted in the future solely to organizations of a universal character if they applied to other organizations by virtue of a source other than the draft articles. Consequently, in paragraph 2, the expression "international law" meant all international law with the exception of the present convention. He would vote in favour of the article on that understanding.

105. Mr. EUSTATHIADES said he was satisfied with the explanations that had been given.

106. Mr. AGO, speaking on behalf of the Working Group, said that in order to take account of Mr. Rosenne's proposal and Mr. Ushakov's request for clarification of paragraph 3, he would propose a number of amendments to article 2.

107. In paragraphs 2 and 3, the word "extend" should be replaced by the word "relate".

108. In paragraph 2, the words "the application to the relations of States with such other organizations" should be replaced by the words "the application to the repre-

sentation of States in their relations with such other organization".

109. In paragraph 3, the words "conferences other than those convened by or under the auspices of international organizations of universal character" should be replaced by the words "other conferences".

110. Also in paragraph 3, the words "the application to those conferences" should be replaced by the words: "the application to the representation of States at such other conferences".

111. The CHAIRMAN said that if there were no objection he would ask the Commission to vote on article 2 as amended by Mr. Ago.

Article 2, as amended, was adopted by 13 votes to 1, with 1 abstention.

The meeting rose at 6.10 p.m.

1135th MEETING

Tuesday, 13 July 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 to 3; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.174 and Add.1 and 2; A/CN.4/L.177/Add.1)

[Item 1 of the agenda]

(continued)

CONSOLIDATED DRAFT ARTICLES SUBMITTED BY
THE WORKING GROUP ON SECOND READING

(continued)

ARTICLE 4

1. The CHAIRMAN invited the Commission to continue consideration of the texts of articles submitted by the Working Group on second reading (A/CN.4/L.177/Add.1), starting with article 4.

²⁶ See para. 88 above.

2.

*Article 4**Relationship between the present articles and other international agreements*

The provisions of the present articles

(a) are without prejudice to other international agreements in force between States or between States and international organizations of universal character, and

(b) shall not preclude the conclusion of other international agreements regarding the representation of States in their relations with international organizations.

3. Mr. AGO, speaking on behalf of the Working Group, said that the Working Group had revised the text of article 4 in the light of the Commission's previous discussion.¹

4. The CHAIRMAN put article 4 to the vote.

Article 4 was adopted by 15 votes to none.

ARTICLE 11

5.

*Article 11**Accreditation to organs of the Organization*

1. A member State may specify in the credentials issued to its permanent representative that he is authorized to act as a delegate to one or more organs of the Organization.

2. Unless a member State provides otherwise its permanent representative may act as a delegate to organs of the Organization for which there are no special requirements as regards representation.

3. A non-member State may specify in the credentials issued to its permanent observer that he is authorized to act as an observer to one or more organs of the Organization when this is admitted.

6. Mr. AGO, speaking on behalf of the Working Group, said that the Working Group had revised the text of article 11 in the light of the Commission's previous discussion.²

7. Mr. ROSENNE said that, under paragraph 1 (9) of article 1, as adopted by the Commission³ the term "delegation to an organ" meant "the delegation sent by a State to represent it at the organ". There was an element of ambiguity in that provision—an ambiguity which was deliberate and was intended to cover the extreme variety of situations in which a member State of an organization could be represented at an organ of the organization. To give one obvious example, under Article 32 of the Charter, a Member State of the United Nations which was not a member of the Security Council could, under certain conditions, participate without voting in the Council's discussions.

8. He would vote in favour of article 11 on the clear understanding that paragraph 1 was based on the same broad concept as paragraph 1 (9) of article 1, and that

the term "delegate" was not restricted to members of the organ in question.

9. Mr. AGO, speaking on behalf of the Working Group, said that article 11 was intended to refer to States members of the organization, not to the members of the organ in question.

10. In paragraphs 1 and 2 of the French version, the words "*délégués auprès*" should be replaced by the words "*délégué à*", and in paragraph 3 of the French version, the words "*observateur auprès*" should be replaced by the words "*observateurs à*". In all three paragraphs of the English version, where the word "to" followed the words "delegate" or "observer" it should be replaced by the word "at", in view of the decision taken by the Commission when it had settled the definitions.

11. Mr. REUTER said he did not think it was correct to make that change in paragraph 3. In any case, before amending paragraph 3 of the English version, the Commission ought perhaps to wait until it could consult Mr. Kearney and Sir Humphrey Waldock.

12. The CHAIRMAN said that if there were no objection he would take it that the Commission accepted the suggested amendments to paragraphs 1 and 2, but wished to postpone its decision on paragraph 3.

It was so agreed.

13. The CHAIRMAN put paragraphs 1 and 2 of article 11, as amended, to the vote.

Paragraphs 1 and 2 of article 11, as amended, were adopted by 16 votes to none.

CONSOLIDATED DRAFT ARTICLES PROPOSED BY
THE WORKING GROUP
(A/CN.4/L.174/Add.2)

(resumed from the previous meeting)

ARTICLE 66⁴

14.

*Article 66**Privileges and immunities of other persons*

1. The members of the family of the head of delegation who accompany him, and the members of the family of any other delegate or member of the diplomatic staff of the delegation who accompany him shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 58, 59, 60, 62, 63, 64, in paragraphs 1 (b) and 2 of article 65 and in article 72.

2. Members of the administrative and technical staff of the delegation, together with members of their families who accompany them and who are not nationals of or permanently resident in the host State, shall enjoy the privileges and immunities specified in articles 58, 59, 60, 62, 63, 64 and 72 except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 60 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1 (b)

¹ See 1132nd meeting, para. 54-61.

² *Ibid.*, paras. 87-96.

³ See 1130th meeting, para. 13 and 1131st meeting, para. 49.

⁴ Formerly article 105.

of article 65 in respect of articles imported at the time of their entry into the territory of the host State to attend the meeting of the organ or conference.

3. Members of the service staff of the delegation shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment, and the exemption from social security legislation provided for in article 62.

4. Private staff of members of the delegation shall be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the tasks of the delegation.

15. Mr. AGO, speaking on behalf of the Working Group, said that the former title of the article, as adopted at the twenty-second session,⁵ had been preferred to the rather long title proposed by the Drafting Committee⁶ and that, as in all the articles on delegations, the words "performance of the tasks" had replaced the words "exercise of the functions", used in the articles on missions.

16. The reference to article 72 in paragraphs 1 and 2 was a mistake and should be deleted.

17. The CHAIRMAN said that if there were no objection he would take it that the Commission accepted the correction required in paragraphs 1 and 2.

It was so agreed.

18. The CHAIRMAN put article 66, as corrected, to the vote.

Article 66 was adopted by 15 votes to none with 1 abstention.

ARTICLE 67⁷

19.

Article 67

Nationals of the host State and persons permanently resident in the host State

1. Except in so far as additional privileges and immunities may be granted by the host State, the head of delegation and any other delegate or member of the diplomatic staff of the delegation who are nationals of or permanently resident in that State shall enjoy only immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of their functions.

2. Other members of the staff of the delegation and persons on the private staff who are nationals of or permanently resident in the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those members and persons in such a manner as not to interfere unduly with the performance of the tasks of the delegation.

20. Mr. AGO, speaking on behalf of the Working Group, said that whereas the former text had been drafted simply by reference to article 41, the corresponding article on permanent missions, the present text was modelled on that article, which had become article 37 (A/CN.4/L.174/Add.2).

21. The CHAIRMAN put article 67 to the vote.

Article 67 was adopted by 16 votes to none.

ARTICLE 68

22.

Article 68

Duration of privileges and immunities

1. Every person entitled to privileges and immunities under the provisions of the present articles shall enjoy such privileges and immunities from the moment he enters the territory of the host State for the purpose of attending the meeting of an organ or conference or, if he is already in its territory, from the moment when his appointment as a member of the delegation 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 these articles have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the delegation, immunity shall continue to subsist.

3. In case of the death of a member of the delegation, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the delegation not a national of or permanently resident in the host State or of a member of his family accompanying him, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property which is in the host State solely because of the presence there of the deceased as a member of the delegation or of the family of a member of the delegation.

23. Mr. AGO, speaking on behalf of the Working Group, said that article 68, which combined the former articles 108 and 109, was modelled on article 38, which was the corresponding article relating to missions.

24. Mr. YASSEEN said that in paragraph 1 of the French version the words "*pénètre sur*" should be replaced by the words "*entre dans*".

25. Mr. CASTRÉN and Mr. REUTER agreed.

26. The CHAIRMAN said that if there were no objection the words "*pénètre sur*" would be replaced by the words "*entre dans*" in paragraph 1 of the French version.

It was so agreed.

27. Mr. USHAKOV asked whether, in the second sentence of paragraph 2, the words "in the exercise of his functions" should not be replaced by the words "in the performance of his tasks".

⁵ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

⁶ See 1126th meeting, para. 88.

⁷ Formerly article 106.

28. Mr. ROSENNE said that, while it was appropriate to refer to the "tasks" of a delegation, the correct word to use in the present context was "functions" because paragraph 2 of article 68 referred to the functions of an individual member of a delegation and not to the tasks of the delegation itself.

29. Mr. USHAKOV said he accepted that explanation.

30. The CHAIRMAN put article 68 to the vote.

Article 68 was adopted by 15 votes to none.

ARTICLE 69

31.

Article 69

End of the functions of the head of delegation or any other delegate or member of the diplomatic staff

The functions of the head of delegation or of any other delegate or member of the diplomatic staff of the delegation shall come to an end, *inter alia*:

(a) on notification of their termination by the sending State to the Organization or the conference;

(b) upon the conclusion of the meeting of the organ or the conference.

32. Mr. AGO speaking on behalf of the Working Group, said that no significant change had been made in the text of article 69, which had formerly been article 114. A new title had been proposed.

33. The CHAIRMAN put article 69 to the vote.

Article 69 was adopted by 16 votes to none.

ARTICLE 70

34.

Article 70

Protection of premises, property and archives

1. When the meeting of an organ or a conference comes to an end, the host State must respect and protect the premises of the delegation so long as they are assigned to it, as well as the property and archives of the delegation. The sending State must take all appropriate measures to terminate this special duty of the host State within a reasonable time.

2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and the archives of the delegation from the territory of the host State.

35. Mr. AGO speaking on behalf of the Working Group, said that no change had been made in the text of article 70, which had formerly been article 116.

36. The CHAIRMAN put article 70 to the vote.

Article 70 was adopted by 16 votes to none.

PART IV. General provisions

ARTICLE 71

37.

Article 71

Nationality of the members of the mission or the delegation

The head of mission and members of the diplomatic staff of the mission, the head of delegation, other delegates and mem-

bers of the diplomatic staff of the delegation should in principle be of the nationality of the sending State. They may not be appointed from among persons having the nationality of the host State, except with the consent of that State which may be withdrawn at any time.

38. Mr. AGO, speaking on behalf of the Working Group, said that article 71 was the first article in Part IV (General Provisions). The only changes made in the text of the article were those necessary to consolidate the provisions of the former articles 11, 56 and 85.

39. The CHAIRMAN put article 71 to the vote.

Article 71 was adopted by 16 votes to none.

ARTICLE 72

40.

Article 72

Laws concerning acquisition of nationality

Members of the mission or the delegation not being nationals of the host State, and members of their families forming part of their household or, as the case may be, accompanying them, shall not, solely by the operation of the law of the host State, acquire the nationality of that State.

41. Mr. AGO, speaking on behalf of the Working Group, said that the only changes made in the text of article 72 were those necessary to consolidate the former articles 39 and 72 with the relevant provisions of article 104.

42. The CHAIRMAN put article 72 to the vote.

Article 72 was adopted by 16 votes to none.

ARTICLE 73

43.

Article 73

Privileges and immunities in case of multiple functions

When members of the permanent diplomatic mission or of a consular post in the host State are included in a mission or delegation, they shall retain their privileges and immunities as members of their permanent diplomatic mission or consular post in addition to the privileges and immunities accorded by the present articles.

44. Mr. AGO, speaking on behalf of the Working Group, said that article 73 was modelled on article 9, paragraph 2, of the 1969 Convention on Special Missions⁵ and replaced the former article 107.

45. The CHAIRMAN put article 73 to the vote.

Article 73 was adopted by 16 votes to none.

ARTICLE 74

46.

Article 74

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

⁵ See General Assembly resolution 2530 (XXIV), Annex.

to respect the laws and regulations of the host State. They also have a duty not to interfere in the internal affairs of that State.

2. In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from jurisdiction, the sending State shall, unless it waives the immunity of the person concerned, recall him, terminate his functions with the mission or the delegation or secure his departure, as appropriate. The sending State shall take the same action in case of grave and manifest interference in the internal affairs of the host State. The provisions of this paragraph shall not apply in the case of any act that the person concerned performed in carrying out the functions of the mission or the tasks of the delegation.

3. The premises of the mission and the premises of the delegation shall not be used in any manner incompatible with the exercise of the functions of the mission or the performance of the tasks of the delegation.

47. Mr. AGO, speaking on behalf of the Working Group, said that the only changes made in the text of article 74 were those necessary to consolidate the former articles 45 and 112 with the relevant provision of article 76.

48. The CHAIRMAN put article 74 to the vote.

Article 74 was adopted by 16 votes to none.

ARTICLE 75⁹

49.

Article 75

Professional or commercial activity

The head of mission and members of the diplomatic staff of the mission, the head of delegation, other delegates and members of the diplomatic staff of the delegation shall not practise for personal profit any professional or commercial activity in the host State.

50. Mr. AGO, speaking on behalf of the Working Group, said that the question whether members of a delegation should be placed on the same footing as members of a permanent mission in the matter of professional and commercial activities in the host State had been discussed in some detail at an earlier meeting.¹⁰ The Working Group had reconsidered the question and had reached the conclusion that they should; but as a member of the Commission, he could not support that view unless the precise scope of article 75 was clearly explained in the commentary.

51. Mr. EUSTATHIADES said he shared Mr. Ago's opinion.

52. Mr. ROSENNE said that, while the provisions of article 75 were quite acceptable in the case of missions, they were not acceptable for delegations. There had been a long discussion on that subject in the Commission and the general feeling had been that delegations should not be treated in the same way as missions with regard to the question of the professional or commercial activities of their members.

53. He suggested that article 75 be referred back to the Working Group with instructions to examine the question with respect to missions and to delegations separately, so that the Commission could take separate decisions.

54. Mr. USHAKOV said he agreed that missions and delegations should not be treated alike, but he did not see how that view could be reflected in the wording of the article. The Commission should therefore state the principle in the article and explain in the commentary that it was possible to derogate from it. In any case, if the article were referred back to the Working Group, it would find it difficult to amend the text without precise instructions.

55. Mr. ELIAS said that nothing would be gained by referring the article back to the Working Group, since the Commission had no fresh points to place before it.

56. It would therefore be better to accept the principle as formulated in the article and explain the possibilities of derogation in the commentary.

57. Mr. EUSTATHIADES and Mr. CASTRÉN supported Mr. Elias's view.

58. Mr. YASSEEN said that the scope of an article should be defined by its text, not by the commentary.

59. Mr. BARTOŠ said he regretted that the new text of the article had not retained the proviso desired by several members of the Commission, consisting in the phrase "except with the prior consent of the host State". The principle should be applied strictly in the case of missions, but could be relaxed for delegations, in view of their temporary nature, if the host State needed to make the exercise of professional or commercial activity subject to its prior consent.

60. Mr. ROSENNE suggested that the Working Group consider the possibility of limiting article 75 to missions, for which there was no problem.

61. In the case of delegations, no similar provision was necessary, in view of the provisions of article 67, on nationals of the host State and persons permanently resident in the host State.

62. Mr. AGO said that in fact it was to be feared that adding the proviso of the prior consent of the host State would not solve the problem, since its consent might not be obtainable in time if the meeting was a short one. On the other hand, a person resident in the host State could not be expected to suspend his professional activities there for the period during which he was a member of a delegation of his State of nationality. It would therefore be better to drop the provision in the case of delegations and leave the matter to practice.

63. The CHAIRMAN suggested that article 75 be referred back to the Working Group for review in the light of the discussion on the understanding that any member of the Commission might submit concrete proposals to the Group.

It was so agreed.¹¹

⁹ Formerly articles 46, 76 and 113.

¹⁰ See 1109th meeting, para. 107 *et seq.*

¹¹ Article 75 was subsequently deleted by the Working Group; see document A/CN.4/L.181.

ARTICLE 76

64.

*Article 76**Entry into the territory of the host State*

1. The host State shall permit entry into its territory of
 - (i) members of the mission and members of their families forming part of their respective households, and
 - (ii) members of the delegation and members of their families accompanying them.
2. Visas, when required, shall be granted as promptly as possible to any person referred to in paragraph 1.

65. Mr. AGO, speaking on behalf of the Working Group, said that the only changes introduced in article 76 were those necessary to consolidate the former articles 27*bis*, 67 and Z (A/CN.4/241/Add.6, para. 4 under article 115).

66. The CHAIRMAN put article 76 to the vote.

Article 76 was adopted by 16 votes to none.

ARTICLE 77

67.

*Article 77**Facilities for departure*

The host State shall, if requested, grant facilities to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave its territory.

68. Mr. AGO, speaking on behalf of the Working Group, said that the only changes introduced in article 77 were those necessary to consolidate the former articles 48 and 115 with the relevant provisions of the former article 77.

69. The CHAIRMAN put article 77 to the vote.

Article 77 was adopted by 16 votes to none.

ARTICLE 78¹²

70.

*Article 78**Transit through the territory of a third State*

1. If a head of mission or a member of the diplomatic staff of the mission, a head of delegation, other delegate or member of the diplomatic staff of the delegation passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return.

2. The provisions of paragraph 1 shall also apply in the case of:

- (i) members of the family of the head of mission or of a member of the diplomatic staff of the mission forming part of his household and enjoying privileges and immunities, whether travelling with him or travelling separately to join him or to return to their country;

- (ii) members of the family of the head of delegation, of any other delegate or member of the diplomatic staff of the delegation who are accompanying him and enjoy privileges and immunities, whether travelling with him or travelling separately to join him or to return to their country.

3. In circumstances similar to those specified in paragraphs 1 and 2, third States shall not hinder the passage of members of the administrative and technical or service staff, and of members of their families through their territories.

4. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the host State. They shall accord to the couriers of the mission or of the delegation, who have been granted a passport visa if such visa was necessary, and to the bags of the mission or of the delegation in transit the same inviolability and protection as the host State is bound to accord.

5. The obligations of third States under paragraphs 1, 2, 3 and 4 shall also apply to the persons mentioned respectively in those paragraphs, and to the official communications and bags of the mission or of the delegation when they are present in the territory of the third State owing to *force majeure*.

71. Mr. AGO, speaking on behalf of the Working Group, said that paragraph 2 had been divided into two sub-paragraphs in order to mark the difference between members of the family of a member of the mission forming part of his household and members of the family of a member of the delegation who were accompanying him.

72. The CHAIRMAN put article 78 to the vote.

Article 78 was adopted by 16 votes to none.

73. Mr. USHAKOV said the Commission would remember the difficulties to which the use of the words "their States" had given rise in article 48, on precedence.¹³ He noticed that paragraph 2 of article 78 used the expression "*rentrer dans leur pays*" in the French version, and he wondered whether it might not be possible to use the words "*leurs pays*" in article 17, at any rate for the French version.

74. Mr. REUTER said that "*leurs pays*" was certainly a broader term than "*leurs Etats*" and might be suitable.

ARTICLE 79

75.

*Article 79**Non-recognition of States or governments or absence of diplomatic or consular relations*

1. The rights and obligations of the host State and of the sending State under the present articles shall be affected neither by the non-recognition by one of those States of the other State or of its government nor by the non-existence or the severance of diplomatic or consular relations between them.

2. The establishment or maintenance of a mission, the sending or attendance of a delegation or any act in application of the present articles shall not by itself imply recognition by the sending State of the host State or its government or by the host State of the sending State or its government.

¹² Formerly articles 43, 74 and 110.

¹³ See 1133rd meeting, paras. 117-128.

76. Mr. AGO, speaking on behalf of the Working Group, said that article 79 merely consolidated the former articles 49 *bis*, 77 *bis* and 116 *bis*.

77. The CHAIRMAN put article 79 to the vote.

Article 79 was adopted by 17 votes to none.

ARTICLE 80

78.

Article 80

Non-discrimination

In the application of the provisions of the present articles no discrimination shall be made as between States.

79. Mr. AGO, speaking on behalf of the Working Group, said that no changes had been introduced in the text of article 80, which merely consolidated the former articles 44, 75 and 111.

80. The CHAIRMAN put article 80 to the vote.

Article 80 was adopted by 17 votes to none.

The meeting rose at 11.5 a.m.

1136th MEETING

Wednesday, 14 July 1971, at 10.20 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 to 3; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.174/Add.3)

[Item 1 of the agenda]

(continued)

THIRD REPORT OF THE WORKING GROUP

1. The CHAIRMAN invited Mr. Kearney, Chairman of the Working Group, to introduce its third report (A/CN.4/L.174/Add.3). He suggested that articles 81 and 82 and the proposed new sub-paragraph (3) *bis* of article 1, paragraph 1, be considered together.

ARTICLES 81 and 82, and new sub-paragraph (3) *bis* of article 1, paragraph 1

2.

Article 81

Consultations between the sending State, the host State and the Organization

If any dispute between one or more sending States and the host State arises out of the application or interpretation of the present articles, consultations between: (i) the host State, (ii) the sending State or States concerned, and (iii) the Organization or, as the case may be, the Organization and the conference, shall be held upon the request of any such State or of the Organization itself.

3.

Article 82

Conciliation

1. If the dispute is not resolved through the consultations referred to in article 81 within three months from the date of their inception, it may be submitted by any State party to the dispute to such procedure applicable to the settlement of the dispute as may be established in the Organization. In the absence of any such procedure, any State party to the dispute may bring it before a conciliation commission to be constituted in accordance with the provisions of this article by giving written notice to the other States participating in the consultations and to the Organization.

2. A conciliation commission will be composed of three members, of whom one shall be appointed by the host State, and one by the sending State. Two or more sending States may agree to act together, in which case they shall jointly appoint the member of the conciliation commission. These two appointments shall be made within two months of the written notice referred to in paragraph 1. The third member, the Chairman, shall be chosen by the other two members.

3. If either side has failed to appoint its member within the time limit referred to in paragraph 2, the Executive Head of the Organization shall appoint such member within a further period of one month. If no agreement is reached on the choice of the Chairman within four months of the written notice referred to in paragraph 1, either side may request the Executive Head of the Organization to appoint the Chairman within a further period of one month.

4. Any vacancy shall be filled in the same manner as the original appointment was made.

5. The Commission shall establish its own rules of procedure and shall reach its decisions by a majority vote. With the authorization of the General Assembly of the United Nations the Commission may request an advisory opinion from the International Court of Justice regarding the interpretation or application of these articles.

6. If the Commission is unable to secure agreement among the participating States on a resolution of the dispute within six months of its initial meeting, it shall prepare as soon as possible a report of its proceedings and transmit it to the parties and to the Organization. The report shall include the Commission's findings upon the facts and the law and its recommendations as to the course of action that should be followed to achieve an amicable settlement of the difference. The time limit for the preparation of the report may be extended by decision of the Commission. The report shall not be binding upon the participating States or upon the Organization.

7. Nothing in the preceding paragraphs shall preclude a conference from adopting any other appropriate procedure for the settlement of a dispute arising in connexion with the conference.

4. *New sub-paragraphs 3 bis of article 1, paragraph 1*
Use of terms
- ...
(3 bis) "Executive Head" means the principal executive official of the Organization, whether designated "Secretary-General", "Director-General" or otherwise.
5. Mr. KEARNEY (Chairman of the Working Group) said that article 81 was a revision of the former article 50;¹ it preserved the structure and context of article 50 but brought it into line with article 82. In the introductory phrase, for example, the words "any dispute between one or more sending States and the host State" was a slightly more precise formulation than in article 50 and made it possible to move into the conciliation procedure in article 82 without the need to distinguish between a difference, a question and a dispute.
6. The phrase beginning with the words "the Organization or, as the case may be, the Organization and the conference" had been introduced in order to make it possible for the officers of a conference to participate in the consultations.
7. Article 82 had been drafted by the Working Group on the basis of the discussions in the Commission on the question of consultations.² Those discussions had revealed a fairly wide range of opinion: some members had thought that all disputes should be referred to the International Court of Justice, while others had taken the view that some provision for consultations would be sufficient. The Working Group had reached the conclusion that the majority view was probably in favour of a conciliation procedure which would not be unduly formal or burdensome.
8. In drafting article 82, the Working Group had been influenced by the provisions on conciliation in the Vienna Convention on the Law of Treaties,³ as well as by the relevant provisions of the recent draft convention on international liability for damage caused by space objects,⁴ although neither of those conventions provided the precise model needed.
9. Paragraph 1 of article 82 set the time pattern which was essential in any conciliation procedure. Moreover, it limited the right to bring a dispute before a conciliation commission to the States parties to the dispute; the organization and the conference itself would not be entitled to do so.
10. Paragraph 2 dealt with the composition of the conciliation commission, which was based on the standard practice followed in setting up arbitration panels. Since more than one sending State was likely to be involved in a dispute, it was provided that two or more sending States, acting together, might jointly appoint their member of the conciliation commission. The Working Group had decided to leave it open to the sending States whether to act separately or jointly. While that solution had the disadvantage of making it more difficult to achieve uniformity of views, it had the advantage of a simpler procedure.
11. Paragraph 3 was a safeguard clause which provided that: "If either side has failed to appoint its member within the time-limit referred to in paragraph 2, the Executive Head of the Organization shall appoint such member within a further period of one month". The Working Group had deliberately chosen the term "Executive Head", which already appeared in one or more international conventions, in preference to the term "chief administrative officer, which was used in Article 97 of the Charter. It accordingly proposed a new sub-paragraph (3) bis of article 1, paragraph 1, which would define the term "Executive Head".
12. Paragraph 4 was a standard clause which called for no comment.
13. Paragraph 5 provided that the Commission could request an advisory opinion from the International Court of Justice with the authorization of the General Assembly, but did not specify whether the authorization would be general or whether a special authorization would have to be obtained in each case. In view of the time factor, the Working Group thought that a general authorization would be desirable, but the question was one which should be decided by the General Assembly. A reference to that point should be included in the commentary.
14. Paragraph 6 was based largely on the corresponding provision in the Vienna Convention on the Law of Treaties. The last sentence in that paragraph had been included by mistake, the Working Group having already decided to delete it.
15. Lastly, paragraph 7 was a final safeguard clause required because decisions taken by the conference were not covered by the general saving clause concerning the rules of the organization.
16. Mr. USHAKOV said that the words "among the participating States" in article 82, paragraph 6 seemed unnecessary and were not very clear; he proposed that they be deleted. In any case, the words "*de la part*", used in the French version, were an unsatisfactory translation of the English word "among".
17. A number of other drafting changes were needed in the French version. In paragraph 5 of article 82, the words "*Avec l'autorisation de*" should be substituted for the words "*Moyennant d'y être autorisée par*"; in paragraph 6, in addition to the point he had already mentioned, a more suitable verb than "*obtenir*" should be found for the English word "secure" in the first sentence; and in paragraph 7 the words "*à l'occasion de*" were an unsatisfactory translation of the English expression "in connexion with".
18. In the new sub-paragraph (3) bis of article 1, paragraph 1, the expression "*fonctionnaire le plus élevé*" departed too far from the English text, while the phrase

¹ See 1100th meeting, para. 45 and 1119th meeting, para. 81.

² See 1119th meeting, paras. 81-86, 1120th and 1121st meetings.

³ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, pp. 298 and 301 (United Nations publication, Sales No.: E.70.V.5).

⁴ A/AC.105/94.

"*désigné sous le nom de*" was inelegant and perhaps inappropriate.

19. Mr. USTOR said that the texts of articles 81 and 82 drafted by the Working Group were a good compromise, in the best tradition of the Commission.

20. Mr. KEARNEY said he could agree to the deletion of the words "among the participating States" in the first sentence of paragraph 6 of article 82.

21. Mr. TAMMES proposed that the phrase "between one or more sending States and the host State" in article 81 be deleted, as the article was sufficiently clear without it.

22. The CHAIRMAN suggested that, in order to save time, the Commission consider first the new sub-paragraph (3) *bis* of article 1, paragraph 1.

23. Mr. AGO said that the English expression "Executive Head" was taken from article I, section 1 (vii) of the Convention on the Privileges and Immunities of the Specialized Agencies,⁵ the English and French versions of which read, respectively: "The term 'executive head' means the *principal executive official* of the specialized agency in question, whether designated 'Director-General' or otherwise"; and "*Le terme 'directeur général' désigne le fonctionnaire principal de l'institution spécialisée en question, que son titre soit celui de directeur général ou tout autre*".

24. Thus, in the Convention, the words "executive head" were translated by "*directeur général*", a title appropriate for some specialized agencies, but not for others, or for the United Nations, which was administered by a Secretary-General. The Working Group had therefore translated "Executive Head" by "*Chef de l'administration*". That difference apart, however, there was nothing to prevent the Commission from using the words employed in the Convention and, in the French version of the sub-paragraph, replacing the words "*fonctionnaire le plus élevé*" by the expression "*fonctionnaire principal*".

25. Mr. SETTE CÂMARA said that in his opinion the use of the term "Executive Head" in paragraph 3 of article 82 was an unwarrantable departure from the language of Article 97 of the Charter. That Article read: "The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization". The Secretary-General therefore, was not the head of the Organization, but the head of the Secretariat of the Organization.

26. Mr. ROSENNE said that if the Commission decided to retain the term "Executive Head", the commentary should include an explanation of the deliberate lack of concordance between the English and French versions of that expression.

27. Mr. Ushakov's difficulty with the proposed new sub-paragraph (3) *bis* of article 1, paragraph 1, might be

overcome by using the expression "howsoever designated".

28. Mr. ELIAS suggested that the Commission retain the expression "Executive Head", but define it as the "chief administrative officer", in accordance with Article 97 of the Charter. The words "whether designated 'Secretary-General', 'Director-General' or otherwise" should, however, be retained.

29. Mr. KEARNEY, replying to Mr. Sette Câmara, said that the Working Group had adopted the expression "Executive Head" deliberately, both because it had been used in the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, and because it appeared to have a somewhat broader scope than the term used in Article 97 of the Charter.

30. Mr. RUDA said that the term "*jefe ejecutivo*", used in the Spanish version, had a very different meaning from the English term "Executive Head". The word "*ejecutivo*" implied a person who was in command, while the word "executive" implied a person who obeyed orders. He suggested that the Spanish term be brought more closely into line with the French version by using some such wording as "*el principal funcionario administrativo*".

31. Mr. ALCÍVAR supported that suggestion.

32. Mr. REUTER suggested that in the French version the words "*qu'il soit désigné sous le nom de*" be replaced by the words "*qu'il porte le titre de*", since the term "*nom*" was inappropriate in that context.

33. Mr. CASTRÉN said he thought the Commission might take a decision on Mr. Elias' suggestion for the English version, after which the other versions would merely have to be brought into line with the English wording.

34. Mr. KEARNEY said he could accept the expression "principal executive official", though he found the words "chief administrative officer" equally acceptable and perhaps in some ways preferable.

35. Mr. ELIAS, supported by Mr. ROSENNE, said that the Commission should follow the language used in the Charter.

36. Mr. YASSEEN said he found the French version of sub-paragraph (3) *bis* perfectly satisfactory. The word "*fonctionnaire*" had a precise meaning in French. It was not the first time it had been used, and therefore translated, in an international convention. There was nothing against employing a time-honoured translation once again.

37. Mr. AGO said that the difficulty might be overcome by simply omitting the new definition and, in the two places in which they appeared in article 82, paragraph 3, replacing the words "the Executive Head" by the words "the chief administrative officer", in the English version, and the words "*chef de l'administration*" by the words "*le plus haut fonctionnaire*" in the French version.

38. Mr. ELIAS said that he could accept Mr. Ago's suggestion.

⁵ United Nations, *Treaty Series*, vol. 33, p. 266.

39. Mr. KEARNEY said that in that case it should be made clear in the commentary that the Commission was using the term in the sense in which it was used in the Charter.

40. Mr. USHAKOV asked whether the precedent established by the Convention on the Privileges and Immunities of the Specialized Agencies was not an obstacle to the solution proposed by Mr. Ago, since it might be asked why the definition contained in that Convention had been disregarded in the present draft.

41. Mr. RUDA said he could agree to Mr. Ago's suggestion. He would like to ask the Secretariat, however, to replace the words "*jefe ejecutivo*" in the Spanish version of article 82, paragraph 3 by something closer to the French text, such as "*el más alto funcionario*".

42. Mr. REUTER said that he thought the Commission ought to discuss substantive issues before spending time on drafting points. For instance, he himself was opposed to the intervention by the chief administrative officer of the organization provided for in article 82, paragraph 3; that was a question which should be settled first.

43. Mr. AGO said that most of the constituent instruments of the specialized agencies, particularly those of later date than the Charter, used the same terminology as the Charter. Consequently, the expression "the chief administrative officer of the Organization", used in Article 97 of the Charter, did not refer only to the Secretary-General of the United Nations.

44. He therefore proposed that the new sub-paragraph (3) *bis* should not be inserted in article 1, paragraph 1, and that the words "the Executive Head of the Organization" in the English version of article 82, paragraph 3, and the corresponding words in the other language versions, should be replaced by the expressions used in the respective versions of Article 97 of the Charter.

45. The CHAIRMAN said that if there were no objection he would take it that the Commission accepted Mr. Ago's proposal.

It was so agreed.

46. The CHAIRMAN invited the Commission, now that sub-paragraph (3) *bis* had been disposed of, to consider articles 81 and 82.

47. Mr. REUTER said the Working Group had produced an admirable draft for articles 81 and 82, but there were a number of points of substance which he wished to place before the Commission.

48. The first point was that the two articles envisaged a two-stage procedure, with article 81 providing for a stage of prior negotiations, possibly bilateral, but in all likelihood multilateral, since the organization would almost certainly intervene in many cases, although it was not obliged to do so. It was right that that should be so, since practice showed that the organization could play an important role at that stage, and article 81 could prove to be of great value in the future.

49. A serious difficulty could arise, however, in the operation of the conciliation procedure. For during the prior consultations, not only would the organization naturally offer material assistance, but it would also take up a position, primarily through its chief administrative officer. Yet it was the organization itself which, although committed, would be required to appoint an umpire, so that if the present formula was retained, the organization's chief administrative officer might deliberately refrain from participating in the prior consultations in the knowledge that he might be called upon to play a fundamental role in the conciliation procedure. That was most regrettable, since although consultation procedure was not perfect, it had proved its worth and become indispensable. If these premises were accepted, the appointment of the third member of the conciliation commission should be made in a different way.

50. To those who said the precedent established by the Vienna Convention on the Law of Treaties had been followed, he would reply, first, that the solution chosen at Vienna had been adopted for reasons which had since lost their force, for example, certain opinions which had been held regarding the intervention of the president of the International Court of Justice. But his principal reply would be that in the machinery provided for in the Vienna Convention on the Law of Treaties, the organization was not a party to the dispute, whereas under the draft articles, if the consultation machinery was to function in the way it should, the organization should participate and make known what it considered to be the best and most reasonable way of settling the dispute.

51. The second point was that paragraph 7 of article 82 appeared to endow a conference with legal personality. He saw no objection to the president of a conference taking part in consultations as its representative, under article 81, but the adoption of a procedure for the settlement of a dispute presupposed the existence of legal personality, which the law did not yet accord to conferences. Moreover, the settlement of a dispute under a procedure adopted by a conference clearly lay beyond the usual competence of a conference. Surely it could not be the intention that a conference should become a party to an international agreement or, to go even further, that it should impose the method of settling a dispute through its internal rules.

52. In any case, it was clear that the present wording of paragraph 7 was unacceptable.

53. His third point was that, under article 82, paragraph 1, the conciliation process was restricted to a procedure instituted within the organization. That might exclude procedures instituted outside the organization, for example, by agreement between the host State and the sending State which were in dispute, seeing that the draft quite rightly assumed that the organization was not a party to the dispute. If so, the text was correct, but that raised a legal problem with regard to the possibility of excluding such procedures, and if it was not intended to exclude them, paragraph 1 should be more broadly worded.

54. Mr. KEARNEY (Chairman of the Working Group)

replying to Mr. Reuter's remarks on article 82 paragraph 6, said that the chief administrative officer of the organization would only be called upon to appoint the chairman of the conciliation commission if the two parties could not agree on the choice of a chairman. It would be slower and more cumbersome to leave his appointment to, say, the President of the International Court of Justice.

55. It had been assumed that the chief administrative officer of the organization would not himself participate in the consultations provided for in article 81, but would be represented by another senior official of the organization—the legal adviser, for example. The chief administrative officer himself would act only if it became necessary for him to appoint the chairman of the conciliation commission because of disagreement between the parties.

56. The provisions of paragraph 7 had been introduced mainly in consideration of the time factor. In view of the short duration of conferences, it would not be possible to set in motion the machinery for conciliation laid down in paragraph 6: the conciliation procedure would not be completed before the end of the conference. It was therefore desirable to give some tolerance to the conference, even at the price of appearing to confer an unusual status upon it.

57. Lastly, in drafting the first sentence of paragraph 1, the Working Group had relied on the effect of article 4. By virtue of that article, an agreement which might exist between the two States concerned for the compulsory jurisdiction of the International Court of Justice would remain valid and would apply to any dispute arising from the application of the draft articles.

58. The CHAIRMAN said that further discussion of articles 81 and 82 would be deferred till the next meeting.

Co-operation with other bodies

[Item 9 of the agenda]

(resumed from the 1124th meeting)

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

59. The CHAIRMAN welcomed Mr. Fernando, Chairman of the Asian-African Legal Consultative Committee, and invited him to address the Commission.

60. Mr. FERNANDO (Observer for the Asian-African Legal Consultative Committee,) after thanking the Commission for its standing invitation to the Committee to send an observer, said he was glad to be the observer at a session at which the Commission was dealing with relations between States and international organizations, since his Committee probably satisfied the Commission's definition of an international organization.

61. The Committee owed its origin to the imagination of outstanding Asian jurists who had foreseen the important role which public international law would play in

the world of the future. The usefulness of the work accomplished by the Committee had been recognized by the governments of Asia and Africa, which had renewed its mandate for successive five-year periods; a new period of five years was due to begin in November 1971.

62. As a result of the efforts of the Committee's Secretary-General, Mr. Sen, who was accompanying him, and of the devotion of former members, many countries had been attracted to the Committee, which now had 21 members, 16 from Asia and 5 from Africa. That number was expected to increase, and steps were being taken to translate documents into French in preparation for the introduction of French, in addition to English, as a working language for the Committee's discussions.

63. Through the good offices of the Government of Japan, it had been possible to appoint a Deputy Secretary-General to ease the increasing burden of work falling on the Secretary-General. A director of research would also be appointed.

64. The development of public international law was a means of fostering international co-operation and was therefore necessary for the furtherance of peace. The patient research of the International Law Commission on the law of treaties had made possible the success of the 1969 Vienna Convention on that subject. The Asian-African Legal Consultative Committee had itself devoted two of its sessions to the law of treaties, thereby greatly assisting the representatives of the Asian countries in shaping their contributions to the Vienna Conference.

65. International organizations were playing an increasing role in the life of the world community and the Commission's present discussions were evidence of its importance. As for the Committee, it considered its role to consist in taking note of the more important subjects to be codified by the Commission, assisting the Committee's members by preliminary research and thereafter submitting a generally agreed view to governments.

66. The Committee's role in relation to its member governments was no different from that of the Commission in relation to the General Assembly. Observing the debates of the Commission, he had been impressed by the objective approach displayed by its members and their self-restraint in voluntarily reducing the length of their comments to the minimum compatible with the importance of the subjects. He would convey those impressions to his fellow members of the Committee which perhaps attached too great importance to the views of governments, considering that it was an advisory body. He had also been impressed by the learning and the mature wisdom of the members of the Commission and by their spirit of comradeship. His necessarily brief visit served to show that one of the purposes of the Asian-African Committee was to co-operate with the Commission.

67. He thanked the Chairman and the members of the Commission for the welcome accorded him and renewed the invitation to the Commission to be represented by an observer at the Committee's thirteenth session, to be held at Lagos in 1972.

68. The CHAIRMAN, thanking the Observer for the Asian-African Legal Consultative Committee for his statement, said his Committee had made a valuable contribution to the rule of law and thus to world peace.
69. Mr. TABIBI said he wished to associate himself with the welcome extended to the Chairman of the Asian-African Legal Consultative Committee. An excellent tradition of exchanging observers and keeping in contact had been established by the Committee and the Commission. The close relations between the two bodies meant that the Committee gave high priority to items which appeared on the Commission's agenda.
70. The work of the Committee had been of great help in advancing the work of codification of international law by the Commission. While the Vienna Conference on the Law of Treaties had been in progress in 1968 and 1969, the Asian-African Legal Consultative Committee had continued to study the law of treaties and its work had been of great benefit to the participants in the Vienna Conference. The Committee had thereby contributed to the success of that Conference.
71. Mr. RUDA, speaking also on behalf of Mr. Alcívar and Mr. Sette-Câmara, said he joined in the welcome extended to the Observer for the Asian-African Legal Consultative Committee. Relations between the Committee and the countries of Latin America were getting closer every day. At its Colombo session, in January 1971, the Committee had discussed the law of the sea and several Latin American countries had sent observers to its meetings; those countries had common problems with the countries of Asia and Africa regarding the law of the sea, so that mutual consultation was very useful. He was confident that the interest of Latin American countries in the work of the Committee would continue in the future. He also noted with satisfaction the increase in the membership of the Committee and the proposed introduction of the use of French in its work.
72. Mr. KEARNEY said that there was great interest in the United States in the work of the Asian-African Legal Consultative Committee, as was shown by the fact that the American Society of International Law had sent observers to the Colombo session. He himself had been much impressed by the variety of the Committee's activities and by the depth of exploration of the various subjects it examined.
73. He associated himself with the expressions of appreciation to the Chairman and Secretary-General of the Committee for attending the Commission's present session and expressed the hope that the fruitful co-operation between the Committee and the Commission would continue in the future.
74. Mr. ELIAS, associating himself with the welcome extended to the Chairman and Secretary-General of the Asian-African Legal Consultative Committee, said that the Committee's work was attracting increasing attention; its Colombo session had been attended by no less than five observers from Latin America and five from the United States, as well as an observer for the Council of Europe and one for the World Intellectual Property Organization. Those observers had been given full freedom to speak on the topics before the Committee, which had included the law of the sea, with special reference to the sea bed. The members of the Committee had been glad to hear the different views expressed by the observers. The independence of mind and the spirit of enquiry shown by all participants in those discussions had made them particularly fruitful. The Committee had set up a working group to study the problems of the law of the sea, which was expected to meet shortly. The outcome of that work was bound to provide another interesting contribution by the countries of Asia and Africa to the consideration of problems of international law.
75. Mr. YASSEEN said that close links and a gratifying measure of co-operation had been established between the Commission and the Committee in the service of the codification and progressive development of international law.
76. Mr. USHAKOV thanked Mr. Fernando for his admirable account of the work and activities of the Committee over which he presided, and which had taken as its main task that of promoting the progressive development not only of Asian and African law, but also of international law in general. He himself had been privileged to represent the Commission at the Committee's eleventh session at Accra in 1970, and had admired the high quality of its work and the very full documentary material prepared on the items on its agenda, which the members of the Commission could study to their advantage.
77. Mr. AGO said he was glad to see the great progress the Committee had made since his first contact with it at Baghdad, shortly after its establishment. He was happy to find that the Committee was pursuing its work as enthusiastically and earnestly as it had then and he wished it every possible success in its future activities.
78. Mr. ROSENNE joined in welcoming the Chairman and Secretary-General of the Asian-African Legal Consultative Committee. He expressed his appreciation of the interesting statement made by the Committee's Observer and of his thought-provoking impressions of the International Law Commission's work.
79. The CHAIRMAN said that the Commission was grateful to the Observer for the Asian-African Legal Consultative Committee for his lucid statement and thanked him for the invitation he had extended to the Commission to send an observer to the Committee's forthcoming session at Lagos.

The meeting rose at 1.10 p.m.

1137th MEETING

Thursday, 15 July 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, 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 to 3; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.169; A/CN.4/L.171; A/CN.4/L.174 and Add.2 and 3)

[Item 1 of the agenda]

(resumed from the previous meeting)

THIRD REPORT OF THE WORKING GROUP

(continued)

ARTICLE 81 (Consultations between the sending State, the host State and the organization) and

ARTICLE 82 (Conciliation) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of articles 81 and 82 as they appeared in the Working Group's third report (A/CN.4/L.174/Add.3).

2. Mr. USHAKOV said that the Working Group agreed that the words "among the participating States", in the first sentence of article 82, paragraph 6, should be deleted.

3. Mr. REUTER said he could not agree to the deletion of the last sentence in article 82, paragraph 6, as had been intimated by Mr. Kearney at the previous meeting.¹ He would suggest that the sentence be restored.

4. Nor could he accept the substance of the first sentence of paragraph 6, since the entire article was based on the assumption that the dispute was between States and that the Organization was not a party to it. The sentence should read: "If the States concerned have not reached agreement...". The present wording was unacceptable.

5. With regard to the words "*à l'occasion de la conférence*", at the end of the French version of paragraph 7, which Mr. Ushakov found unsatisfactory as a rendering of the English "in connexion with",² it was hard to find anything better, since all the possible alternatives posed problems.

6. Mr. CASTRÉN said that the Working Group had submitted an admirable text for articles 81 and 82, which suitably completed the draft articles by making provision for the settlement of disputes arising out of their application and interpretation, as several Governments, as well as several members of the Commission, had requested. He had no difficulty in accepting the wording of articles 81 and 82, subject to the drafting changes which had been suggested.

7. With regard to the relationship between the two articles, they complemented each other well; both were important, but the emphasis should be placed on the compulsory conciliation procedure, since consultations could always be organized without difficulty, even in the absence of any express provision. The Organization played an important role in consultations; the fact that in the conciliation procedure it had some administrative functions should not affect the role it played in the consultations.

8. With regard to Mr. Reuter's comments at the previous meeting on article 82 paragraph 7,³ he thought the paragraph was not only useful but also acceptable juridically. Even if the conference was not a juridical person, that did not prevent it from taking the necessary decisions with regard to the procedure to be followed for the settlement of disputes arising in connexion with the conference, and from doing so through its competent organs, in the first instance the General Assembly, which in addition could delegate its powers to a certain extent.

9. Finally the last sentence of article 82, paragraph 6, which appeared in the text by mistake, was not only redundant, since it was self-evident that the report of a conciliation commission would not bind the parties, but also dangerous, since mention of that fact might diminish the interest of States in the conciliation procedure.

10. Mr. YASSEEN said that article 81, which provided for a consultation procedure, with the intervention of the Organization, and which should be capable of settling most disputes, was admirable.

11. Article 82, on the other hand, was unsatisfactory because the conciliation procedure for which it provided, as a subsequent stage to the consultations, doubtless by analogy with the law of treaties, was little else than a more formal process of consultation and would be unlikely in practice to be more effective than the consultation procedure itself. There were good reasons for thinking that a dispute which was not settled by consultation would not be settled by conciliation. A different procedure should therefore be envisaged.

12. The analogy with the law of treaties was inappropriate, since the Organization which was the subject of the draft articles was not to be found in treaty relations and so could not intervene in disputes between States with regard to a treaty. Most problems referable to treaty law were bilateral, whereas problems arising

¹ See 1136th meeting, para. 14.

² *Ibid.*, para. 17.

³ *Ibid.*, paras. 51 and 52.

in relations with international organizations were multi-lateral, since they concerned most or all of the member States of international organizations.

13. The recourse to the International Court of Justice for an advisory opinion, provided for in article 82, paragraph 5, meant that the General Assembly would have to consider the question, since its authorization was required. That was not a practical solution, quite apart from the fact that such a procedure was scarcely commensurate with the minor nature of the matters that would require settlement.

14. The wording of paragraph 6 did not correspond with the concept of conciliation, which implied not an agreement being imposed but simply the parties accepting or rejecting the solution proposed. In addition, from the drafting point of view, it was incorrect to speak in the penultimate sentence of a time-limit for the preparation of the report, since earlier in the paragraph it was provided that the Commission should merely prepare its report "as soon as possible", which did not imply any time-limit.

15. Paragraph 7 was unacceptable from the technical point of view. Whether or not the conference was a juridical person, it could not formulate rules enforceable against States on a question which did not concern the conference but which arose in connexion with it. For example, if a conference decided that a dispute between a participating State and the host State should be referred to the International Court of Justice, such a decision would not be enforceable against the host State.

16. He therefore questioned the value of article 82 and feared that the Commission's concern to provide for a conciliation procedure might, as in the League of Nations days, result in the creation of machinery which would remain ineffectual.

17. Mr. ELIAS said that article 81 was quite acceptable to him. He supported Mr. Tammes' proposal that the words "between one or more sending States and the host State" be deleted,⁴ but would be prepared to accept the text as it stood.

18. As for article 82, despite the Commission's decision at the previous meeting to replace, in paragraph 3, the term "Executive Head" by the words "chief administrative officer", and to drop the proposal for a new subparagraph 3 *bis* for paragraph 1 of article 1,⁵ a number of difficulties still remained.

19. The proposed conciliation commission was conceived as a permanent body with power to request, through the General Assembly of the United Nations, an advisory opinion from the International Court of Justice regarding the interpretation or application of the draft articles. As he saw it, Article 65 of the Statute of the International Court of Justice did not provide any basis for such a procedure. If that proposal were adopted, it would be necessary to change the rules of procedure of the International Court of Justice in order to make

it possible to set in motion the procedure envisaged in the second sentence of paragraph 5 of article 82.

20. With regard to the conciliation procedure, he noted with satisfaction that the Working Group had reached unanimous agreement on a simple procedure. The powers conferred upon the proposed conciliation commission, including that of extending time-limits, were consistent with the permanent character of the proposed institution. He hoped the Commission would be able to agree on the proposed scheme, so that it could be submitted in due course to a conference of plenipotentiaries, but a number of problems could arise. For example, if either of the two parties concerned, especially the host State, refused to co-operate, it was difficult to see how the procedure of obtaining an advisory opinion from the International Court of Justice could be relied on to effect a settlement. As for disputes arising out of conferences, it was more than probable that the conference would be over before the International Court of Justice had time to give an advisory opinion.

21. In paragraph 1, he suggested that the concluding words, "by giving written notice to the other States participating in the consultations and to the Organization", be replaced by the words "by giving written notice to the Organization and to the other States participating in the consultation", thus reversing the order of reference.

22. Mr. ROSENNE said the Working Group had produced a text which represented an important contribution to enabling the Commission to perform one of its essential roles as they had developed in the course of time, that of acting as a catalyst from points of departure which at first sight might seem irreconcilable. The observations which he was about to make were intended to draw attention to a number of problems which needed to be resolved before the Commission could present to the General Assembly, to Governments, and in due course to a conference of plenipotentiaries, a well-thought-out basis for discussion and thus allow the international community to reach a viable solution to a difficult problem.

23. The first problem was that of determining the States to which it was intended that articles 81 and 82 should apply. One possibility was that those articles should apply only to the States parties to the convention that would emerge from the present draft articles. Another was that they should apply to all States that were members of the Organization, regardless of whether they were parties to the convention or not. A third possibility was that they should apply to all States coming within the scope of the convention, States which would vary from organization to organization, for it should be remembered that the draft articles dealt also with the relations between the Organization and non-member States. It was also possible to envisage that those matters should be left to be governed by the rules of international law on the subject of treaties and third States; he was inclined to feel that such a solution was perhaps the best.

24. With regard to article 82, he wished to raise a question which was only partly one of drafting, since it also involved a question of principle. In his view, article 82

⁴ *Ibid.*, para. 21.

⁵ *Ibid.*, para. 45.

should include a provision on the lines of the new paragraph 3 which had been proposed in the Special Rapporteur's working paper on the question of the inclusion in article 50 of a provision on the settlement of disputes.⁶ The additional paragraph would specify that the provisions of article 82 were without prejudice to provisions concerning the settlement of disputes contained in international agreements in force between States or between States and international organizations.

25. He did not agree with the statement by the Chairman of the Working Group at the previous meeting, that the matter was covered by the provisions of article 4.⁷ That article contemplated agreements on the subject of the representation of States to international organizations; it was not intended to contemplate such agreements as the general treaties of conciliation, arbitration and judicial settlement concluded by Switzerland with a number of countries, including his own. The problem was one of the application of successive treaties and it would be useful to clarify the matter by means of a provision on the lines of that which had been proposed by the Special Rapporteur and which he had already referred to. Such clarification was particularly necessary in the light of the fact that, as stressed at the previous meeting by the Chairman of the Working Group, the proposed conciliation procedure was intended as a procedure between States⁸ a view which he entirely accepted.

26. With regard to paragraph 5, it was clear that there was no analogy between its provisions and those of article 66 of the 1969 Vienna Convention on the Law of Treaties and the Annex to that Convention. In view of the difference in substance, no such analogy was possible, but the Working Group had of course drawn inspiration from the language of the 1969 Vienna Convention. In that spirit, he would himself suggest that, in the first sentence of paragraph 5, the word "decisions" be replaced by the words "decisions and recommendations", which was the formula used in the last sentence of paragraph 3 of the Annex to the 1969 Vienna Convention.⁹

27. On the question of the authorization of the General Assembly for requesting an advisory opinion from the International Court of Justice, it was his understanding that the Working Group had been thinking in terms of Article 96(2) of the Charter, which provided that specialized agencies, and organs of the United Nations other than the General Assembly Council, might be authorized by the General Assembly to request advisory opinions of the International Court of Justice on legal questions arising within the scope of their activities. It was also his understanding that the Working Group was in favour of a general authorization. If that were the case, the Commission should exercise great caution before it considered introducing, even in a commentary, the far-reaching idea of recommending that a conciliation body of

three members should be authorized to request an advisory opinion of the International Court of Justice.

28. In the first sentence of paragraph 6, it was essential to retain the idea which the words "among the participating States" endeavoured to express, though the drafting of the passage was open to criticism.

29. He had misgivings regarding the use of the term "resolution" in that same sentence and of the words "the Commission's findings upon the facts and the law" in the second sentence of paragraph 6. That wording was unsatisfactory, especially if linked with the use of the word "decisions" in the first sentence of paragraph 5.

30. The deletion of the final sentence of paragraph 6, "The report shall not be binding upon the participating States or upon the Organization", was a drafting matter but the idea which the sentence expressed should find a place somewhere in the draft.

31. With regard to the conciliation procedure in paragraph 6, he had noted two small omissions which he would be prepared to accept if they were intentional. The first was that no indication was given as to who was to bear the cost of the proceedings; that point could be left out of the draft if the Commission so desired. The second was the question of a possible quasi-intervention in conciliation proceedings, a very difficult question which had been discussed at length during the Vienna Conference on the Law of Treaties. There again, the Commission might prefer not to deal with the question.

32. With regard to paragraph 7, he shared the already expressed view that it was basically not relevant; the essential ideas which it attempted to cover probably appeared elsewhere. In the case of a conference of any length, the matter would in any case be covered in the agreement which was invariably concluded between the Organization and the host State before the conference. The question therefore came within the scope of the provisions of article 4 and could be explained in the commentary.

33. Mr. EUSTATHIADES said the Working Group was to be commended for laying before the Commission a set of provisions which formed an acceptable basis for the consideration of a question which could not be overlooked in the draft articles. Those provisions owed much to Mr. Kearney's proposals,¹⁰ which had the advantage over those of the Special Rapporteur¹¹ of making conciliation compulsory and establishing the procedure.

34. The wording of articles 81 and 82 was on the whole satisfactory, and the Commission would do well to adhere to the general approach which they represented, despite certain differences of opinion and the one or two problems which arose.

35. Article 81, in particular, raised the virtually insoluble problem of the States to which the future convention would apply. That problem arose at the stage of article 81, since at the conciliation stage, represented by

⁶ See document A/CN.4/L.171, para. 6.

⁷ See 1136th meeting, para. 57.

⁸ *Ibid.*, para. 9.

⁹ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 301.

¹⁰ A/CN.4/L.169.

¹¹ A/CN.4/L.171.

article 82, the question of which States would be parties to the dispute was already settled. The answer which sprang to the jurist's mind was that article 81 could apply only to the States which would be parties to the future convention, since the article provided that the consultation procedure was applicable to disputes arising out of the application or interpretation of the "present articles". The question would appear in a different light if the draft articles were adopted in the form of a recommendation, as in the case of the Convention on Special Missions. At all events, the question needed to be raised.

36. With regard to the conciliation procedure provided for in article 82, it would appear that it was intended to deal merely with minor disputes for which the prior consultation procedure had proved unsuccessful. The only other disputes that could arise would be serious disputes relating to political rather than legal problems, in which case it would be inappropriate to resort to the advisory opinion of the International Court of Justice and preferable to rely on agreements between the parties concerned, in particular between States and international organizations, as the Special Rapporteur had provided.¹² However, such a solution was only to be contemplated in exceptional cases, for which provision admittedly had to be made, but without encouraging the practice of concluding agreements for the settlement of routine disputes, for which consultations and conciliation should suffice.

37. The reservation for a procedure established in the Organization, provided for in article 82, paragraph 1, had been rightly criticized by Mr. Reuter.¹³ If what was contemplated was a procedure in which the Organization itself could intervene as a party, for example under a headquarters agreement, that should be clearly stated. As it was worded, the paragraph was open to question and did not even cover the idea expressed in paragraph 3 of the article 50 proposed by the Special Rapporteur¹⁴

38. He supported Mr. Elias' proposal that, at the end of paragraph 1, the Organization should be mentioned before the participating States.¹⁵

39. He agreed with Mr. Reuter that it was inappropriate to provide, in paragraph 3, that the chairman of the conciliation commission might be appointed by the Organization¹⁶ since, irrespective of whether it was a party to the dispute—and it was not clear exactly when it became a party—conciliation was in its general interests.

40. The time-limits stipulated in paragraphs 1 and 6 were excessive, because it was easy to arrange consultations, with all the parties on the spot, and the minor nature of the disputes which would require settlement would not involve a lot of preparatory work. Moreover, it was preferable to encourage the parties to expedite matters. It would therefore be better either to stipulate

shorter periods of time or else to speak of "a reasonable period of time".

41. With regard to paragraph 6, if the words in the first sentence, "among the participating States", were deleted, as had been proposed,¹⁷ it was difficult to see from whom the Commission would have to secure agreement. It would be more logical to say either "If, within [a period to be stipulated] no agreement has been reached on a settlement of the dispute. . .", which preserved the idea of agreement without specifying between whom; or, in more general terms, "If the dispute has not been settled".

42. With regard to the contents of the report of the conciliation commission, the words "upon the facts and the law" in the second sentence of paragraph 6 should be deleted, since the Commission might not necessarily have to find on a point of law and might be called simply to establish facts. However, if the present wording was retained, the words "as the case may be" should be added after the words "the law".

43. He reserved his position with regard to the deletion of the last sentence of the paragraph, which, the Commission had been told, had appeared in the text by mistake.¹⁸

44. At the previous meeting, Mr. Reuter had criticized the fact that article 82, paragraph 7, appeared to endow a conference with legal personality.¹⁹ He himself agreed with Mr. Kearney that the draft articles should make it possible for disputes arising in connexion with the conference to be settled without delay and without recourse to lengthy procedures.²⁰ The provision in paragraph 7 was therefore appropriately placed in article 82, although its wording could be improved.

45. Mr. ROSENNE said that he would like to make it clear that when he had raised the question to whom the conciliation procedure was intended to apply,²¹ he had not been referring to the broad question to whom the draft articles as a whole should apply. He hoped the Working Group was clearly aware of what it intended to say by the words in article 82, paragraph 1, ". . . it may be submitted by any State party to the dispute to such procedure applicable to the settlement of the dispute as may be established in the Organization".

46. Mr. RUDA said that he had certain doubts about articles 81 and 82. In particular, he had doubts about the exact role of the Organization in the consultation procedure provided for in article 81. If the dispute was between a sending State and the host State, it would seem logical that the process of conciliation should be exclusively between those two parties. The introduction into that article of the "Organization" seemed to add an element of confusion, since the Organization might be represented by its most important organ, such as the

¹² *Ibid.*, para. 6.

¹³ See 1136th meeting, para. 53.

¹⁴ See document A/CN.4/L.171, para. 6.

¹⁵ See para. 21 above.

¹⁶ See 1136th meeting, paras. 49 and 50.

¹⁷ *Ibid.*, para. 16.

¹⁸ *Ibid.*, para. 14.

¹⁹ *Ibid.*, para. 51.

²⁰ *Ibid.*, para. 56.

²¹ See para. 23 above.

General Assembly, or by its chief administrative officer. He would suggest, therefore, that the final phrase in that article, "or of the Organization itself" be deleted.

47. Mr. Kearney had said that article 4 covered that type of situation by stating: "The provisions of the present articles (a) are without prejudice to other international agreements in force between States or between States and international organizations of international character". He would point out, however, that the case of the settlement of disputes within the Organization was also provided for in article 3, which stated: "The application of the present articles is without prejudice to any relevant rules of the Organization or to any relevant rules of procedure of the conference". If specific mention were made of article 4, therefore, article 3 should be mentioned as well.

48. With respect to article 82, paragraph 3, he shared Mr. Reuter's doubts about the advisability of entrusting the chief administrative officer of the Organization with the power to appoint a member of the conciliation commission, since that officer might not possess the necessary degree of impartiality. He would prefer that that power be entrusted to some such person as the President of the International Court of Justice.

49. With regard to paragraph 5, he supported Mr. Rosenne's suggestion that the word "decisions" in the first sentence be replaced by the words "decisions and recommendations".²² He also had some doubts about the second sentence, which stated that the Commission, with the authorization of the General Assembly, could request an advisory opinion from the International Court of Justice regarding the interpretation or application of the present articles.

50. He shared Mr. Reuter's views concerning paragraph 6.

51. He also shared Mr. Reuter's doubts about paragraph 7, which only complicated the conciliation procedure in general and would be better left out.

52. Mr. REUTER said that he wished to define his position, but in a constructive spirit. To take first the points he regarded as secondary, he noted Mr. Kearney's view that article 4 provided an adequate safeguard for treaty provisions in bilateral agreements between States.²³ Since that safeguard also applied to procedures instituted within the Organization, the latter received an enhanced status by being expressly mentioned in article 82, paragraph 1. However, he was not opposed to that formulation.

53. He maintained his position with regard to article 82, paragraph 7, and noted with satisfaction that Mr. Yassen, Mr. Rosenne and Mr. Ruda all shared his view. However, he was prepared to vote for the paragraph even though he found it ill-conceived.

54. Finally, although the beginning of article 82, paragraph 6, was rather clumsily drafted, a circumstance

which to some extent affected the actual nature of the procedure, he could accept the paragraph, at a pinch, in view of the drafting problems which had been pointed out.

55. There were two very important points, however. First, with regard to the intervention of the chief administrative officer of the Organization provided for in article 82, paragraph 3, it had been said that the entire draft was based on the idea that, from a formal point of view, the disputes being dealt with were in fact disputes between States and that the article was not concerned with disputes between States and the Organization. But while he endorsed that view, he would point out that the reality was rather different, so that certain precautions were necessary. He therefore proposed the addition at the end of that paragraph of a sentence which might be worded: "If he considers it appropriate, the chief administrative officer of the Organization may request the President of the International Court of Justice to make the above appointments".

56. For the Organization had two courses open to it. It could either take a definite stand in the consultations, as in the Santiesteban case discussed in the Secretariat's study of the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities,²⁴ or again as in the case of the building for the Chinese delegation to UNESCO, where the Director-General of UNESCO had taken a vigorous stand against the French Government at the request of UNESCO's Executive Board.²⁵ Or, if relatively unimportant issues were involved, such as an untimely alcohol test or a case of bigamy during an interminable conference, it could refrain from intervening in the consultations altogether. If it adopted the first course, its chief administrative officer would obviously not take advantage of his powers and appoint a third member who supported his views; on the contrary, he would take care to appoint the most impartial chairman possible. From the chairman's point of view, however, it would be a little embarrassing if the person responsible for his appointment had played a part in the case itself, and it would certainly be preferable for the chief administrative officer himself, if he were relieved of such a burden and allowed to transfer the responsibility for the appointment of the chairman to the International Court of Justice.

57. With regard to the last sentence of article 82, paragraph 6, which the Working Group had finally decided to delete and which stated that "The report shall not be binding on the participating States or upon the Organization", the Working Group seemed to have been looking for a quasi-arbitral conciliation formula. He had no objection to a formula of that kind, but a political question was involved, namely, just how far to go. Also, the sentence to be deleted had an unfortunate psychological effect.

²² *Ibid.*, para. 26.

²³ See 1136th meeting, para. 57.

²⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, pp. 172-173.

²⁵ *Ibid.*, pp. 202-203.

58. However, if it was intended to emphasize that conciliation proper was meant, it should be remembered that the word "conciliation" was occasionally employed even in cases where such a procedure had mandatory effects. In any case, it was clear from the text proposed that those responsible for it had sought to set up a fairly firm régime, with at least the appearance of giving rise to obligations. If it was possible to go further than conciliation pure and simple, it might be well to base the provisions in question on the draft convention on international liability for damage caused by space objects,²⁶ article XIX, paragraph 2 of which provided that, when the decision of the claims commission was not binding, "the Commission shall render a final and recommendatory award, which the parties shall consider in good faith". If even that could not be said in article 82, it might be better to say nothing at all.

59. Mr. AGO said that he would start with a few general observations. First, he would say to those members of the Commission who thought that article 82 should have gone as far as providing for arbitration, and even for the compulsory jurisdiction of the International Court of Justice, that although the system proposed did not fully meet his wishes, he had decided to accept it because it was the only solution which seemed likely to secure the approval of the Commission as a whole.

60. He had the impression from the discussion that an insufficiently sharp distinction had been drawn between mere consultations and conciliation procedure. Consultations had nothing to do with any procedure. Consultations meant simply holding discussions. Conciliation procedure was quite a different matter. It was a procedure in the formal sense, whose specific purpose was to reach a settlement of the dispute, even if, in the last resort, that settlement depended on its acceptance by the parties. Thus the conciliation procedure provided for in article 82 in no way duplicated the consultations provided for in article 81.

61. Furthermore, there was at present a definite trend in favour of conciliation procedures, as evidenced by the Vienna Convention on the Law of Treaties and the draft convention on international liability for damage caused by space objects. Even if some thought that the draft did not go far enough, at least it made a start, and that was something.

62. With regard to the scope of the provisions, the procedure would obviously be binding only on the States to the convention. It was also certain, though, that once the convention had entered into force, international organizations would endeavour to secure the greatest possible number of accessions to it and, even if the States involved in a dispute were not parties to the convention, there would be nothing to prevent them from agreeing *de facto* to the operation of the procedure which the convention set up. The system proposed might therefore have repercussions beyond the circle of States parties. But that was only his personal hope, and in no way

an acknowledgment that there was any legal obligation on States which did not become parties to the future convention.

63. At the same time, it was vitally important to safeguard the procedures established by existing bilateral and multilateral agreements, because those procedures might be more advanced and provide for arbitration, or even for the compulsory jurisdiction of the International Court of Justice. He did not think that article 4 offered a sufficient safeguard in that respect, since it related essentially to conventions concerning representation of States in international organizations in general rather than the settlement of disputes. Article 82 should therefore include an express proviso of the kind which the Special Rapporteur had proposed.²⁷

64. To turn to a few points of detail, he was opposed to the deletion, from the first line of article 81, of the words "between one or more sending States and the host State". Those words limited the scope of articles 81 and 82 by excluding disputes between a State and the Organization, and to delete them would only create confusion.

65. He was also opposed to the deletion of the concluding words of the article, "or of the Organization itself" because the Organization could play a useful role in encouraging the parties to meet it for consultations.

66. With regard to the procedure for the appointment of the chairman laid down in article 82, he had absolutely no doubt that the Organization's chief administrative officer would be completely objective. For example, the Director-General of the ILO was responsible under several international agreements for appointing the chairmen of arbitral tribunals or conciliation commissions, as the case might be, and the parties had always found his choice excellent. It was true, though, that where the dispute was one where a settlement was to the Organization's interest, or where the Organization had taken a definite stand in consultations, it was desirable from the point of view of the chief administrative officer himself, that he should be able to delegate the appointment of the chairman to the President of the International Court of Justice.

67. As far as the advisory opinion of the International Court of Justice was concerned, Article 96 of the Charter and Article 65 of the Court's Statute made authorization by the General Assembly indispensable. It had been suggested that such authorization might be given once and for all. That solution would clearly have the advantage of expedition, but it was scarcely compatible with the fact that in principle each dispute would be submitted to an *ad hoc* commission. Although the General Assembly was free to refuse its authorization, it was difficult to see why it should.

68. The wording of paragraph 6 suitably expressed the idea that the settlement of the dispute was dependent on the agreement of the parties, since the conciliation commission confined itself to making recommendations.

²⁶ A/AC.105/94.

²⁷ See document A/CN.4/L.171, para. 6.

69. The English version, "resolution of the dispute", of the phrase "*solution du différend*" which was used in the French version, was possibly a little ambiguous.

70. It was certainly psychological reasons which had led the Working Group to decide on the deletion of the last sentence of the paragraph. Obviously there could be no settlement without the agreement of the parties, but the parties themselves were perfectly aware of that and it was inappropriate to remind them of the fact in an express provision.

71. If the last sentence were to be kept, however, he would not be opposed to the addition, as suggested by Mr. Reuter, of a sentence to the effect that the parties should consider the commission's report in good faith.²⁸ That was a minimal condition to require of the parties. It was important that they should not go into a conciliation procedure with the fixed intention of disregarding the commission's recommendations. Conciliation sometimes came very near to arbitration, of course, and it was striking to note the variety of language employed in treaties in connexion with it. In any case, it was a constructive step to move towards a conciliation procedure which tended, however slightly, in the direction of arbitration.

72. Perhaps the article should even provide that the conciliation commission might recommend in its report that, if the dispute remained unsettled owing to the failure of the parties to agree on the commission's recommendations, it should be submitted to arbitration or to the jurisdiction of the International Court of Justice. The conciliation commission would naturally be free to make such a recommendation in any case, but it might be useful to say so.

73. Lastly, paragraph 7 was not as important as some members seemed to think. In view of the inevitable delays attaching to conciliation procedures, the time-limits stipulated were always too short and it was always necessary to ask for extensions; a conciliation procedure was therefore unlikely to succeed within the relatively short life of a conference. That might be regrettable, both for minor issues and for urgent problems such as questions of privileges and immunities. The Working Group had therefore decided to include the proviso which paragraph 7 represented.

74. Mr. ALCÍVAR said that he had serious reservations about the form of arbitral conciliation suggested by Mr. Ago. He would prefer to keep the text of article 82, paragraph 3, as it stood.

75. Mr. CASTRÉN said that in his view paragraph 6 did not confuse conciliation proper with arbitration. There was no ambiguity.

76. Although the word "decision" appeared in paragraph 5, it was clear from paragraph 6 that the commission made recommendations which were not binding upon the parties.

77. With regard to paragraph 7, Mr. Ago and Mr. Eustathiades had shown that the periods of time involved in the conciliation procedure were too long for a conference, and the usefulness of the provision was therefore undeniable.

78. Mr. TABIBI said that, after listening to Mr. Ago, he was prepared to accept the basic régime for consultations and conciliation provided for in articles 81 and 82. He himself would have preferred a compulsory procedure, such as arbitration or reference to the International Court of Justice, but he realized that the present text represented a compromise.

79. He agreed with Mr. Rosenne that there was no analogy between the present articles and article 66 of the Vienna Convention on the Law of Treaties and the Annex to that Convention.²⁹

80. He was somewhat concerned about the suggestion that the General Assembly should authorize the conciliation commission to request an advisory opinion from the International Court of Justice; it would be much better if the General Assembly itself made that request directly to the Court.

81. Lastly, since paragraph 7 of article 82 was not part of the conciliation procedure set forth in the preceding paragraphs, it might be more appropriately embodied in a separate article 23.

82. The CHAIRMAN suggested that, if there were no objection, the Commission refer articles 81 and 82 back to the Working Group for reconsideration in the light of the discussion.

It was so agreed.

The meeting rose at 1.10 p.m.

²⁹ See para. 26 above.

1138th MEETING

Friday, 16 July 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Yasseen.

²⁸ See para. 58 above.

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 to 3; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.171; A/CN.4/L.174/Add.2 and 3; A/CN.4/L.177/Add.2 and 3)

[Item 1 of the agenda]

(continued)

CONSOLIDATED DRAFT ARTICLES SUBMITTED BY THE
WORKING GROUP ON SECOND READING

ARTICLE 38 *bis*

1. The CHAIRMAN invited the Commission to consider the text of articles 38 *bis* (A/CN.4/L.177/Add.2), 81 and 82 (A/CN.4/L.177/Add.3) submitted by the Working Group on second reading, commencing with article 38*bis*, the proposed text for which read:

2.

Article 38 bis¹

Professional or commercial activity

The head of mission and members of the diplomatic staff of the mission shall not practice for personal profit any professional or commercial activity in the host State.

3. Mr. KEARNEY (Chairman of the Working Group) said that, following the discussion in the Commission² on article 75 (A/CN.4/L.117/Add.2), which had been drafted as a general article for Part IV, the Working Group had come to the conclusion that the problem of engaging in professional or commercial activity in the host State related essentially to the staff of permanent missions and permanent observer missions; the limitation with respect to the possible activities of members of delegations was of relatively small importance. Given the fact that there were quite large numbers of technical delegations, the services of whose members might not be undesirable to the host State, there were sound reasons for removing the limitation with respect to delegations.

4. The Working Group had accordingly redrafted article 75 in its original form before the scope had been broadened to include delegations, and had put it back in the part relating solely to missions as article 38 *bis*. That meant, of course, that the succeeding articles would have to be renumbered.

5. The CHAIRMAN put article 38 *bis* to the vote.

Article 38 bis was adopted by 14 votes to none.

6. Mr. ELIAS suggested that the spelling of the verb "practice" be altered to "practise", with an "s".

7. Mr. ROSENNE said that the spelling should be the same as in the corresponding article 48 of the 1969 Convention on Special Missions,³ namely, "practise".

8. The CHAIRMAN said that the spelling would be amended.

¹ Formerly article 75.

² See 1135th meeting, paras. 49 to 63.

³ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 105.

ARTICLE 81 and ARTICLE 82

9.

Article 81

Consultations between the sending State, the host State and the Organization

If any dispute between one or more sending States and the host State arises out of the application or interpretation of the present articles, consultations between: (i) the host State, (ii) the sending State or States concerned, and (iii) the Organization or, as the case may be, the Organization and the conference, shall be held upon the request of any such State or of the Organization itself with a view to exploring the possibilities of an amicable disposition of the dispute.

10.

Article 82

Conciliation

1. If the dispute is not disposed of as a result of the consultations referred to in article 81 within three months from the date of their inception, it may be submitted by any State party to the dispute to such procedure applicable to the settlement of the dispute as may be established in the Organization. In the absence of any such procedure, any State party to the dispute may bring it before a conciliation commission to be constituted in accordance with the provisions of this article by giving written notice to the Organization and to the other States participating in the consultations.

2. A conciliation commission will be composed of three members, of whom one shall be appointed by the host State, and one by the sending State. Two or more sending States may agree to act together, in which case they shall jointly appoint the member of the conciliation commission. These two appointments shall be made within two months of the written notice referred to in paragraph 1. The third member, the Chairman, shall be chosen by the other two members.

3. If either side has failed to appoint its member within the time limit referred to in paragraph 2, the Chief administrative officer of the Organization shall appoint such member within a further period of one month. If no agreement is reached on the choice of the Chairman within four months of the written notice referred to in paragraph 1, either side may request the Chief administrative officer of the Organization to appoint the Chairman within a further period of one month. The Chief administrative officer of the Organization shall appoint as the Chairman a qualified jurist who is neither an official of the Organization nor a national of any State party to the dispute.

4. Any vacancy shall be filled in the same manner as the original appointment was made.

5. The Commission shall establish its own rules of procedure and shall reach its decisions and recommendations by a majority vote. If so authorized by or in accordance with the Charter of the United Nations the Commission may request an advisory opinion from the International Court of Justice regarding the interpretation or application of these articles.

6. If the Commission is unable to obtain an agreement among the States parties to the conciliation proceedings on a settlement of the dispute within six months of its initial meeting, it shall prepare as soon as possible a report of its proceedings and transmit it to the parties and to the Organization. The report shall include the Commission's conclusions upon the facts and questions of law and the recommendations it has submitted to the parties in order to facilitate a settlement of the dispute. The six months time limit may be extended by decision of the Commission.

7. Nothing in the preceding paragraphs shall preclude a conference from establishing any other appropriate procedure for the settlement of a dispute arising in connexion with the conference.

8. This article is without prejudice to provisions concerning settlement of disputes contained in international agreements in force between States or between States and international organizations.

11. Mr. KEARNEY (Chairman of the Working Group) said that he would introduce together the new texts for articles 81 and 82 as prepared by the Working Group in the light of the discussion at the previous meeting.

12. In article 81, the Working Group had not accepted the suggestion to delete the words "between one or more sending States and the host State", because those words had the advantage of stressing that it was not intended to deal with disputes that might arise between the Organization itself and a State, whether the host State or a sending State. The only disputes that were covered were those which might arise between one or more sending States and the host State.

13. Similarly, the Working Group had not accepted the suggestion to delete the words "or of the Organization itself" at the end of article 81. The Organization was under a duty to assist the sending State in solving the problems which might arise regarding the fulfilment of the obligations of the host State. It seemed only reasonable therefore that the Organization should be able to initiate consultations.

14. The only change which had been made in article 81 was the addition of a clause at the end indicating the purpose of the consultations. The addition was based on a proposal by Mr. Elias, though the language used was somewhat different, in order to make clear the informal nature of the consultations procedure.

15. With regard to article 82, a large number of suggestions had been made at the previous meeting. In the first sentence of paragraph 1, the Working Group had decided to maintain unchanged the words "it may be submitted by any State party to the dispute"; it had felt that the matter was not one in which a great degree of precision was possible or even desirable. The question should be left to be governed by the general rules of international law on the application of treaties, in particular the provisions of the 1969 Vienna Convention on the Law of Treaties which dealt with the subject of treaties and third States.

16. In that same paragraph, the Working Group had accepted the proposal made by Mr. Elias to reverse the order of the references to the Organization and to the other States respectively.⁴

17. With regard to paragraph 2, no proposals had been made during the discussion and the text had been left unchanged.

18. In paragraph 3, the Working Group had given careful consideration to the suggestion that, since the

Organization was to some extent involved in the dispute as a result of the preliminary consultations, every effort should be made to avoid any possible accusation of bias. The Working Group had not accepted the suggestion that the chairman of the conciliation commission should be appointed by the President of the International Court of Justice. It had, however, inserted an additional sentence at the end of the paragraph, setting forth three requirements for the appointment; first, that the person selected should be a qualified jurist; secondly, that he should not be an official of the Organization, and, thirdly, that he should not be a national of any State party to the dispute. If those three requirements were satisfied, the basis for any allegation of bias in the choice would be substantially diminished.

19. With regard to paragraph 4, no proposals had been made during the discussion and the text remained unchanged.

20. In paragraph 5, the Working Group had adopted the proposal made by Mr. Rosenne at the previous meeting to replace in the first sentence the word "decisions" by the words "decisions and recommendations". In the second sentence, taking into account the views expressed by several members, the Working Group had decided to use language taken from the last portion of Article 65(1) of the Statute of the International Court of Justice. It would now be for the specialized agency concerned, or the General Assembly of the United Nations, to decide how the request for an advisory opinion should be made.

21. In paragraph 6, the words "resolution of the dispute" had been replaced by the words "settlement of the dispute". In the second sentence, the words "findings upon the facts and the law and its recommendations" had been replaced by the words "conclusions upon the facts and questions of law and the recommendations it has submitted to the parties". It was thus made clear that the intention was to refer to recommendations by the conciliation commission to the parties for the purpose of facilitating a settlement of a dispute.

22. In the third sentence, the opening words "The time limit for the preparation of the report" had been replaced by the words "The six months time limit" so as to make it clear that the possibility of extension referred to the six months' limit for initiating the conciliation proceedings and not to any time-limit for the preparation of the report, since according to the first sentence of the paragraph, the report should be prepared "as soon as possible". Provision had to be made for a possible extension of the six months' time-limit, because a request might be made for an advisory opinion of the International Court of Justice and it would be necessary to await that opinion and its consideration by the parties before a decision could be made that agreement of the parties was not possible.

23. The Working Group had examined the suggestion for the re-introduction at the end of paragraph 6 of the

⁴ See 1137th meeting, para. 21.

⁵ *Ibid.*, para. 26.

sentence reading: "The report shall not be binding upon the participating States or upon the Organization," but had reached the conclusion that the sentence was completely redundant. Since the proceedings were purely for the purpose of conciliation, it was self-evident that what would emerge from such proceedings could not be binding on the parties.

24. The Working Group had also examined the suggestion to introduce into paragraph 6 the formula according to which the report had to be considered in good faith by the participating States and by the Organization, a formula derived from article XIX, paragraph 2 of the draft convention on international liability for damage caused by space objects.⁶ The Working Group had come to the conclusion that, for present purposes, it was better to proceed on the assumption of good faith rather than to lay down a specific obligation that the report should be considered in good faith.

25. The Working Group had not accepted the proposal to delete paragraph 7 since it considered that provision necessary, but it had replaced the words "adopting any other appropriate procedure" by the words "establishing any other appropriate procedure", which had a slightly less legalistic connotation. It was hoped that that change would allay the concern of the opponents of paragraph 7.

26. Lastly, the Working Group had introduced a new paragraph 8, specifying that the provisions of article 81 were without prejudice to provisions concerning settlement of disputes in international agreements in force between States or between States and international organizations. It felt that that clarification was useful and would avoid any dispute regarding the nature and scope of article 4.

27. Mr. USHAKOV said he thought there was still room for improvement.

28. In article 82, paragraph 5, it was inappropriate to state that the Commission could be "authorized by ... the Charter of the United Nations" to request an advisory opinion from the International Court of Justice. Only the General Assembly and the Security Council were authorized by the Charter, under Article 96, to request an advisory opinion; other organs were required to obtain the prior authorization of the General Assembly to make a request. The beginning of the second sentence in paragraph 5 might therefore be amended to read: "If so authorized in accordance with the Charter of the United Nations, the commission may request an advisory opinion".

29. The second sentence in paragraph 3 was so drafted that it gave the impression that it was the request which should be made within a period of one month, whereas the intention was that it was the appointment which should be made within that period. A full-stop should be placed after the words "to appoint the Chairman". The paragraph would then continue: "This appointment shall be made within a further period of one month".

30. Lastly, in the English version of paragraph 7, the word "adopting" had been replaced by the word "establishing", but the word "adopter" had been left in the French version; it should be replaced by the verb "instituer".

31. Mr. REUTER said that although the Working Group had obviously done a great deal of work on article 82, he still could not support the procedure it laid down, and that for two reasons.

32. First, greater powers could not, in law, be conferred on a conference than on an organization. An organization could not, in the case of a dispute between States, take a step such as that provided for in paragraph 7. He therefore maintained his original position on that paragraph.

33. Secondly, with regard to paragraph 3, he was still in favour of wording which would enable the chief administrative officer of the Organization to leave it to the President of the International Court of Justice to appoint the third conciliator, for it was important not only that the decisions taken should be just, but that they should be seen to be just.

34. Mr. KEARNEY (Chairman of the Working Group), said that it was certainly not the purpose of paragraph 7 to empower a conference to do anything which it could not otherwise do. The power of a conference depended on the participating States and on the authority given by those States to their delegations at the conference. There had been no intention to prejudge the power of the conference, and if that intention had not been made sufficiently clear, the wording could be adjusted accordingly.

35. Mr. REUTER said that a solution which would make the position much clearer would be to say, in paragraph 7, that the conference might "recommend". If the dispute was between States and the whole system was based on that idea it would be for the States to accept the conference's recommendation or not, as it wished. But to say that the conference might "establish" a procedure for the settlement of a dispute was not much different from saying that it might "adopt" a procedure, for that would constitute a decision of the conference which was something he could not accept.

36. Mr. EUSTATHIADES said he wondered whether a different drafting might not overcome that difficulty. He suggested that the words "a conference from establishing" be replaced by the words "the establishment within a conference", which would give the provision a more general meaning.

37. The words "settlement of a dispute" led to an association of ideas with the case dealt with in article 81, which, however, was excluded by the phrase "nothing in the preceding paragraphs", since "paragraphs" could only refer to the remainder of article 82. He wondered whether it would not be preferable, as indeed had been suggested, to draft the paragraph to cover consultations as well.

38. Mr. THIAM said that the wording of the second sentence in article 82, paragraph 5, was defective. To

⁶ A/AC.105/94.

say that the Commission "may" do what it was "authorized" to do was clumsy.

39. In paragraph 6 the words "on a settlement of the dispute" seemed unnecessary, since the whole article dealt precisely with that.

40. Mr. KEARNEY (Chairman of the Working Group) said that the same problems arose with the language of Article 65(1) of the Statute of the International Court of Justice, on which the provision in question was based. It was also necessary to bear in mind the provisions of Article 96(2) of the Charter of the United Nations, which governed the question of requests for advisory opinions; such a request could be made, with the authorization of the General Assembly, by a specialized agency or by an organ of the United Nations other than the General Assembly itself or the Security Council. No definition, however, was given in the Charter of what constituted an "organ of the United Nations". It was possible that the proposed conciliation commission might be considered as such an organ and therefore come within the ambit of Article 96(2) of the Charter and Article 65(1) of the Statute of the International Court of Justice.

41. Mr. RUDA said that he shared the views of Mr. Reuter but wished to add two comments of his own. The first concerned article 81; he firmly believed that the consultations envisaged in that article should take place exclusively between the host State and the sending State. It was only if no agreement had been reached between those two States that, at the next stage, it was appropriate that the Organization itself should join in the proceedings.

42. Also, a minor point, the formula which had been added at the end of the article struck him as rather too vague; it should be worded more precisely in order to make it clear that the purpose of the consultations was to arrive at an amicable settlement of the dispute.

43. His second comment concerned the first sentence of paragraph 5 of article 82, where a reference to "recommendations" had been introduced. He had misgivings regarding the retention of the reference to "decisions", since that word implied a binding force that was not in conformity with the character of consultation proceedings. He therefore suggested the deletion of the words "decisions and". Those words should only be retained if it were clearly understood that the reference was to interim decisions relating exclusively to procedural matters and which did not touch on the merits of the dispute.

44. Mr. KEARNEY (Chairman of the Working Group) said that Mr. Ruda's interpretation was correct; the term "decisions", as used in the first sentence of paragraph 5, did not refer to binding judicial decisions. The conciliation commission had to make such procedural decisions as those connected with the extension of time-limits or with the request for an advisory opinion of the International Court of Justice.

45. Mr. ROSENNE said that, at the previous meeting, he had not proposed the deletion of the word "decisions" but simply its replacement by the phrase "decisions and recommendations", as had been done by the Working Group.

46. Mr. AGO said that the word "decisions" was essential, since the Commission would certainly have to take decisions during the procedure, such as a decision to request an opinion from the International Court of Justice, and the recommendations themselves were the result of a decision.

47. Mr. RUDA said that Mr. Ago's explanation certainly showed that "decisions" could only mean interlocutory decisions which did not affect the substance of a dispute and related solely to procedural matters.

48. Mr. CASTRÉN said that the new draft of articles 81 and 82 was even better than the previous text (A/CN.4/L.174/Add.3) which he had found very good.

49. With regard to article 81, it was certainly necessary to explain the purpose of the consultations. The word "amicable" was not very satisfactory, because under the Charter and under general international law, States must settle all their disputes amicably; indeed, conciliation itself was an amicable procedure. He therefore proposed that the word "amicable" be deleted.

50. With regard to article 82, it might perhaps be better to state in paragraph 5 that the Commission "shall reach its recommendations and other decisions" instead of "shall reach its decisions and recommendations." On the other hand, the text of the second sentence ought not to be amended, even if what it contained might appear self-evident. The reminder was not out of place.

51. Paragraph 6 might be simplified as proposed by Mr. Thiam.⁷

52. Mr. Eustathiade's suggestion for paragraph 7 was very ingenious.⁸ It should be noted, however, that a conciliation procedure was sometimes established even before a conference convened. An example was the Agreement of 15 February 1968 between the United Nations and the Iranian Government regarding arrangements for the International Conference on Human Rights to be held in Teheran in 1968.⁹ That Agreement contained a section X on privileges and immunities which referred to the United Nations Convention on Privileges and Immunities,¹⁰ and a section XVI which referred to the procedure laid down in section 30 of that convention for the settlement of disputes involving a question of principle concerning the Convention and establishing a procedure for dealing with other disputes.

53. He approved of the addition of paragraph 8 modelled as it was on paragraph 3 of the former article 50 (A/CN.4/L.171).

54. Mr. ELIAS requested that separate votes be taken on articles 81 and 82.

55. He said he would vote in favour of article 81 as it stood, although for the concluding formula he would have preferred the shorter and simpler language: "with a view to effecting a settlement of the dispute".

⁷ See para. 39 above.

⁸ See para. 36 above.

⁹ United Nations, *Treaty Series*, vol. 631, p. 104.

¹⁰ *Ibid.*, vol. 1, p. 14.

56. With regard to article 82, he could agree with Mr. Thiam's suggestion to delete the words "to the conciliation proceedings on a settlement of the dispute", in the first sentence of paragraph 6.

57. Mr. AGO said he was not against the deletion of the word "amicable" in article 81.

58. On the other hand, he hoped that the phrase "exploring possibilities" would be retained because it showed clearly that consultations were not a procedure. Article 81 established something which went further than consultations between two States, which were a matter of course if those States maintained diplomatic relations. The justification for a special provision was precisely the possibility of tripartite consultations.

59. As to article 82, in paragraph 5 the word "decisions" should be retained before "recommendations", because it brought out the fact that the decisions were merely interlocutory. On the other hand, the second sentence in the paragraph might with advantage be amended in accordance with Mr. Ushakov's suggestion.¹¹

60. If the words "States" and "to the conciliation proceedings" in the first sentence of paragraph 6 were deleted, that would simplify the text.

61. In paragraph 7 no reference should be made to article 81, because article 81 itself applied to conferences as well. Paragraph 7 should not therefore cover consultations.

62. Mr. Reuter's suggestion¹² to say "recommending" instead of "adopting" or "establishing" had its attractions, but some rules of procedure might provide that if a dispute arose—on privileges and immunities, for example,—a small committee should be set up to settle it; that went beyond a recommendation.

63. On the other hand, he would be glad to support Mr. Eustathiades' suggestion¹³, if it made general agreement easier. The words "for the settlement of a dispute arising" might perhaps be replaced by the words "for the settlement of disputes arising", since they might give the impression that something was to be imposed on a State after a dispute had arisen.

64. Mr. ROSENNE said that he was prepared to accept articles 81 and 82 as a whole in the form in which they were now proposed.

65. For the concluding words of article 81, he would himself suggest the even shorter formula "with a view to settling the dispute". That language was more suitable in view of the element of formalization in the consultations envisaged, which was not usual for consultations in general. In the case under consideration, the two States concerned in the consultations might not have diplomatic relations between themselves or might not even recognize one another.

66. In paragraph 6 of article 82, he felt that it was

essential to retain the reference to the inability to reach an agreement.

67. He could not support paragraph 7 as it stood, but could accept it if suitably amended.

68. In paragraph 8, the word "the" should be inserted between the words "concerning" and "settlement".

69. Mr. USHAKOV said that if it were merely a matter of improving the drafting of paragraph 7, he was prepared to support the wording proposed by Mr. Eustathiades.¹⁴

70. On the other hand, he was opposed to the deletion of the paragraph. If that were done, what would happen if a dispute arose in connexion with a conference convened at Sydney, say, by an organization with headquarters in New York? The parties would first have to hold consultations under article 81. If those failed, the parties would have to begin by resorting to any procedures which might have been established within the organization, and that would mean that they would have to go to New York. Only after that would they resort to the conciliation procedure laid down in article 82, with all the delay that involved. The conference would have been over long since. That was why a safeguard clause such as paragraph 7 was essential: it provided a speedier solution. Such long delays might be tolerable for permanent missions, but were impossible for a conference which met for only a brief period. Those members of the Commission who were against paragraph 7 should at least propose a specific solution to the difficulty.

71. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to the replacement of the words "with a view to exploring the possibilities of an amicable disposition of the dispute", at the end of article 81, by the words "with a view to disposing of the dispute".

It was so agreed.

72. The CHAIRMAN put article 81, as thus amended, to the vote.

Article 81, as thus amended, was adopted by 15 votes to none, with 1 abstention.

73. The CHAIRMAN said that, before putting article 82 to the vote, he wished to confirm that there was general agreement on a number of amendments.

74. First, at the end of the second sentence of paragraph 3, a full stop should be placed after the words "the Chairman" and the remainder of the sentence should be deleted and replaced by the words: "This appointment shall be made within a period of one month".

75. Secondly, in paragraph 5, the beginning of the second sentence should be amended to read: "If so authorized in accordance with the Charter of the United Nations, the Commission may . . .".

¹¹ See para. 28 above.

¹² See para. 35 above.

¹³ See para. 36 above.

¹⁴ *Ibid.*

76. Thirdly, in the second line of paragraph 6, the word "States" and the words "to the conciliation proceedings" should be deleted, so that the passage would now read "among the parties".

77. Fourthly, paragraph 7 should be amended to read: "Nothing in the preceding paragraphs shall preclude the establishment of another appropriate procedure for the settlement of disputes arising in connexion with the Conference."

78. If there were no objection, he would take it that the Commission accepted those amendments.

It was so agreed.

79. The CHAIRMAN said he would now put article 82, as thus amended, to the vote paragraph by paragraph.

Paragraph 1

Paragraph 1 was adopted by 16 votes to none.

Paragraph 2

Paragraph 2 was adopted by 16 votes to none.

Paragraph 3

80. Mr. EUSTATHIADES said he did not think the chairman of the conciliation commission need be a qualified jurist, as provided in the last sentence of paragraph 3, since the matters which would be the subject of a conciliation procedure would not necessarily be primarily of a legal nature. It would therefore be better to allow the chief administrative officer of the organization complete latitude to appoint the person best suited for the task. He accordingly proposed that the beginning of the last sentence of paragraph 3 be amended to read: "The chief administrative officer of the Organization shall appoint the Chairman, who shall be neither an official of the Organization nor a national...".

81. Mr. CASTRÉN said he endorsed the views of Mr. Eustathiades.

82. Mr. YASSEEN said he could not agree. Conciliation could not relate to anything but a purely legal dispute, since the dispute would have arisen "out of the application or interpretation of the articles". Consequently, only a jurist would be qualified to handle the dispute.

83. Mr. ROSENNE said that Mr. Eustathiades had been right to raise that point, since not every dispute was a legal dispute. The real difficulty was that there was no standard definition of the term "qualified jurist".

84. Mr. ELIAS said that the term "qualified jurist" should be retained, since the task required sound legal knowledge.

85. Mr. AGO said that the article would suffer if it were amended as proposed by Mr. Eustathiades, since the word "jurist" drew attention to the fact that the conciliation procedure was designed to settle points of law.

86. The CHAIRMAN put Mr. Eustathiades' amendment to the vote.

Mr. Eustathiades' amendment was rejected by 9 votes to 5, with 2 abstentions.

87. The CHAIRMAN put paragraph 3, as previously amended, to the vote.

Paragraph 3, as thus amended, was adopted by 14 votes to 1, with 1 abstention.

88. The CHAIRMAN put paragraph 4 to the vote.

Paragraph 4 was adopted by 15 votes to 1.

89. The CHAIRMAN put paragraph 5, as previously amended, to the vote.

Paragraph 5, as thus amended, was adopted by 16 votes to none.

90. The CHAIRMAN put paragraph 6, as previously amended, to the vote.

Paragraph 6, as thus amended, was adopted by 16 votes to none.

91. The CHAIRMAN put paragraph 7, as previously amended, to the vote.

Paragraph 7 was adopted by 16 votes to none.

92. The CHAIRMAN put paragraph 8 to the vote.

Paragraph 8 was adopted by 16 votes to none.

93. The CHAIRMAN put article 82 as a whole to the vote.

Article 82 as a whole was adopted by 15 votes to none, with 1 abstention.

94. Mr. REUTER, explaining his vote, said that he had abstained from voting on article 82 as a whole and had voted against paragraph 3 because the Commission, for a reason which he did not consider valid, had refused to allow the chief administrative officer of the organization the right, when he saw fit, to delegate to an eminent personality, namely, the President of the International Court of Justice his right to appoint a member of the conciliation commission. He himself did not think the Commission could really be suspicious of the President of the International Court of Justice, since it had approved the advisory opinion procedures as a means of guidance for the conciliation commission. His contention was that the chief administrative officers of international organizations—which were not participating in the preparation of a set of articles which concerned them—should have the right to commit themselves, if necessary, to the defence of a legal argument during a consultation procedure and the right to adopt a procedure

which could, in the eyes of third parties as well as of the parties to the dispute, invest the chairman of the conciliation commission with all the necessary authority. That was absolutely essential, since it was too often overlooked that the same person could not appear in a case both as judge and party.

95. Mr. RUDA, explaining his vote, said that he had abstained from voting on paragraph 3 for the reasons which he had stated at the previous meeting.¹⁵

96. Mr. ALCÍVAR, explaining his vote, said that he had voted in favour of paragraph 6, though he hoped the commentary would mention the final sentence in the original paragraph 6 (A/CN.4/L.174/Add.3) which read: "The report shall not be binding upon the participating States or upon the Organization", but which had been deleted.

The meeting rose at 1 p.m.

¹⁵ See 1137th meeting, para. 48.

1139th MEETING

Monday, 19 July 1971, at 3.10 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Sir Humphrey Waldock.

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 to 3; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.174/Add.4 and 5)

[Item 1 of the agenda]

(continued)

FOURTH REPORT OF THE WORKING GROUP

Draft articles on observer delegations to organs and conferences and paragraphs 1(9) and 1(10) of article 1 (Use of Terms) of the consolidated draft articles

ARTICLE A and paragraphs 1(9) and 1(10) of article 1 (Use of Terms)

1. The CHAIRMAN invited the Commission to consider the Working Group's draft articles on observer

delegations to organs and conferences, contained in its fourth report (A/CN.4/L.174/Add.4 and 5), commencing with article A.

2.

Article A

Use of terms

(a) "observer delegation to an organ" means the delegation sent by a State to observe on its behalf the proceedings of the organ;

(b) "observer delegation to a conference" means the delegation sent by a State to observe on its behalf the proceedings of the conference;

(c) "observer delegation" means, as the case may be, the observer delegation to an organ or the observer delegation to a conference;

(d) "sending State" means the State which sends:

...

(iii) an observer delegation to an organ or an observer delegation to a conference;

(e) "observer delegate" means any person designated by a State to attend as an observer the proceedings of an organ or of a conference (A/CN.4/L.174/Add.5).

3. Mr. KEARNEY (Chairman of the Working Group) said that the foreword (A/CN.4/L.174/Add.4) to the Working Group's fourth report explained the manner in which the Working Group had established the texts of twenty-three draft articles designated A to W on observer delegations. The fundamental assumption on which those articles were based was that an observer delegation would consist of one or two observers and that its functions would be strictly confined to observation.

4. The Working Group had decided to present those articles as a separate set, to be annexed to the consolidated draft articles, because governments and secretariats of international organizations had not yet had an opportunity to express their views on them. The articles had, however, been so drafted as to facilitate their integration into the consolidated draft if it were so decided either by the General Assembly or by a future conference of plenipotentiaries.

5. A small correction should be made to the title so that it read "Observer delegations to organs and to conferences"; that would bring it into line with the title of Part III.

6. The first article, dealing with the use of terms, was numbered article A; the provisions of sub-paragraphs (a) and (b) described the meaning of the terms "observer delegation to an organ" and "observer delegation to a conference" in such a manner as to stress that those delegations had simply the function of observation. Sub-paragraph (c) dealt with the term "observer delegation", which covered both observer delegations to organs and observer delegations to conferences. The purpose of sub-paragraph (d) was to insert in the definition of "sending State" an additional passage to cover the sending State of an observer delegation. Sub-paragraph (e) dealt with the meaning of "observer delegate", as being a person who was a member of an observer delegation.

7. Mr. ROSENNE said he noticed that, as explained in paragraph 4 of its foreword (A/CN.4/L.174/Add.4),

the Working Group proposed amendments (A/CN.4/L.174/Add.5), to paragraphs 1(9) and 1(10) of article 1.¹ He would like to know whether those amendments would be examined together with article A, with which they were connected.

8. Also, since it was suggested that the present set of articles should constitute an annex, he would like to know whether the proposed amendments to paragraphs 1(9) and 1(10) of article 1 would stand, regardless of the General Assembly's decision on articles A to W.

9. Mr. KEARNEY (Chairman of the Working Group) said that it was indeed the intention to submit articles A to W in the form of an annex, leaving open the question of how the General Assembly might deal with those articles.

10. He agreed that it would be advisable to deal, in conjunction with article A, with the Working Group's proposal to reword paragraphs 1(9) and 1(10) of article 1 (Use of terms) to read:

"(9) 'delegation to an organ' means the delegation sent by a State to participate on its behalf in the proceedings of the organ;

"(10) 'delegation to a conference' means the delegation sent by a State to participate on its behalf in the proceedings of the conference." (A/CN.4/L.174/Add.5)

11. The purpose of those amendments was to bring out the distinction between a delegation to an organ and a delegation to a conference more clearly than was the case with the texts of those sub-paragraphs given in the Working Group's second report (A/CN.4/L.174/Add.2). Those earlier texts referred to a delegation sent by a State "to represent it" in an organ or at the conference. The wording now proposed referred to a delegation sent by a State "to participate on its behalf" in the proceedings of the organ or of the conference.

12. Mr. ROSENNE said that there had been an intentional lack of symmetry between the original wording of paragraph 1(9), which described a "delegation to an organ" as meaning the delegation sent by a State to represent it in the organ, and paragraph 1(10), which described a "delegation to a conference" as meaning the delegation sent by a "participating" State to represent it at the conference.

13. That subtle difference had been discussed when the Commission had considered article 1 at its 1130th and 1131st meetings, and also at the 1135th meeting, when the Commission had discussed the text of article 11 submitted by the Working Group on second reading. On those occasions, it had been explained on behalf of the Working Group that the deliberate lack of symmetry was intended to allow for the great variety of delegations to organs. It was for that reason that the term "participating State" had not been used in the original text of paragraph 1(9). It was, however, used in paragraph 1(10) because the position in the case of conferences was more

clear-cut; the term "participating State" had in that context the same technical meaning as in the 1969 Vienna Convention on the Law of Treaties.

14. He would therefore urge that paragraphs 1(9) and 1(10) of article 1 be left unchanged because their original wording served to bring out the great variety of situations covered by the term "delegation to an organ". They included the case of a State member of an organization which was not a member of the organ and that of a State which was not a member of the Organization at all.

15. As far as article A was concerned, he suggested the insertion, in sub-paragraph (b), after the words "by a State", of the words "not participating in the conference". No similar change would of course be made in sub-paragraph (a).

16. Mr. USHAKOV said that, apart from the new series of articles on observer delegations, the Working Group had considered that the definitions in article 1, paragraphs (9) and (10) should be amended to stress the function of participation in an organ or a conference rather than the function of representation, since the latter was common to all delegations of all kinds. Not only were the proposed new definitions more consistent with the facts, but they brought out clearly the distinction between participating States and other States.

17. Mr. AGO said that the need to amend the definition in article 1, paragraphs (9) and (10), had appeared even more obvious when the Working Group had come to draw a distinction between observer delegations and delegations proper. The definition in paragraph (9) in particular did not exclude observer delegations, since the function of any delegation was to represent the sending State; but it was intended to cover only delegations of States which participated in the proceedings of an organ, regardless of whether they were members of the Organization and of the organ, members of the Organization only but invited to take part in the proceedings of the organ, or even invited to take part in the proceedings of the organ though not members of the Organization, as might happen in the Security Council, for example. In every case the essential point to be brought out was participation in the proceedings.

18. The Commission as well as the Working Group had failed to notice a contradiction between the definition of "delegation" in paragraph (9) and the definition of "delegate" in paragraph (19), where it was stated that a delegate participated in the proceedings of an organ or of a conference. The definitions relating to observer delegations brought out even more clearly the fact that observer delegations did not participate in the proceedings of organs or of conferences.

19. Mr. ROSENNE said he did not think it was correct to draft paragraphs (9) and (10) in a way that maintained in the definitions an exact parallelism between the two types of delegation. There was a very substantive difference between a delegation participating in a conference—which was clear-cut, and a delegation observing a conference—which was also clear-cut, and those various

¹ See 1130th meeting, para. 13 and 1131st meeting, para. 49.

shades of participation and non-participation and being present and being represented and so on at a meeting of an organ.

20. For instance, he was not convinced that a delegation of a Member of the United Nations which was not a member of the Security Council which participated in a meeting of the Security Council as of right under Article 31 of the Charter was, strictly speaking, an observer delegation. The extreme parallelism which was now proposed for paragraphs (9) and (10), and which was matched in definitions A (a) and A (b), did not adequately reflect the real situation.

21. Mr. KEARNEY (Chairman of the Working Group) said that a delegation sent by a Member of the United Nations which was not a member of the Security Council to participate in the proceedings of that Council under Article 31 of the Charter would not be an observer delegation within the meaning assigned to the term "observer delegation to an organ" by sub-paragraph (a) of article A.

22. Mr. BARTOŠ said he agreed with Mr. Rosenne. There was a difference between States which sent an observer delegation to the Security Council and those which, under the Charter or the rules of procedure of the Security Council, took part in the Security Council's discussions but were not entitled to vote and were not regarded as observers. It was, therefore, an oversimplification to classify as observers all States which did not participate in the decisions or organs; the exceptional situation of those which participated in the discussions without being entitled to vote should also be taken into consideration.

23. Sir Humphrey WALDOCK said that it had never been in the minds of the members of the Working Group that a delegation attending Security Council proceedings under Article 31 of the Charter would be considered as an observer delegation. Such a delegation was not merely observing the proceedings; it was actually "participating" in them without vote, as the language of that Article expressly stated.

24. Mr. USHAKOV said that the new definitions proposed in paragraphs (9) and (10) brought out better than the previous texts the fact that the delegations with which they dealt participated in the proceedings of the organs or of the conference and consequently were not observers, any more than were the States referred to in Articles 31 and 32 of the Charter which, though not members of the Security Council, were invited to participate in its proceedings without vote, whether or not they were Members of the United Nations.

25. Mr. ROSENNE said that the discussion had gone a long way towards clarifying the position, but he still felt that a certain asymmetry between the definitions of "delegation to an organ" and "delegation to a conference" was necessary. He therefore proposed the deletion of the words "the proceedings of", in paragraph (10) of article 1.

26. Mr. EUSTATHIADES said that the new definitions proposed by the Working Group were a considerable

improvement, because they replaced the notion of representation by the notion of participation in the proceedings; the Commission should retain them.

27. The advantage of the notion of participation was that it covered three possible categories of delegations in the light of the Charter and practice: delegations which participated in the proceedings with the right to vote, delegations which participated in the discussions without the right to vote, and delegations which were allowed to express their views without taking part in the discussions.

28. It was not possible to speak of "participation" without mentioning proceedings, since observers too exercised that kind of participation. The text proposed by the Working Group should preferably, therefore, be retained as it stood and an explanation should be given in the commentary of the various types of participation involved.

29. Mr. USHAKOV said that it was States which participated in the proceedings and delegations which participated in the conference, so that the words "the proceedings of" in paragraph (10) could be deleted.

30. Mr. SETTE CÂMARA said the Working Group's redraft of paragraphs (9) and (10) of article 1 established a clearer distinction between observer delegations to organs and to conferences respectively.

31. He saw no reason to discuss the problem of Article 31 of the Charter. The representatives of a Member State attending the proceedings of the Security Council under the Charter were by no means observers; they participated in the work of the Council.

32. He fully supported the proposed article A, particularly the emphasis placed on the main function of an observer delegation, which was simply to observe certain proceedings.

33. Mr. KEARNEY (Chairman of the Working Group) said that he realized the need to cover the point raised by Mr. Rosenne.

34. The proposed wording for paragraphs 1(9) and 1(10) of article 1 had the disadvantage of using the same language to describe two different types of delegations, and the same was true of paragraphs (a) and (b) of article A. An observer delegation to an organ had in fact more limited functions than an observer delegation to a conference. One method of bringing out that difference might be to replace the concluding portion of paragraph (a) by some such wording as: "to participate in the proceedings of the organs to the extent permitted by the rules of procedure of that organ".

35. Mr. CASTRÉN said that the new definitions proposed for paragraphs (9) and (10) were a great improvement. Since, however, there were several forms of participation and an observer participated in fact in a conference—though not in the same way as an ordinary delegation—to an even greater degree if given the right to express its views, it would be preferable to maintain the words "participate in the proceedings" and to explain clearly in the commentary the difference

between observer delegations and ordinary delegations.

36. In the definitions in paragraphs (a) and (b) of the French version of article A, the word "*observer*" should be replaced by the word "*suivre*", which was the word used in paragraph (e), in order to avoid stating a self-evident fact. The same change might be made in the English version, where the words "to observe" would be replaced by the words "to attend".

37. Mr. THIAM said that the Working Group had rightly wished to draw a distinction between the functions of observation and of participation, but in reality, the notion that an observer participated in the proceedings of a conference could not be entirely discarded. It would be better, therefore, as Mr. Eustathiades had proposed, to explain in the commentary what was meant by participation and to set out the various degrees of participation which might be entailed.

38. Mr. AGO, referring to the comments of Mr. Rosenne and Mr. Kearney on the possibility of introducing a shade of difference between the definitions in paragraphs (9) and (10), said that, in his opinion, Mr. Kearney's proposal could not be accepted because it would equally apply to many other articles, and in the case of conferences too.

39. To say simply, as Mr. Rosenne proposed, "to participate on its behalf in the conference" would be a good way out, because there was only one form of participation in a conference, whereas participation in the proceedings of an organ assumed various forms. He could therefore accept the amendment proposed by Mr. Rosenne.

40. Mr. USHAKOV said he formally seconded Mr. Rosenne's proposal for the deletion of the words "in the proceedings of" in paragraph (10).

41. Mr. KEARNEY (Chairman of the Working Group) said that he would not press his suggestion to amend the concluding words of sub-paragraph (b). Instead he would support Mr. Rosenne's proposal to delete the words "the proceedings of" in paragraph 1 (10).

42. Mr. EUSTATHIADES asked whether the explanations he had suggested would be placed in the commentary, even if Mr. Rosenne's amendment were adopted.

43. The CHAIRMAN said he could assure him that they would. He would now put Mr. Rosenne's amendment for the deletion of the words "the proceedings of", in paragraph 1 (10), to the vote.

Mr. Rosenne's amendment was adopted by 10 votes to 2, with 5 abstentions.

44. The CHAIRMAN put article 1, paragraph (9), and paragraph (10) as amended, to the vote.

Article 1, paragraph (9), and paragraph (10) as amended, were adopted by 16 votes to none, with 2 abstentions.

45. The CHAIRMAN put article A to the vote.

Article A was adopted by 17 votes to none.

46. Mr. EL-ERIAN, explaining his vote, said that he wished to make a clear distinction between juridical participation and physical participation. For example, Article 35, paragraph 2, of the Charter stated: "A State which is not a member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter". In such a case, the State might participate physically in the meeting of the Security Council or of the General Assembly, and might even speak, but that would not amount to juridical participation.

ARTICLE B (Sending of observer delegations)

ARTICLE C (Appointment of the observer delegates)

ARTICLE D (Letters of appointment of the observer delegates)

ARTICLE E (Appointment of the observer delegation and

ARTICLE T (Privileges and immunities of other persons)

47. The CHAIRMAN invited Mr. Kearney, Chairman of the Working Group, to introduce articles B to E (A/CN.4/L.174/Add.5).

48.

Article B²

Sending of observer delegations

A State may send an observer delegation to an organ or to a conference in accordance with the rules and decisions of the Organization.

49.

Article C³

Appointment of the observer delegates

Subject to the provisions of article 71, the sending State may freely appoint the observer delegates.

50.

Article D⁴

Letters of appointment of the observer delegates

The letters of appointment of the observer delegates shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs, or, if the rules of the Organization or the rules of procedure of the conference so admit, by another competent authority of the sending State. They shall be transmitted, as the case may be, to the Organization or to the conference.

51.

Article E⁵

Composition of the observer delegation

1. The observer delegation shall consist of one or more observer delegates.

2. With the consent of the host State, it may include additional personnel.

² Corresponds to article 41.

³ Corresponds to article 42.

⁴ Corresponds to article 43.

⁵ Corresponds to article 44.

52. Mr. KEARNEY (Chairman of the Working Group) said that article B was the same rule as that laid down in article 41 concerning delegations to organs and conferences.

53. Article C differed from article 42 in that the latter referred to articles 45 and 71, while article C referred only to article 71; article 45 referred to the size of a standard delegation and was not referred to in article C because of the changes which had been made with respect to the composition of observer delegations.

54. Article D followed the same approach as that used with respect to the members of regular delegations.

55. Article E was a combination of provisions concerning the composition and size of observer delegations. The Working Group had decided to eliminate the long list of representatives, members of the diplomatic staff and the like, in order to simplify the draft. If additional staff should be necessary, it would be covered by paragraph 2.

56. Mr. BARTOŠ said he regretted that article E did not mention the diplomatic staff of the observer delegation. It was true that it spoke of "additional personnel", but that was a very vague expression to use where a matter of such great practical importance was concerned.

57. Mr. EL-ERIAN said that the point made by Mr. Bartoš should be mentioned in the commentary, namely, that the meaning of the term "additional personnel" was clear in the light of the other parts of the draft articles.

58. The CHAIRMAN asked if members wished to take a single vote on articles B to E.

59. Mr. BARTOŠ asked for a separate vote on article E.

60. The CHAIRMAN put articles B, C and D to the vote.

Articles B, C and D were adopted by 15 votes to none.

61. The CHAIRMAN invited the Commission to consider article E.

62. Mr. USHAKOV proposed that the word "shall" be replaced by the word "may" in paragraph 1, in order to express the fact that the sending State had a faculty in the matter.

63. He also proposed that paragraph 2 be amended to read: "With the consent of the host State, it may also include personnel."

64. Mr. BARTOŠ said that in his view the provision in paragraph 2 was quite impracticable because it would mean that the consent of the host State would have to be obtained to bring in a typist or a cipher clerk.

65. Mr. CASTRÉN said that he entirely agreed with Mr. Bartoš that paragraph 2 was too strict. The sending State should be free to include junior staff.

66. Mr. KEARNEY (Chairman of the Working Group)

said that in drafting article E, the Working Group had been anxious not to overload it with a long list of different classes of persons who might be present in the observer delegation. He would not, however, have any objection to a specific reference to secretarial assistants, although the consent of the host State would be necessary if the sending State wished to include diplomatic, technical, administrative and private staff in the observer delegation.

67. Mr. USHAKOV said that the Working Group had been thinking more of privileges and immunities than of the composition of the observer delegation. Perhaps the following wording would meet the point made by Mr. Bartoš: "With the consent of the host State, it may also include personnel consisting of persons enjoying privileges and immunities".

68. Mr. BARTOŠ said that to stipulate the consent of the host State amounted to giving it a power of veto and restricting the freedom of action of the sending State.

69. He had already reminded the Commission⁴ of what had happened after the First and again after the Second World War. It was Clemenceau who had conceived the idea of States with a limited interest in the drawing up of the peace treaties. Those States had only been allowed to express their views through a single observer, whereas the Allied powers had been able to call on all the experts they wanted. The provision was a clear infringement of the principle of the equality of States.

70. Mr. ROSENNE said that it was his understanding that the faculty with respect to the use of the word "may" was exclusively that of the sending State.

71. Mr. BARTOŠ proposed the deletion of the opening words "With the consent of the host State", in paragraph 2. In no event should the sending State be required to seek the blessing of the host State before it could include in its delegation the staff it needed.

72. Mr. KEARNEY (Chairman of the Working Group) said that in that case he feared that it would be necessary to amend several other articles, such as article F, on notifications.

73. Mr. USHAKOV said that paragraph 2 of article E was related to paragraph 2 of article T. If the former were deleted, the latter would lose all meaning.

74. Mr. BARTOŠ said that, in his view, to lay down a general rule to the effect that the additional personnel did not automatically enjoy privileges and immunities, and that those depended on agreement between the host State and the sending State, placed the sending State in the hands of the host State, which might abuse its position. A rule of that kind conflicted both with United Nations practice and with present-day diplomatic practice.

75. Moreover, he did not see why a provision such as that in paragraph 2 of article T had been submitted. If that provision came before the General Assembly, States would be clamouring about the lack of adequate

⁴ See 1122nd meeting, paras. 50 and 51.

safeguards for the personnel of the delegation. For instance, if a cipher clerk of an observer delegation were refused privileges and immunities by the host State, the delegation's cipher would be at the latter's mercy. He felt it was his duty as a jurist to warn the Commission of the practical repercussions of such a dangerous solution.

76. Mr. USHAKOV said that the Working Group had taken into consideration the fact that the task of an observer delegation was not to participate in the work of the body concerned but to act as an observer. Generally speaking, therefore, an observer delegation did not need experts. If that proved necessary in a specific case, however, two courses were open to the sending State: either to appoint an expert observer delegate, which was always possible, or, if it wished the delegation to include personnel in addition to the expert delegate, to conclude an agreement with the host State. The situation was therefore less dramatic than it might seem.

77. Mr. CASTRÉN said he could support Mr. Bartoš's proposal on condition that the Commission added to article E a provision on the size of the observer delegation similar to that adopted by it in article 45 in connexion with the size of a delegation to an organ or conference.⁷

78. Mr. USHAKOV said that he thought that wording modelled on the article referred to by Mr. Castrén could be added to paragraph 2 without deleting the words "With the consent of the host State".

79. Mr. REUTER said that, in his opinion, the discussion of paragraph 2 should be combined with the discussion of article T.

80. Sir Humphrey WALDOCK said that he had not been with the Working Group when article T was considered and he was somewhat surprised that the consent of the host State should be the determining factor. He would suggest that some less categorical language be used such as "In addition, with the consent of the host State, it may include further personnel necessary for the performance of its official functions".

81. Mr. AGO said he thought the real problem lay in article T.

82. He was opposed to the addition of wording similar to that adopted by the Commission in article 45, which was too widely drawn to be justifiable for an observer delegation to an organ or conference.

83. Perhaps it would be sufficient to add at the beginning of paragraph 2 some such wording as: "Subject to what is reasonable and normal, it may...". If the consent of the host State was not required, the additional personnel would automatically enjoy the privileges and immunities provided for in the draft articles. If, on the other hand, the consent of the host State was required, the relevant agreement would cover the question of privileges and immunities.

84. Mr. EUSTATHIADES said he supported the view expressed by Mr. Reuter. In any case, the suggestions put forward by Sir Humphrey Waldock and Mr. Ago would probably suffice to reflect the idea which Mr. Castrén sought to express.

85. Sir Humphrey WALDOCK said that he was inclined to agree that the Commission should discuss article E in conjunction with article T.

86. The CHAIRMAN proposed that the Commission consider article T before taking any decision on article E.

It was so decided.

87.

Article T

Privileges and immunities of other persons

1. Members of the families of observer delegates shall, if they accompany such observer delegates, enjoy the privileges and immunities specified in articles M to O and Q to S provided that they are not nationals of or permanently resident in the host State.

2. The situation of any additional personnel of the observer delegation shall be regulated by special agreement between the sending State and the host State (A/CN.4/L.174/Add.5).

88. Mr. KEARNEY (Chairman of the Working Group) said that article T dealt primarily with the privileges and immunities of members of the family of observer delegates. Paragraph 2 dealt with the situation of additional personnel, which was intimately connected with the requirement of the consent of the host State referred to in paragraph 2 of article E. As Mr. Ushakov had pointed out in connexion with that paragraph,⁸ the Working Group had assumed that observer delegations were sent merely for purposes of observation and were usually extremely limited with respect to their composition. In his own experience, they seldom consisted of more than two persons.

89. Mr. BARTOŠ said that observer missions, as defined, did not play a purely passive role but also engaged in important political activity. It was therefore essential that the attribution of privileges and immunities to the additional personnel of observer delegations should not be left to the discretion of the host State.

90. It had taken two centuries to establish guarantees that the representative of the sending State would be accorded privileges and immunities. If a contrary idea were embodied in the draft articles, a principle would have been adopted which would conflict with the whole of international law and even with the Charter, which, in Article 105, stated that representatives of the Members of the United Nations and officials of the Organization should enjoy such privileges and immunities as were necessary for the independent exercise of their functions; they did not enjoy them in their personal interest.

91. Sir Humphrey WALDOCK said that he shared the difficulty referred to by Mr. Bartoš, although to a some-

⁷ See 1133rd meeting, paras. 105 to 107.

⁸ See para. 76 above.

what less extent. He felt that article T must at least include a provision to the effect that any additional personnel should enjoy immunity from jurisdiction in respect of acts performed in the exercise of their official functions.

92. Mr. ROSENNE said that he was grateful to Mr. Bartoš for having raised his point, since the Commission's work might otherwise have been rejected by the General Assembly.

93. He wished to ask the Working Group about the relationship between article I and the apparent veto of the host State referred to in article E. Article I stated that "The Organization or, as the case may be, the Organization and the conference, shall, where necessary, assist the sending State, its observer delegation and the observer delegates in securing the enjoyment of the privileges and immunities provided for in the present articles." How did that article operate if the granting of privileges and immunities was intended to be the exclusive prerogative of the host State?

94. A second question: if the host State did not grant minimum privileges and immunities, did the Working Group envisage that the procedure for consultations would be applicable? If the answer was in the affirmative, it would be necessary to redraft all the articles in order to exclude that apparent right of the host State.

95. Mr. USHAKOV said that article 37 dealt with a specific case and that the régime of privileges and immunities that it established could not be easily transposed.

96. Ultimately, there were two solutions: either to enumerate the various classes of personnel which could form part of an observer delegation—diplomatic, administrative and technical, service and domestic—or to state that observer delegations consisted solely of delegates. In the latter case, the consent of the host State would be necessary for the other members of the personnel. In the former case, the enumeration would be a very long one for a delegation whose sole task was to observe and not to participate in the work of the body concerned.

97. Sir Humphrey WALDOCK said that it had not been in his mind to propose that the Commission should drop article U, which referred to nationals of the host State and persons permanently resident in the host State. He was troubled, however, by the fact that the "other persons" referred to in article T might include experts and confidential secretaries whose privileges and immunities would be at the disposal of the host State. He did not think that the host State could admit persons in an observer delegation, other than private servants, without granting them privileges and immunities in respect of their official acts.

The meeting rose at 6.10 p.m.

1140th MEETING

Tuesday, 20 July 1971, at 10.25 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Sir Humphrey Waldock.

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 to 3; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.151; A/CN.4/L.162/Rev.1; A/CN.4/L.173; A/CN.4/L.174/Add.4 and 5)

[Item 1 of the agenda]

(continued)

FOURTH REPORT OF THE WORKING GROUP

(continued)

Draft articles on observer delegations to organs and conferences (continued)

ARTICLE E (Composition of the observer delegation) and ARTICLE T (Privileges and immunities of other persons) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of articles E and T in the Working Group's fourth report (A/CN.4/L.174/Add.5).
2. Mr. KEARNEY (Chairman of the Working Group) said that there appeared to be serious differences of opinion as to the approach the Commission should take in dealing with observer delegations. One of the problems was that the Secretariat had not produced any full-scale study showing what was the practice concerning such delegations.
3. In view of the broad definition given to the term "delegation", the Working Group had decided that it was dealing with a very limited type of delegation which would exist only on relatively rare occasions and which would normally consist of only one or two persons. He personally was not aware of any customary law whatever concerning observer delegations of that type. He would therefore submit that the Commission had three courses open to it.
4. Either it could follow the line proposed by the Working Group, with some modifications. Or it could say that observer delegations were entitled to all the privileges and immunities enjoyed by regular delegations; in his view, that would be an extreme course for which no basis in international law existed. Or again, it

could conclude that there was simply such a lack of general information and scientific studies that it was unable to take a final decision at the present time.

5. He had no objection to expanding the present text to include the case of such assistants as coding clerks and secretaries, if the Commission considered that necessary. For example, paragraph 1 of article E might state that the observer delegation could consist of one or more observer delegates and the essential technical and administrative personnel.

6. That would, of course, raise the question of the privileges and immunities to be granted to such technical and administrative personnel under paragraph 2 of article T. He could agree to amend paragraph 2 of article T, as Sir Humphrey Waldock had suggested, in order to provide exemption from jurisdiction for such additional personnel in respect of acts performed in the exercise of official duties. Such an amendment would involve certain consequential amendments to other articles, such as articles Q and R. He was, however, opposed to the complete assimilation of observer delegations to regular delegations.

7. The Commission should either reject the Working Group's draft articles altogether or else make only modest changes in them.

8. Mr. ROSENNE said that he would like to suggest that Mr. Kearney's view that observer delegations rarely consisted of more than one person contained an element of optical illusion. It was true that the majority of such delegations consisted of one person, but it should not be forgotten that in most cases, particularly in Geneva and in New York, there was a permanent mission behind that person. In the light of the important statement made by Mr. Bartoš at the previous meeting,¹ the Commission should bear in mind not only the observer delegations present in Geneva and New York but also those which might be sent elsewhere.

9. Like Mr. Kearney, he also wondered whether the Commission was really in a position to put forward any proposals concerning that area of the law which would meet the standards of meticulousness which the Commission had always set for itself and which the General Assembly and the international community at large expected of it. At the present stage, it was not a question of adopting one approach or another but of deciding whether any approach could meet those standards.

10. He would like to remind the Commission of what had happened in the past when it had put recommendations or proposals to the General Assembly which had not been fully thought out and which had not gone through the full process of criticism by governments and thorough discussion in the Sixth Committee. He feared that if the Commission should decide to omit the chapter on observer delegations and merely include in its report a statement to the effect that it had considered

that subject but had not completed it, the General Assembly might send it back to the Commission.

11. Mr. EL-ERIAN (Special Rapporteur) said that Mr. Kearney had referred to the lack of general information and scientific studies about observer delegations. In that connexion, he would like to draw the Commission's attention to the working paper which he had submitted at the last session on that subject (A/CN.4/L.151). Paragraph 2 of that working paper stated: "The Study of the Secretariat does not include detailed information on temporary observers. According to the information provided to the Special Rapporteur by the Legal Advisers of some specialized agencies, the practice relating to the privileges and immunities of temporary observers is fragmentary and varied". There was also very little legal literature on the subject.

12. The draft articles which he had submitted on the subject at the present session (A/CN.4/L.173) had been based on the assumption that observer delegations covered a wide variety of categories of personnel. He had, therefore, tended to give them rather broad privileges and immunities, but in view of the definition which the Commission had adopted for the term "delegation", the personnel of observer delegations, and accordingly their privileges and immunities, had become much more restricted.

13. The Commission could choose between two alternatives: it could either remain silent on the subject of observer delegations, or it could do its best to prepare a set of draft articles and submit them to the General Assembly. Since, in his opinion, the absence of such articles would represent a lacuna in the draft, he thought that the Commission should submit a final text, without waiting for the comments of governments, to the General Assembly, which would then be in a better position to take a decision concerning that type of delegation.

14. Mr. AGO said that he was glad to hear that the Special Rapporteur advocated the inclusion of a set of articles on observer delegations; the draft would be incomplete without one.

15. The proposed articles as a whole were satisfactory. The problem to be settled was a fairly limited one. It was simply to decide on what conditions persons other than delegates might participate in an observer delegation and what their status should be.

16. It was tempting just to draft brief provisions referring to the agreement between the host State and the sending State on privileges and immunities, and omitting the opening words of paragraph 2 of article E, as Mr. Bartoš had proposed at the previous meeting.²

17. It would be preferable, however, to make a further attempt to draft provisions setting out specifically the categories of staff to be included in observer delegations in addition to the delegates themselves, and the régime of privileges and immunities to be accorded to such staff. It would look strange if nothing were said about the

¹ See 1139th meeting, paras. 64, 68, 69, 71, 74, 75, 89 and 90.

² *Ibid.*, para. 71.

privileges and immunities of such staff, when article T, paragraph 1, was devoted to members of the families of observer delegates.

18. Articles E and T should therefore be referred back to the Working Group.

19. Sir Humphrey WALDOCK said he personally thought that the Commission should include some articles on observer delegations to organs and to conferences, since otherwise, having spent almost the whole of the session on the present topic, it might lay itself open to valid criticism by the General Assembly if it merely recognized the existence of a gap in its draft and made no proposals in regard to it.

20. He felt that article T was altogether too illogical when read in conjunction with article U, since while article T, paragraph 1, dealt with the privileges and immunities of families, article U made no attempt to provide for the privileges and immunities of "additional personnel" who might include important technical experts or a confidential secretary. At the very least it seemed to him essential to specify their immunity in respect of acts done in the performance of their official functions. Consequently, he thought that both articles E and T were in need of some revision by the Working Group.

21. Mr. EUSTATHIADES said that the Commission should be grateful to Mr. Bartoš for raising the problem. The discussion had clearly shown, however, that there was no need for undue apprehension. The sending State could ensure that experts of high rank were accorded the desired privileges and immunities by appointing them delegates.

22. The problem of the link between article E and article T arose with regard to members of the staff of lower rank. All that was needed in article E, paragraph 2, was the addition of a specific provision concerning the size of the additional staff, specifying that it should not be unduly large. In article T, paragraph 2, however, the formulation suggested by the Working Group should be retained, whereby the question was to be regulated by agreement between the sending State and the host State, but some minimum requirements might well be stated explicitly for inclusion in any such agreement.

23. It was true that the Commission had not been able to consult governments on that part of the draft, but in view of the scanty information to be derived from international practice, government comments would be largely *de lege ferenda*. Such consultations were unlikely to disclose anything of great interest.

24. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer articles E and T back to the Working Group.

It was so agreed.

25. Mr. KEARNEY (Chairman of the Working Group) suggested that he might give a rapid summary of the remaining articles. Members could then mention any particular difficulties which occurred to them.

26. Mr. BARTOŠ said that, after the discussion which had just taken place, the Commission had come near to finding a solution. The discussion had shown, first, that the composition of a delegation must be a matter solely for the sending State, but that the sending State was obliged to ensure that the size of the delegation did not exceed what was strictly necessary, and secondly, that the members of the staff should enjoy as of right certain minimum privileges and immunities, such as inviolability of the person and inviolability for acts performed in the exercise of their official functions.

27. If the Working Group succeeded in settling the problem on that basis, it would be possible to reach unanimous agreement on provisions which would meet the concern of the larger States without prejudicing the interests of the smaller States.

28. Mr. TABIBI said he agreed with the Special Rapporteur that to omit the chapter on observer delegations would mean leaving a serious gap in the draft as a whole.

29. He also felt, however, that the Commission should be very careful not to permit the same status to observer delegations as to regular delegations, since that might create a number of problems from a practical point of view. The United Nations now numbered more than 127 Members and every Member had the right to send observers to any United Nations Conference. That was a particular hardship for the poorer countries of Asia and Africa, which for economic reasons found it impossible to send observer delegations to all conferences, and, for the same reasons were unable to act as hosts to conferences. The expansion of observer delegations, therefore, was certainly not to be encouraged. In any case, they should not be placed on the same level as regular delegations with respect to privileges and immunities.

30. Sir Humphrey WALDOCK said that he hoped that the Working Group would have authority to review all the articles in the chapter on observer delegations.

31. Mr. AGO said he endorsed Sir Humphrey Waldock's comment. A definition should be added to article A, and the text of article F, on notifications, should be reviewed.

32. The CHAIRMAN said that, if there were no objections, the Working Group would be asked to consider the effects of its reconsideration of articles E and T on other articles in that part of the draft.

It was so agreed.

ARTICLES F to S and U to W

33. The CHAIRMAN invited the Chairman of the Working Group to make some preliminary comments on articles F to S and U to W.

34. Mr. KEARNEY (Chairman of the Working Group) said that article F, on notifications, would require an additional paragraph to cover the situation of families. Article G, on precedence, and article H, on general facilities, did not present any particular problems.

35. No article on premises and accommodation, along the lines of article 51, had been included, since in most cases observer delegations would use the premises of their permanent missions, or else operate from their hotel rooms.

36. Article I, on assistance in respect of privileges and immunities, merely reproduced the language of article 52.

37. Article J did not present any problem. No article had been included in the present draft on exemption of the premises from taxation.

38. Article L, on freedom of communication, was largely in accordance with article 57, although the provisions concerning authorization to install a wireless transmitter, to designate couriers *ad hoc* and to entrust the bag of the delegation to the captain of a ship or of a commercial aircraft had been omitted.

39. Article M, on personal inviolability, was the same as article 58 concerning regular delegations, as was also article N, on inviolability of accommodation and property, although some changes had been necessary in paragraph 3 in order to distinguish it from paragraph 3 of article 53.

40. With respect to article O, on immunity from jurisdiction, the Working Group had decided to use alternative B of article 60. It had granted immunity from the criminal jurisdiction of the host State in full and had not limited such immunity to acts performed in the course of official functions.

41. For article P, on waiver of immunity, the Working Group had decided to retain paragraph 5 of article 61, in respect of a civil action.

42. Articles Q, R and S were substantially the same as those provided for regular delegations, although the Working Group had not included the provisions of article 63, on exemption from dues and taxes.

43. Article T had, of course, already been discussed.

44. Article U, on nationals of the host State and persons permanently resident in the host State, was shorter than the corresponding provisions of article 67, since it contained no breakdown of the staff of the delegation into different categories.

45. Article V, on duration of privileges and immunities, in effect reproduced article 68.

46. Article W, on end of the functions of the observer delegates, was the same as article 69.

47. No articles had been included on the protection of the premises, property and archives of observer delegations. Certain adjustments would be necessary in the general provisions.

The meeting rose at 11.30 a.m.

1141st MEETING

Wednesday, 21 July 1971, at 3.10 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Sir Humphrey Waldock.

Review of the Commission's long-term programme of work

(A/CN.4/245)

[Item 7 of the agenda]

1. The CHAIRMAN invited the Legal Counsel to introduce the Survey of International Law (A/CN.4/245), the working paper prepared by the Secretary-General in the light of the decision of the Commission to review its programme of work.

2. Mr. STAVROPOULOS (Legal Counsel) said that the Survey of International Law was in fact the second Survey which the Secretariat had undertaken. The first Survey¹ referred to in the present document as the "1948 Survey" had been written by the late Sir Hersch Lauterpacht, who for that purpose had served for a few months as a member of the Secretariat.

3. The 1948 Survey was remarkable in many ways, above all in the scope and authority of what it said, and had been widely consulted and used over the years, both in universities and amongst practitioners. It was on the basis of that Survey, moreover, that the Commission, at its first session, had drawn up the list of topics which had constituted the Commission's long-term programme of work and which was now to be reviewed.

4. The Commission was almost unique among United Nations bodies in having given itself, not just an agenda, but a programme listing what it hoped to achieve over a long span of years. The Commission had made very substantial progress towards the completion of the programme it had first set itself, so that now the question arose of what adjustments and additions needed to be made to that programme, in order that the Commission might take further steps towards the achievement of its over-all objective, the progressive development and codification of international law as a whole.

5. When, therefore, some twenty-three years later, the Secretary-General was again requested to provide a "Survey of International Law", it was natural that the Secretariat should have turned to the 1948 Survey in order to see both what subjects had been covered in that

¹ A/CN.4/1/Rev.1.

study, and how they had been presented. Preparation of the present Survey, which might be called the "1971 Survey", had turned out to be an extremely interesting, if difficult, exercise. International law as it had seemed in 1948, and international law as it appeared in late 1970 and early 1971 when the present document was being written, were very different subjects, although not perhaps in fundamentals. However, all could agree that the outlook before the Commission in 1971 was very different from what it had been at its first session.

6. In 1948 the Second World War had not long been over. Sir Hersch Lauterpacht had written essentially against the background of the experience of the League and of its attempts to undertake the codification of international law. Those attempts had been largely unsuccessful. The Second World War had produced a strong impulse towards law and international co-operation and it was generally felt that a fresh attempt must be made to achieve a better legal order. But in 1948 the Commission was not yet in operation, and the division, written into the Statute of the Commission, between "codification" and "progressive development" was one to which the 1948 Survey had to give considerable attention, although the subsequent history of the Commission had shown the difficulty, if not the impossibility, of observing that distinction strictly.

7. By comparison, any Survey made in 1971 could reflect the actual experience, and the success, of the Commission in finding a method whereby particular topics could be examined, and drafts prepared, which could then be placed before plenipotentiary bodies. A regular process was now in operation which had not existed before. A good part of the 1971 Survey therefore consisted of a history of the work of the Commission, as well as of the steps taken elsewhere, in developing international law over the past twenty-three years.

8. International law had undoubtedly grown since 1948. Fields of law which had scarcely been imagined in 1948—for example, the law relating to outer space—had since been developed, and others, which had been little thought about even two or three years ago, such as the law relating to the environment and to the sea-bed beyond national jurisdiction, were now the subject of international attention. The present Survey thus dealt with a number of topics which either had not been discussed at all in the 1948 Survey, or had been mentioned only in passing. Those topics included the law relating to economic development; representation of States in their relations with international organizations; treaties between States and international organizations; unilateral acts; the law relating to international watercourses; the law relating to the continental shelf, and the question of the sea-bed and subsoil beyond national jurisdiction; the law of the air, outer space and the environment—none of which had been included in the 1948 Survey; the law relating to international organizations; the law relating to armed conflicts and international criminal law; and international law relating to individuals. That last heading included a section on human rights, a subject on which a whole body of law had been created since 1948. That list of topics indicated some of the pressures and

forces which had moulded the course of international law over the last twenty-five years.

9. Besides those new subjects, the present Survey reflected the Commission's own achievements. But although they might be familiar to international lawyers, by the world at large it was still insufficiently appreciated how wide an area of law had been codified under United Nations auspices during the past ten to fifteen years. Admittedly much remained to be done, but much had already been done, and that gave grounds for hope for the future work of the Commission.

10. He would not attempt to enter into the question of what particular subjects the Commission, either at the present or at its next session, might choose to include in its future long-term programme. He assumed, as the Survey assumed, that those subjects on which the Commission was currently engaged would continue to be examined, and that in itself would provide a number of topics. But he also assumed that the Commission would wish to add others, so as not to lose sight of its long-range objective. That was not, however, to suggest that the present Survey had been prepared on the assumption that the Commission would wish to take up all of the topics mentioned there; that was not the case.

11. It was made clear in the introduction that the aim of the Survey was to provide, as its title indicated, a survey, or balance-sheet, of the whole field of international law at the present time—on the basis of which, after reviewing the situation as a whole, the Commission might decide how best to proceed. Thus, part of the Survey was devoted to a description of areas of international law which the Commission itself was unlikely to examine, at least in the immediate future, but which it might find it helpful, for that very reason, to have summarized. All parts of international law, after all, ultimately came together, and an advance in one area might lead to an advance in another. He hoped the range and detail of the 1971 Survey would enhance its value, not only to the Commission but to all persons interested in international law, whether in universities, in foreign ministries or in international organizations, and appeal to the educated public generally.

12. He very much regretted that, on grounds of expense, the Secretariat was unable for the time being to give the document a wider distribution. Published separately, it might prove useful in many countries as an introduction—along, of course, with conventional text books—to international law and perhaps provide an answer to the question so often asked: "What is international law, and what is it all about?"

13. The submission of the 1971 Survey to the Commission was something in which the Secretariat took a certain pride and to which it attached a certain importance. It was his hope that the series of Surveys now begun would be continued at approximately twenty-year intervals, and that in the 1990s a further Survey would again be undertaken by the Secretariat. He was sure that every member of the Commission, on reading the present Survey, had noted at least one point on which he would enter a caveat, or where he would have put the matter

slightly differently. The problem, however, was to achieve the over-all task, with an over-all balance.

14. The United Nations Secretariat was, he believed, exceptionally, perhaps uniquely, qualified to do that. It followed closely the work of the Commission, the work of the Sixth Committee and the work of all the numerous other United Nations bodies concerned with international law. It had knowledge and experience, and it included lawyers representative of the different regions of the world. It was his hope that the confidence the Commission had shown in the Secretariat, in entrusting the present task to it, would prove to have been justified.

15. The CHAIRMAN thanked the Legal Counsel for his very lucid introduction; he was sure the Survey would constitute a landmark not only in the work of the Commission but in the history of international law itself.

16. Mr. ROSENNE said he wished to thank the Legal Counsel for his illuminating introduction and particularly the Chief of the Codification Division and his staff for the Survey, which more than reached into the broad objectives he had had in mind when he had first suggested in 1968, at the 979th meeting, that the Commission should ask the Secretary-General to prepare a new Survey,² on the basis of which the Commission could undertake a general revision of the 1949 list of topics and bring it up to date in the light of the achievements of the past, of the likelihood that with the completion of the current work programme the 1949 list would be all but exhausted, and of the general needs of the international community. The introduction to the new Survey was a particularly valuable part of the new document. The Survey itself was, in its own way, as remarkable as the 1948 Survey in its day, but its scope, like its context, was vastly different.

17. The new Survey was a sober balance-sheet because it did not fall into the trap of euphoria, characteristic of some circles, at the success of the codification of the law of treaties, which had no doubt been facilitated by a convenient political conjuncture. It was also thought-provoking, because it raised the very large question whether the Commission should always contemplate its work as limited to the preparation of draft articles intended to serve as a basis for an international convention concluded by a conference of plenipotentiaries.

18. More than once he himself had expressed doubts as to whether that was the only method of furthering the codification and progressive development of international law and whether a convention was really the only conceivable conclusion for a codification conference. Now the new Survey seemed to strengthen his doubts on that score and he believed that the Commission should devote deep thought, without preconceived ideas, to that central problem. The need for careful consideration of that problem was borne out by the experience of the League of Nations. He was engaged at present in the preparation of a study of the work of the League of Nations Com-

mittee of Experts for the Progressive Codification of International Law—the Commission's predecessor body which had met at Geneva from 1925 to 1928—and on the antecedents of the Codification Conference which had met at The Hague in 1930, and he had gained the impression that the League of Nations attempts had foundered, and had even brought the codification of international law into disrepute, partly because of a lack of clarity as to the methods of work to be followed.

19. The new Survey was also a sombre balance-sheet because it showed that once the Commission had completed the topics already under consideration—a process which might take at least ten years—the topics of general customary international law amenable to the kind of treatment customarily given by the Commission would become few and compact, especially if the Commission continued to think exclusively in terms of producing draft articles as a basis for international conventions.

20. The most likely was probably the topic of extritorial jurisdiction, in its broadest ramifications, but even that topic would have to be weighed very carefully before decisions were taken and recommendations made to the General Assembly. Moreover, it was unlikely that the international community could wait very long for the treatment of that topic, which should lead into such serious and pressing matters as the unlawful seizure of aircraft and the protection of diplomats. There was a danger that the Commission might be overtaken by events in an international society conscious of its needs and impatient to make progress.

21. Before going any further, he wished to express reservations about some of the far-reaching doctrines advanced by the Secretariat in the Survey, especially in paragraphs 240 to 249. He would not like it to be thought that his generally favourable reaction to the Survey as an intellectual product extended to the endorsement of everything that appeared in it.

22. It was obvious that little action could be taken at the present session; that was fortunate, because the matters at stake were delicate and the Commission should not be hurried. It was important that the Survey should be widely known in the Sixth Committee of the General Assembly and also by governments, as well as by professional and academic circles. He hoped the debate in the Sixth Committee, at the forthcoming session of the General Assembly, would throw some light on government thinking regarding the Commission's future long-term programme of work. Despite the financial difficulties, some way should be found to give the document a wide circulation.

23. The Commission's report for the present session should limit itself to recording that it had received the Survey, that it expressed its appreciation to the Legal Counsel and to the Chief of the Codification Division and that, after a preliminary discussion, it had decided to place at the head of the provisional agenda of the Commission's twenty-fourth session the item: "Survey of International Law: Working paper prepared by the Secretary-General (A/CN.4/245)".

² See *Yearbook of the International Law Commission, 1968*, vol. I, p. 206.

24. He next wished to raise in the presence of the Legal Counsel two other matters, although they technically came under the heading of "Other business". The first was to suggest that the Secretariat should examine the possibility of following the example of UNCITRAL, which in its first Yearbook had included the reports of the Sixth Committee and the General Assembly resolutions on the work of that body during its first two sessions.³ It would be a useful addition to the Commission's own Yearbook if the relevant Sixth Committee report and General Assembly resolution on its work were included in each issue.

25. The second matter related to the official records of the Vienna Conference on the Law of Treaties. The third volume of those records, containing the documents of the conference,⁴ omitted two important documents. The first contained the comments and amendments to the final draft articles on the law of treaties submitted by governments in 1968 in advance of the Conference, in accordance with General Assembly resolution 2287 (XXII) (A/CONF.39/6 and Add.1 and 2), consisting of 50 mimeographed pages. The second contained written statements submitted by specialized agencies and inter-governmental bodies invited to send observers to the conference (A/CONF.39/7 and Add.1 and 2 and Add.1/Corr.1) and consisted of 73 mimeographed pages. That document was particularly important for the work now being undertaken by the Commission on the subject of treaties entered into by international organizations, because it constituted the first consistent exposition by international organizations of their views on the general law of treaties.

26. He feared that those two valuable documents would be irretrievably lost if they remained only in mimeographed form and were not included in some printed document. He would therefore request the Secretariat to explore some way of producing those documents in more permanent form, either as an addendum to the official records of the Vienna Conference, or in the Commission's own Yearbook, or in the Juridical Yearbook of the United Nations.

27. Mr. STAVROPOULOS (Legal Counsel) said that Mr. Rosenne's suggestion in the first matter he had raised was a good one but he knew it was unlikely to prove feasible. At its forthcoming session the General Assembly would be considering two reports, one from the committee dealing with the rationalization of documentation and the other from the Joint Inspection Unit, both of which reiterated the rule regarding the avoidance of duplication of documents. The Secretariat would, of course, bear the suggestion in mind and see whether anything could be done to meet Mr. Rosenne's wishes.

28. With regard to the second matter, he would like to reserve his reply until he had been able to ascertain the reason why the two documents in question had not been

reproduced in the official records of the Vienna Conference.

29. Mr. TAMMES said the Secretariat was to be commended for the new Survey, which constituted the most comprehensive and at the same time most concise source of information on new trends in international law now available to the legal profession. He hoped that the document would be made readily available and widely distributed, like the 1948 Survey.

30. The new Survey contained many recommendations concerning the Commission's future work but he would confine his remarks to only a few of them. His attention had been particularly attracted by part VIII, dealing with unilateral acts. After noting that the Commission had chiefly concentrated on the production of draft articles which could form the basis of a convention to be adopted by States (para. 283), and that the same approach could be adopted for the work on unilateral acts, the Survey went on to suggest that "this is a topic on which other directions might also be explored" (*ibid.*). He himself fully subscribed to the view that "a study which examined the subject, or its different branches, and concluded with a series of definitions of the main forms of unilateral acts and their respective effects under international law would be of considerable practical value" (*ibid.*).

31. Another subject, not classified as such but dispersed throughout the Survey, was that of what might be called offences of international concern. Referring to the problem of jurisdiction with regard to crimes committed outside national territory, the 1948 Survey had pointed out that the right of a State to try its nationals for offences committed abroad was not in issue; the question which required clarification and authoritative solution was that of the existence and extent of that right with respect to aliens. International conventions concluded in the 1920s and 1930s on such subjects as obscene publications, narcotic drugs, traffic in persons and slavery, had already allowed the prosecution of both nationals and aliens for certain offences committed abroad. Traditionally, of course, the crime of piracy could be punished by any State—as was reiterated in the 1958 Convention on the High Seas.

32. In 1949, the Commission had dealt with the problem of international crimes of a new dimension when it had formulated the Nuremberg principles in its very first report.⁵ In 1954, the Commission had completed its "Draft Code of Offences against the Peace and Security of Mankind".⁶ Since those offences were, in the Commission's view, offences which contained a political element and which endangered or disturbed the maintenance of international peace and security, the Draft Code did not deal with the type of anti-social acts to which he had referred. The General Assembly still had to take action on that Draft Code.

³ *United Nations Commission on International Trade Law, Yearbook*, vol. I: 1968-1970, pp. 88 to 92 and 121 to 128.

⁴ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5).

⁵ See *Yearbook of the International Law Commission, 1949*, pp. 282-283.

⁶ See *Yearbook of the International Law Commission, 1954*, vol. II, pp. 150-152.

33. As a distinct development, there had emerged over the years particular treaty régimes dealing with a variety of offences of international significance. The use of certain methods and means of warfare had been prohibited, not only for States but also for individuals, and the act of piracy had been extended to air piracy by the 1958 Convention on the High Seas.⁷ Air piracy had also been the subject of the somewhat limited 1963 Tokyo Convention on Offences and Certain Other Acts committed on board Aircraft,⁸ and of the much wider 1970 Hague Convention for the Suppression of the Unlawful Seizure of Aircraft.⁹ The 1970 Hague Convention made the offence in question extraditable and of universal jurisdiction as regards prosecution, and contained the remarkable, although legally doubtful, provision that the offence would be deemed to be included as an extraditable offence in any extradition treaty already in existence between the contracting States.

34. On 2 February 1971, the member States of the Organization of American States had signed a "Convention to Prevent and Punish Acts of Terrorism taking the Form of Crimes against Persons and related Extortion that are of International Significance", as had been pointed out by the Observer for the Inter-American Juridical Committee.¹⁰

35. Mention should also be made of the exchange of letters in 1970 between the President of the Security Council and the Chairman of the Commission on the question of the protection and inviolability of diplomatic agents, recorded in the Commission's report on the work of its twenty-second session (A/8010/Rev.1, para. 11), and of Mr. Kearney's proposal on the same subject at the opening meeting of the present session.¹¹

36. Another category of offences of international concern, but devoid of any political or ideological elements, was that of acts which endangered the human environment. In the words of the Survey, "by definition, matters affecting the environment are all-embracing" (para. 335). They were therefore of international concern, as was illustrated by the relationship between river pollution and marine pollution, since most rivers ultimately emptied into the sea. He hoped the declaration to be adopted at the United Nations Conference on the Human Environment, due to be held at Stockholm in 1972, would mention the establishment of individual criminal responsibility as one of the means to protect the environment.

37. His own conclusions from the relevant parts of the Survey were first, that the development of humanitarian principles had led to the extension of the number of acts of individuals—as distinct from acts of States—which were recognized as contrary to international humanitarian law and therefore of international concern; secondly, that technological development had

greatly increased the ability of man to commit acts endangering the international community as a whole; thirdly, that it was necessary to strike a balance between the need for universality of prosecution of offenders and the recognition of ideological motives, as traditionally implied in the principle of non-extradition of political offenders.

38. The Commission had been aware of those problems when it had decided in 1949 to include the right of asylum in its list of topics, but not to include extradition.¹² The present Survey recommended the reconsideration of the latter decision in view of the "common interest in providing for the return and prosecution of alleged offenders" (para. 370).

39. In the light of the international legal innovations reflected in the Survey, the Commission might well consider reviving its preoccupation with the code of offences against mankind and extending the scope of its work to offences of international concern, other than those against the peace and security of mankind as conceived in 1949. The Survey aptly summarized the central question for consideration as being that of the extent to which a general codification instrument could be of assistance in dealing with such matters as crimes on aircraft or narcotics offences "where a degree of exercise of jurisdiction by a State in matters having an extra-territorial element has been generally accepted by the international community" (para. 90).

40. Mr. CASTRÉN said he wished to thank the Secretariat for the working paper which it had submitted to the Commission. It was an excellent survey of the Commission's activities since its establishment and of the codification of international law in general, as well as of the principal international conventions which had emerged from its work. The authors of the paper had drawn attention to all the important subjects not yet codified and had made some suggestions on the question whether certain topics in international law might be inopportune, either because they were not yet ripe or because they were too controversial or had acute political implications. The working paper and the Secretariat's previous report on the same subject (A/CN.4/1/Rev.1), provided a firm basis for the consideration of the Commission's long-term programme of work.

41. On many occasions in the past twenty-five years the Commission had overestimated its strength and resources and as a result had not yet started to consider some of the items which had been placed on its programme of work at the outset, while others it had been unable to complete. Obviously it should first complete its work on the items already on its agenda—various aspects of the succession of States, State responsibility, the most-favoured-nation clause, the question of treaties concluded between States and international organizations or between two or more international organizations, and the progressive development and codification of the rules of international law relating to international watercourses;

⁷ United Nations, *Treaty Series*, vol. 450, p. 82, article 15.

⁸ *Ibid.*, vol. 704, No. 10106.

⁹ ICAO document 8920.

¹⁰ See 1124th meeting, para. 74.

¹¹ See 1087th meeting, para. 38.

¹² See *Yearbook of the International Law Commission, 1949*, p. 281.

that would probably keep it busy for some fifteen years, before it need contemplate adding further items to its long-term programme. It should not be forgotten, too, that the Commission might be called upon by the General Assembly to give urgent consideration to questions of immediate importance.

42. The question of jurisdiction with regard to crimes committed outside national territory, which had been included in the programme of work for 1949, could now be discarded, since it was a complex problem in international criminal law, for which it would probably be hard to devise uniform rules because national law on the subject differed so widely.

43. On the other hand, it was to be hoped that the study of State responsibility would make it possible to consider the question of the treatment of aliens more successfully than in the past. The question of the right of asylum should preferably be left to the General Assembly, because it was essentially political in character and the Assembly had already considered some aspects of it and adopted a declaration on the subject. The questions of the recognition of States and Governments and the jurisdictional immunities of States and their property should, however, remain on the Commission's long-term programme of work in view of their practical importance and their legal interest, as well as historic waters, including historic bays.

44. The following items might be added to the programme. First, the problems arising from the protection and inviolability of diplomatic agents, representatives of States and consular agents, in other words, the application and strengthening of certain rules of diplomatic and consular law, in particular, the relevant provisions of the 1961 and 1963 Vienna Conventions and the rules concerning the legal status of representatives of States in organizations and international conferences. Secondly, international agreements concluded between subjects of international law other than States and international organizations, such as insurgents. Thirdly, the legal aspects of international unilateral acts; he was referring to Mr. Tammes's remarks and to paragraphs 279-283 of the Secretary-General's working paper. A study of that subject might be of great practical value to States in their mutual relations and it would be well to embark on it, even if its codification was likely to cause some difficulty owing to the lack of agreements on the matter, because unilateral acts were common in international practice and writers had been displaying special interest in them in recent years. Fourthly, since the Commission had almost completed the first part of the topic of relations between States and international organizations, the legal status of international organizations themselves should be considered in order to complete the codification of the subject; indeed, some governments had at one time proposed that that question be considered before the question of representatives of States in organizations. Lastly, human rights were a subject of special importance at the present time. Some aspects had already been codified at the international or regional level, but several others required consideration if they were to be

regulated by written rules. The Commission might help by selecting an appropriate aspect for codification.

The meeting rose at 4.30 p.m.

1142nd MEETING

Thursday, 22 July 1971 at 11.50 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castrén, Mr. Elias, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Ushakov, 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 to 3; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.174/Add.5 and 6)

[Item 1 of the agenda]

(resumed from the 1140th meeting)

FIFTH REPORT OF THE WORKING GROUP

Observer delegations to organs and to conferences

1. The CHAIRMAN invited the Chairman of the Working Group to introduce its fifth report (A/CN.4/L.174/Add.6).

ARTICLES A to X

2.

Article A¹

Use of terms

(a) "observer delegations to an organ" means the delegation sent by a State to observe on its behalf the proceedings of the organ;

(b) "observer delegation to a conference" means the delegation sent by a State to observe on its behalf the proceedings of the conference;

(c) "observer delegation" means, as the case may be, the observer delegation to an organ or the observer delegation to a conference;

(d) "sending State" means the State which sends:

...

(iii) an observer delegation to an organ or an observer delegation to a conference;

(e) "observer delegate" means any person designated by a State to attend as an observer the proceedings of an organ or of a conference;

¹ Corresponds to article 1.

(f) "members of the observer delegation" means the observer delegates and the members of the administrative and technical staff of the observer delegation;

(g) "members of the administrative and technical staff" means the persons employed in the administrative and technical service of the observer delegation;

3.

Article B²

Sending of observer delegations

A State may send an observer delegation to an organ or to a conference in accordance with the rules and decisions of the Organization.

4.

Article C³

Appointment of the members of the observer delegation

Subject to the provisions of article 71, the sending State may freely appoint the members of the observer delegation.

5.

Article D⁴

Letters of appointment of the observer delegates

The letters of appointment of the observer delegates shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or, if the rules of the Organization or the rules of procedure of the conference so admit, by another competent authority of the sending State. They shall be transmitted, as the case may be, to the Organization or to the conference.

6.

Article E⁵

Composition of the observer delegation

1. The observer delegation shall consist of one or more observer delegates.

2. It may also, if necessary, include some administrative and technical staff.

7.

Article F⁶

Notifications

1. The sending State shall notify the Organization or, as the case may be, the conference of:

(a) the composition of the observer delegation and any subsequent changes therein;

(b) the arrival and final departure of members of the observer delegation and the termination of their functions with the observer delegation;

(c) the arrival and final departure of any person accompanying a member of the observer delegation;

(d) the beginning and the termination of the employment of persons resident in the host State as members of the administrative and technical staff of the observer delegation;

(e) the location of the accommodation enjoying inviolability under article N as well as any other information that may be necessary to identify such accommodation.

2. Where possible, prior notification of arrival and final departure shall also be given.

3. The Organization or, as the case may be, the conference, shall transmit to the host State the notifications referred to in paragraphs 1 and 2.

4. The sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2.

8.

Article G⁷

Precedence

Precedence among observer delegations shall be determined by the alphabetical order of the names of their States used in the Organization.

9.

Article H⁸

General facilities

The host State shall accord to the observer delegation the facilities required for the performance of its task. The Organization or, as the case may be, the conference shall assist the observer delegation in obtaining those facilities and shall accord to the observer delegation such facilities as lie within their own competence.

10.

Article I⁹

Assistance in respect of privileges and immunities

The Organization or, as the case may be, the Organization and the conference shall, where necessary, assist the sending State, its observer delegation and the members of the observer delegation in securing the enjoyment of the privileges and immunities provided for in the present articles.

11.

Article J¹⁰

Inviolability of archives and documents

The archives and documents of the observer delegation shall be inviolable at any time and wherever they may be.

12.

Article K¹¹

Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure to all members of the observer delegation such freedom of movement and travel in its territory as is necessary for the performance of the task of the observer delegation.

13.

Article L¹²

Freedom of communication

1. The host State shall permit and protect free communication on the part of the observer delegation for all official purposes. In communicating with the Government of the send-

² Corresponds to article 41.

³ Corresponds to article 42.

⁴ Corresponds to article 43.

⁵ Corresponds to article 44.

⁶ Corresponds to article 46.

⁷ Corresponds to article 48.

⁸ Corresponds to article 50.

⁹ Corresponds to article 52.

¹⁰ Corresponds to article 55.

¹¹ Corresponds to article 56.

¹² Corresponds to article 57.

ing State, its diplomatic missions, permanent missions and permanent observer missions wherever situated, the observer delegation may employ all appropriate means, including couriers and messages in code or cipher.

2. The official correspondence of the observer delegation shall be inviolable. Official correspondence means all correspondence relating to the observer delegation and its task.

3. Where practicable, the observer 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 observer delegation shall not be opened or detained.

5. The packages constituting the bag of the observer delegation must bear visible external marks of their character and may contain only documents or articles intended for the official use of the observer delegation.

6. The courier of the observer 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.

14.

Article M¹³

Personal inviolability

The persons of the observer delegates 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.

15.

Article N¹⁴

Inviolability of accommodation and property

1. The accommodation of an observer delegate shall be inviolable. The agents of the host State may not enter it except with the consent of the observer delegate. Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the observer delegate.

2. The host State is under a special duty to take all appropriate steps to protect the accommodation of the observer delegate against any intrusion or damage.

3. The accommodation of the observer delegate, its furnishings and other property thereon and the means of transport of the observer delegation shall be immune from search, requisition, attachment or execution.

4. The papers, correspondence and property of the observer delegates shall likewise enjoy inviolability.

16.

Article O¹⁵

Immunity from jurisdiction

1. The observer delegates shall enjoy immunity from the criminal jurisdiction of the host State.

2. The observer delegates 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.

3. No measures of execution may be taken in respect of an observer delegate except in cases which do not fall under paragraph 2 and provided that the measures concerned can be taken without infringing the inviolability of his person or his accommodation.

4. The observer delegates are not obliged to give evidence as witnesses.

5. The immunity from jurisdiction of the observer delegates does not exempt them from the jurisdiction of the sending State.

17.

Article P¹⁶

Waiver of immunity

1. The immunity from jurisdiction of the observer delegates and of persons enjoying immunity under article U 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 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.

5. If the sending State does not waive the immunity of any of the persons referred to in paragraph 1 in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

18.

Article Q¹⁷

Exemption from social security legislation

1. The observer delegates shall, with respect to services rendered by the sending State be exempt from social security provisions which may be in force in the host State.

2. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

19.

Article R¹⁸

Exemption from dues and taxes

The observer delegates shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purpose of the observer delegation;

(c) estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article W;

(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;

¹³ Corresponds to article 58.

¹⁴ Corresponds to articles 53 and 59.

¹⁵ Corresponds to former alternative B of article 60.

¹⁶ Corresponds to article 61.

¹⁷ Corresponds to article 62.

¹⁸ Corresponds to article 63.

- (e) charges levied for specific services rendered;
 (f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property.

20.

*Article S¹⁹**Exemption from personal services*

The host State shall exempt the observer delegates from all personal services, from all public service of any kind whatsoever and from military obligations such as those connected with requisitioning, military contributions and billeting.

21.

*Article T²⁰**Exemption from customs duties and inspection*

1. The host State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

- (a) articles for the official use of the observer delegation;
 (b) articles for the personal use of the observer delegates.

2. The personal baggage of the observer delegates shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemption mentioned in paragraph 1, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. In such cases, inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

22.

*Article U²¹**Privileges and immunities of other persons*

1. Members of the families of observer delegates shall, if they accompany such observer delegates, enjoy the privileges and immunities specified in articles M, N, O, Q, R, S and T provided that they are not nationals of or permanently resident in the host State.

2. Members of the administrative and technical staff of the observer delegation, together with members of their families who accompany them and who are not nationals of or permanently resident in the host State, shall enjoy the privileges and immunities specified in articles M, N, O, Q and S. They shall 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 and exemption from dues and taxes on the emoluments they receive by reason of their employment.

23.

*Article V²²**Nationals of the host State and persons permanently resident in the host State*

1. Except in so far as additional privileges and immunities may be granted by the host State, observer delegates who are nationals of or permanently resident in that State shall enjoy only immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of their functions.

2. Members of the administrative and technical staff of the observer delegation who are nationals of or permanently resident in the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those members in such a manner as not to interfere unduly with the performance of the task of the observer delegation.

24.

*Article W²³**Duration of privileges and immunities*

1. Every person entitled to privileges and immunities shall enjoy such privileges and immunities from the moment he enters the territory of the host State for the purpose of attending the meeting of an organ or conference or, if he is already in its territory, from the moment when his appointment as a member of the observer delegation is notified to the host State by the Organization, by the conference or by the sending State.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the observer delegation, immunity shall continue to subsist.

3. In the case of the death of a member of the observer delegation, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the observer delegation not a national of or permanently resident in the host State or of a member of his family accompanying him the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property which is in the host State solely because of the presence there of the deceased as a member of the observer delegation or of the family of a member of the observer delegation.

25.

*Article X²⁴**End of the functions of the observer delegates*

The functions of the observer delegates shall come to an end, *inter alia*:

- (a) on notification of their termination by the sending State to the Organization or the conference;
 (b) upon the conclusion of the meeting of the organ or the conference.

26. Mr. KEARNEY (Chairman of the Working Group) said that in the light of the discussion in the Commission, the Working Group had reviewed the structure of the draft articles on observer delegations to organs and to conferences and had reached the conclusion that, since observer delegations could consist of one or more observers, as necessary, and since their function was primarily to observe, there was no need to provide for separate diplomatic staff.

¹⁹ Corresponds to article 64.

²⁰ Corresponds to article 65.

²¹ Corresponds to article 66.

²² Corresponds to article 67.

²³ Corresponds to article 68.

²⁴ Corresponds to article 69.

27. It had also concluded that it was desirable to make provision for administrative and technical staff, such as secretarial workers, code clerks and the like, in circumstances where the facilities of permanent delegations would not be available, but that it was not necessary to provide for service staff as their functions were primarily of a house-keeping nature and no provision concerning premises had been included in the draft articles on observer delegations. Likewise no reference to private staff had been made.
28. Concerning the privileges and the immunities to which the administrative and technical staff should be entitled, the Working Group had concluded that, if the presence of such staff was authorized, the articles should specify their privileges and immunities in detail.
29. Article A contained a new paragraph (f) which read: "members of the observer delegation means the observer delegates and the members of the administrative and technical staff of the observer delegation", and was followed by a new paragraph (g) which gave a definition of administrative and technical staff in the terms used in the main set of articles.
30. Certain consequential changes had been made in article C but articles B and D remained unchanged.
31. Article E contained a new paragraph 2, which read: "It may also, if necessary, include some administrative and technical staff". That wording was designated to indicate that it was not anticipated that the observer delegation would have a large staff.
32. In article F, on notifications, a new sub-paragraph (c) had been added to cover the families of members of the observer delegation. There was also a new sub-paragraph (d) relating to the employment of persons resident in the host state.
33. Articles G and H contained no changes of any consequence.
34. Article I contained the new phrase "the members of the observer delegation" instead of the words "observer delegates".
35. There were no changes in article J.
36. Article K had been changed to make it clear that all members of the observer delegation should be entitled to freedom of movement.
37. Articles L, M and N remained substantially the same as the former articles.
38. Article O contained certain changes for the purpose of clarification, particularly in paragraph 3.
39. In article P, the reference in paragraph 1 had been broadened by the inclusion of the words "persons enjoying immunity under article U", and a minor change had been made in paragraph 5.
40. Article Q remained unchanged.
41. In article R, the Working Group had reversed the previous decision not to include a provision for the exemption of the observer delegation from dues and taxes in the host State, since it had decided that there were sound arguments for adopting the same rule as that contained in article 63.
42. Articles S and T were the same as the old articles R and S.
43. Article U, formerly article T, had undergone a number of substantial changes. Paragraph 1 now listed the specific articles which governed the privileges and immunities of the families of observer delegates. Paragraph 2 stated that the privileges and immunities of administrative and technical staff and members of their families should include the same personal inviolability, inviolability of accommodation and property, and immunity from jurisdiction as that given to members of normal delegations. They should also be entitled to exemption from customs duties on first entry.
44. Article V contained a new paragraph 2 to cover members of the administrative and technical staff who were nationals of or permanently resident in the host State.
45. Article W remained substantially the same as the old article V, although a phrase had been added at the end of paragraph 4 to cover the presence in the host State of a deceased member of the observer delegation.
46. Lastly, article X remained the same as the old article W.
47. He would particularly like to know whether the changes proposed by the Working Group in the old articles E and T met the general wishes of the Commission.
48. Mr. USHAKOV said there were a number of drafting amendments he would like to suggest.
49. First, in article E, paragraph 2, the sense of the English word "some" was not reproduced in the other language versions. More appropriate translations should therefore be found.
50. Secondly, in article N, paragraph 3, the phrase "the means of transport of the observer delegation" should read "the means of transport of the observer delegate", since the article dealt with the inviolability of his accommodation and property.
51. Thirdly, in the last sentence of article U, paragraph 2, the phrase "to attend the meeting" should be replaced by the phrase "for the purpose of attending the meeting", which was the correct expression and was used in article W. A similar mistake should be corrected in article 66, paragraph 2.
52. Fourthly, in the same paragraph, the phrase "at the time of their entry" should read, as in article 36 of the Convention on Special Missions, "at the time of their first entry".²⁵
53. Lastly, the expression "observer delegates" should, wherever possible, be put in the singular, particularly in articles M and O.

²⁵ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30*, p. 103.

54. Mr. BARTOŠ said he was prepared to accept all the changes proposed by the Working Group except that relating to diplomatic staff, since it deprived the sending State of the right to decide who should be its representatives; a rule of that kind was not consonant with contemporary international practice.

55. Mr. Eustathiades had said at a previous meeting that every State was entitled to appoint as many delegates as it wished.²⁶ That was not always so. The rules or decisions of an organization or the rules of procedure of a conference might not permit the appointment of certain categories of staff.

56. He regretted that, although the text proposed by the Working Group for the set of articles was an improvement on the previous text, he would be obliged to vote against those passages which prevented the sending State from including diplomatic staff in its observer delegations.

57. Mr. EUSTATHIADES said that he found the new version of the draft articles submitted by the Working Group wholly satisfactory.

58. With regard to Mr. Bartoš's point, what he had said at a previous meeting was not that a State might appoint as many observers as it wished but that the sending State could ensure that experts of high rank were accorded the desired privileges and immunities by appointing them delegates.²⁷ If Mr. Bartoš had been thinking of the administrative staff, paragraph 2 should satisfy him on that point.

59. He agreed with Mr. Ushakov that it should be specified in article U, paragraph 2, that what was meant was the first entry into the territory of the host State.

60. Mr. ROSENNE said that he would like to place on record that he had a general reservation concerning the adoption of the present set of draft articles without more detailed study.

61. He shared to a large extent Mr. Bartoš's concern at the absence of any clear reference to diplomatic staff, particularly with regard to paragraph (f) of article A and, of course, article I.

62. Mr. Ushakov had suggested that the term "observer delegates" should be replaced by the term "observer delegate" whenever possible. Another case, in addition to those he had mentioned, was in article N, paragraph 4.

63. Mr. KEARNEY (Chairman of the Working Group) said that he wondered whether the words "*du personnel administratif et technique*", in the French version of article E, paragraph 2, had the same meaning as the English words "some administrative and technical Staff". The intention of the English text, of course, was to limit the size of the administrative and technical staff.

64. Mr. AGO said that it was absolutely necessary to have some limitative expression in article E, paragraph 2, such as the English word "some" in order to avoid being obliged to add an article on the size of the delegation—

which would be redundant in the case of observer delegations—to preserve the parallel with the corresponding article concerning delegations proper. However, since the English word "some" was virtually untranslatable, it would be better either to leave it to the language sections to find an appropriate method of expressing the notion of limitation in the other working languages, or else to change the English.

65. The CHAIRMAN said he would now invite the Commission to vote on the articles contained in the Working Group's fifth report, in succession, beginning with article A as a whole.

Article A as a whole, was adopted by 16 votes to none.

66. Mr. BARTOŠ said that although he had voted for the article as a whole, he could not approve paragraph (f) because it did not include diplomatic staff.

Article B

Article B was adopted by 16 votes to none.

Article C

Article C was adopted by 16 votes to none.

Article D

Article D was adopted by 16 votes to none.

Article E

67. The CHAIRMAN said he would put article E to the vote on the understanding that the language sections would find a suitable wording for paragraph 2 to preserve the notion of limitation, in all the working languages.

Article E was adopted by 14 votes to none, with 2 abstentions.

68. Mr. BARTOŠ said that he had abstained because he could not approve paragraph 2, for the reasons he had already given.

69. Mr. ROSENNE said that he had abstained for the same reasons as Mr. Bartoš.

Article F

Article F was adopted by 16 votes to none.

Article G

Article G was adopted by 16 votes to none.

Article H

Article H was adopted by 16 votes to none.

Article I

Article I was adopted by 16 votes to none.

Article J

Article J was adopted by 16 votes to none.

²⁶ See 1140th meeting, paras. 21 and 22.

²⁷ *Ibid.*, para. 21.

Article K

Article K was adopted by 16 votes to none.

Article L

Article L was adopted by 16 votes to none.

Article M

Article M was adopted by 16 votes to none.

Article N

70. Mr. USHAKOV suggested that, in paragraph 3, the words "the means of transport of the observer delegation" be replaced by the words "the means of transport of the observer delegate".

It was so agreed.

71. Mr. ALCÍVAR asked for a separate vote on the third sentence in paragraph 1.

The third sentence in paragraph 1 was adopted by 12 votes to 1, with 3 abstentions.

72. Mr. USHAKOV, explaining his vote, said that he had voted in favour of the sentence, although he had voted against it in the case of the premises of the mission and the delegation, because article N dealt with the accommodation of the observer delegate and the archives were not therefore concerned.

73. The CHAIRMAN put to the vote article N as a whole, as amended by Mr. Ushakov.

Article N as a whole, as amended, was adopted by 16 votes to none.

Article O

Article O was adopted by 16 votes to none.

Article P

Article P was adopted by 16 votes to none.

Article Q

Article Q was adopted by 16 votes to none.

Article R

Article R was adopted by 16 votes to none.

Article S

Article S was adopted by 16 votes to none.

Article T

Article T was adopted by 16 votes to none.

Article U

74. Mr. USHAKOV suggested that, in the last sentence of paragraph 2, the words "to attend the meeting" be

replaced by the words "for the purpose of attending the meeting", and that earlier in the same sentence the word "first" be inserted between the words "their" and "entry"; the latter change would require an identical change in article 66, paragraph 2.

It was so agreed.

75. The CHAIRMAN put to the vote article U, as amended.

Article U, as amended, was adopted by 16 votes to none.

Article V

Article V was adopted by 16 votes to none.

Article W

Article W was adopted by 16 votes to none.

Article X

Article X was adopted by 16 votes to none.

76. Mr. AGO said that the Commission should be grateful to Mr. Valencia-Espina, the Secretary of the Working Group, without whose help the Working Group would not have been able to complete its work so speedily.

77. Mr. EUSTATHIADES said he believed he was expressing the general feeling of the Commission in offering their thanks to the Working Group, particularly its Chairman, to the Chairman of the Drafting Committee, as well as to the Special Rapporteur, who had worked on the draft for so many years. He proposed that the Commission express its appreciation to the Special Rapporteur, and accordingly submitted the following draft resolution:

The Commission desires to express to the Special Rapporteur its deep appreciation of his valuable contribution over six years to the preparation of the topic by his untiring devotion and scholarly research, thereby enabling the Commission to bring to a successful conclusion the important task of completing, with this draft, the work of codification already carried out in the fields of diplomatic and consular relations and special missions.

78. Mr. CASTRÉN said he fully endorsed Mr. Eustathiades's remarks.

79. He wished to point out that, in the last part of the draft, the articles did not appear in the same order as in the other parts. That was a matter that could perhaps be put right.

The meeting rose at 1 p.m.

1143rd MEETING

Thursday, 22 July 1971, at 3.45 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Sir Humphrey Waldock, Mr. Yasseen.

Review of the Commission's long-term programme of work

(A/CN.4/245)

[Item 7 of the agenda]

(resumed from the 1141st meeting)

1. The CHAIRMAN invited the Commission to resume its consideration of item 7 of the agenda and of the Secretariat working paper, Survey of International Law (A/CN.4/245).
2. Mr. BEDJAOUÏ said that he must express his real admiration for what he might call the epitome of modern international law submitted by the Secretariat in its Survey of International Law. It deserved the widest possible dissemination, for it was of interest to all jurists. It was a lucid statement of the needs of the international community. The proposals in it betokened realistic ambitions as well as wide-ranging views. At a time when what might be called the second age of the Commission was at hand, he hoped the Secretariat would bring up to date and speedily republish the "green book" on the International Law Commission and its work.
3. The wealth of documentation in the Secretariat's working paper showed to the full the value of the work performed by the many bodies, whether official or unofficial, whether subsidiaries of the United Nations or not, which were engaged on tasks parallel to that of the Commission. The abundance of kindred activities seemed to show the need for greater co-ordination, as permitted by the Commission's statute; but that demanded further reflection. He hoped the Secretariat would in any case prepare a brief paper before each session of the Commission giving a list of and progress report on the legal work carried out by such bodies during the previous year.
4. The Secretariat suggested (para. 22) a period of twenty to twenty-five years for the Commission's future long-term programme. That might seem a rather long period, since technological and political developments, speedier communications and the acceleration of the pace of history in general were likely to open up prospects unconceived as yet. The suggestion was reasonable, however, and in any case was dictated by the Commission's methods and the pace of its work. The Commission

should, however, pause for meditation at some stage in its work in order to review its programme, if need be.

5. The Commission should also reflect on its methods of work. Could it not split up during a session into as many working groups as there were topics and special reports? There would be fewer plenary meetings, but they would certainly be more fruitful, because they would have been prepared for by the work of the groups.

6. Another point on methods of work was the question whether very broad topics should be chosen, requiring long and exacting labour, or whether topics should be limited, but more numerous and more varied. The questions of the hi-jacking of aircraft, and the kidnapping of diplomats which Mr. Kearney had asked the Commission to consider,¹ might be completed in two or three years. The right of asylum and the juridical régime of historic waters, also on the Commission's programme of work, were other topics of limited scope.

7. There were other topics which would require ten to fifteen years. Experience showed, however, that when the Commission dealt with such major topics, it often had to leave aside a particular aspect or a related topic and then revert to it later and consider it either separately or as part of some other topic. The choice, then, did not lie between major and minor topics, but was dictated by the needs of the international community. So in drawing up its programme of work, the Commission must bear in mind the recommendations of the General Assembly and the needs of the international community. Those needs developed under the pressure of economic and technological development, and as the Secretariat's working paper emphasized, "the States which have become independent since 1945 have contributed new interests and aspirations to international law" (para. 9).

8. The law should express both the present and the foreseeable needs of the international community. As early as 1929, the Institute of International Law² had said of codification that it should not be restricted to formulating the law of nations as it was, but should develop it as it should be in accordance with the rules which, as international life evolved, the interests of mankind required and morality and justice demanded. Admittedly the Commission's terms of reference required it to propose measures of codification which would prove acceptable to governments. There was, however, a pressing need to get away from the false dichotomy between codification and progressive development, which went hand in hand on that subject. He could endorse what was said in paragraph 9 of the working paper and the comments in paragraph 19 with regard to the shift which had occurred since 1949 in the methods of studying traditional international law and the emphasis placed upon one or other branch of law.

9. Before tackling the problem of the selection of topics, the question of the criteria for the selection had to be settled. By elimination, the topics already considered by

¹ See 1087th meeting, para. 38.

² See *Yearbook of the Institute of International Law*, New York session, 1929, II, p. 312 (French only).

the Commission could be discarded, even if a revised codification or general reconsideration was necessary, as in the case of the law of the sea. Topics already under consideration should be retained, subject to a reassessment of their priority, and might be completed in stages. Thus, the study of State succession should, in the normal course, be followed by succession of governments and succession of membership of international organizations, as well as succession of organization to organization.

10. With regard to that last-mentioned aspect of succession, since the limitation of State sovereignty was not to be presumed, there ought not be a succession. According to some writers, however, there was a continuity in organic international law as an expression of the principle of the continuity of the international public service. That question might perhaps be examined more appropriately not as part of the topic of succession, but as part of the law of international organizations.

11. Topics recommended by the General Assembly must necessarily be included in the Commission's programme of work, but topics being dealt with by *ad hoc* committees should be left aside for the time being.

12. In any event, was it useful and reasonable to draw up an unduly long list? In twenty-three years the Commission had not exhausted the programme established in 1949, and, as Mr. Castrén had reminded the Commission,³ room must be left for requests of the General Assembly. The Commission should also begin next year to consider the appointment of special rapporteurs for new topics to be put in hand forthwith.

13. Among new topics he might suggest was that of the territorial domain of the State, a topic which had hardly as yet been considered for codification. The economic, technological and political development of the world had, however, led to a situation in which the traditional procedures of acquiring "terrestrial" territories had lapsed, and such procedures were in any event inadequate so far as outer space was concerned and would have to be recast for the seas.

14. Recognition of States, governments and belligerents and recognition of *de facto* situations in general might be placed on the agenda again, despite their obvious political implications, and he agreed with the views expressed on that subject in paragraph 66 of the working paper. Some writers drew a distinction between recognition and invocability. Though the creation of a State might be invoked—and there was no rule of international law prohibiting that—if the creation came about contrary to a peremptory principle such as that laid down in Article 2 (4) of the Charter, then it could not be invoked and still less could it be recognized.

15. Because the law relating to international peace and security was so complex, one or more of those parts of it which had already been pioneered in the United Nations should be retained on the programme. The use of force when legal or just, such as its use by the Security Council or by a State in legitimate self-defence,

should also be codified, and it was worth considering the case of wars of liberation and revolutionary wars, for they were still hedged about by the old rules governing civil war. With regard to the law relating to internal armed conflicts, although he agreed with the views expressed by the Secretariat in paragraphs 396 and following, he felt that the topic should be included in the programme of work in terms that went rather beyond merely humanitarian law.

16. The law relating to economic development, which was only one branch of the international law relating to development, was a very new part of it, which, owing to the manifest and ever-increasing needs of the international community, called for the Commission's special attention. The Secretariat's working paper provided a very good exposition of that view in paragraphs 150 and following.

17. With regard to the law relating to international organizations, the Commission should take note of the General Assembly's recommendations as they were made and comply with them. It would then be, so to speak, working to order instead of drawing up a programme which might not be quite what was expected of it.

18. Lastly, it was certainly desirable that fresh and substantial progress should be made in international criminal law over the next twenty years, but it would be better to entrust the subject to some body other than the Commission, since it was completely bound up with the problem of the definition of aggression.

19. The order of priorities should certainly be reviewed, if only in order to draw up the agenda for the twenty-fourth session.

20. Mr. BARTOŠ said that the question of methods of work had been discussed continually throughout the fifteen years he had been a member of the Commission, while in 1947, in the Sub-Committee which had prepared the Commission's draft statute, there had been more talk about ways and means than of the list of topics to be codified. The problem had been whether to embark upon a systematic codification of international law, in which case all that had to be done was to decide how to set about it, or whether to select a number of topics for codification, the choice to be made by people who were in touch with the realities of international life. It was the latter method that had finally been adopted. Codification should therefore be undertaken of those topics which the Commission and the General Assembly considered to be the most important from the point of view of the international community.

21. It was hard, however, to decide what topics answered that criterion and were susceptible of codification within a given period, and the Commission had not always been satisfied with the selection. On the other hand, the collaboration of the jurists in the Secretariat had been even more valuable than could have been hoped. Even if there were still too few, they were the best specialists in the world both for their knowledge of international practice, their skill in research and their familiarity with theory. Without the general staff of the

³ See 1141st meeting, para. 41.

Codification Division, the Commission would not have made much progress.

22. Although at times the Commission had harboured the ambition to complete the codification of a fairly large number of topics, it had not succeeded in doing so. That brought up the problem of the Commission's methods of work. The problem was the more serious because law was dynamic and a codification which might seem excellent at the time it was made, like the codification of the law of the sea, soon began to show gaps owing to the rapid economic, political and legal development of the contemporary world. In that way, a topic would no sooner seem to have been completed than it was already out of date. The Commission's task, therefore, was not only to codify, but also to follow up its codifications and see whether changes in international relations required changes in the law, even in those parts of it which had already been codified. But how was the Commission to find the time to review work it had already completed and to reflect on possible changes to it, when it already had great difficulty in dealing with the codification of three or four topics?

23. A number of topics had been codified and the codification submitted to the appropriate political organ of the United Nations, but they had been considered not yet ripe or else as overripe in view of the existing political balance. All those various problems had led the General Assembly to establish other channels of codification outside the Commission, either by setting up *ad hoc* bodies or by requesting specialized agencies to codify certain topics. The high quality of the Commission's work had been invoked in support of the claim that it should be given a monopoly of codification, but the prerequisite for that was larger resources and more time. As matters stood at present, the Commission had done a great deal of work, but it was still not enough. Besides, apart from any question of the value of its work, the Commission was not necessarily the most appropriate body politically. That was a good enough reason for the establishment of other bodies, such as the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. The Special Committee had been meeting for several years and had finally produced a result which did not perhaps come up to the technical standards of quality which characterized the work of the Commission, but on the other hand the Commission could hardly have produced a text with the political tinge which marked the Special Committee's work.

24. The Secretariat had set out admirably and submitted to the Commission the topics directly or indirectly open to the Commission. It had not arranged them in order of priority, because its intention had been merely to list the topics for codification without expressing any view on the policy of codification. The Commission and the General Assembly had perhaps made the mistake of trying to give priority to too many topics since every topic listed in its programme of work became *ex hypothesi* a priority topic. It should therefore ask the General Assembly for permission to establish an order of priority

among the priority topics themselves. For example, it was obvious that the two topics of the kidnapping of diplomats and the hijacking of aircraft warranted immediate consideration, as Mr. Kearney had requested⁴ and the officers of the Commission had recognized. But how could that be done?

25. The Commission's methods of work must therefore be made more flexible, but that was impossible unless it had longer sessions. It must be capable of answering the needs of contemporary political and social life and consequently must be in a position to codify a larger number of subjects, without, however embarking on a systematic codification of international law. There could be no question of freezing the law for fifty years. New rules had been introduced even into the Justinian codifications, as need had arisen.

26. It was easy to see that there was practically no topic which was not susceptible of codification and whose codification was not necessary. Codification could deal with principles or it could deal with specific and detailed rules. As a selection was essential, it might be made in accordance with two criteria: urgency and the needs of the international community. But to be realistic, it must be understood that a United Nations codification, like every codification in the world, would always lag some way behind life.

27. Despite that, the Commission must be grateful to the Secretariat for the remarkable paper it had submitted. The Survey ought to be used by all specialists in international law and be given as wide a circulation as possible.

28. Mr. SETTE CÂMARA said he associated himself with the tributes paid to the Secretariat on the excellence of their Survey of International Law. Twenty-two years had elapsed since the Commission had made a selection of 14 topics for study from the 25 examined by the Secretariat in the 1948 Survey. During that period, the Commission had submitted final drafts or reports on seven topics and the time had therefore arrived to undertake the review of the remaining topics and the examination of new ones, so as to bring the future programme of work up to date.

29. Unlike the 1948 Survey, which made a preliminary analysis of a mass of customary rules and divergent practice and norms of treaty law which had not yet been systematically arranged, the new Survey appeared as a complete document, based on a thorough analysis of the realities of modern international law and firmly directed towards meeting the needs of the methods of work of the International Law Commission. It had benefited from the existence of a considerable body of codified international law, much of it based on drafts prepared by the Commission itself, and it paid due attention to the new needs of co-ordinating the codified provisions of international law and the new areas of law now being examined.

30. With regard to section 2 of chapter I of the new

⁴ See 1087th meeting, para. 38.

Survey, he believed that the Commission should adhere to its previous decision to postpone the examination of the topic of "The Obligations of International Law in relation to the law of the State"⁵ because of the difficulties arising from the considerable variations in State practice and in the provisions of domestic constitutional law.

31. As for section 4 of the same chapter, he agreed with the conclusion (para. 66) that, although the act of recognition was essentially political, there were various specific aspects of recognition which might be suitable for codification; recognition of States and Governments should therefore remain on the Commission's list of topics.

32. He also agreed with the conclusion that extra-territorial questions involved in the exercise of jurisdiction by States were "not suitable for general codification as carried out by the Commission" (para. 95). As the Survey pointed out, current interest in questions of criminal jurisdiction in respect of crimes committed outside national territory—as evidenced by the Convention for the Suppression of Unlawful Seizure of Aircraft signed at The Hague in December 1970,⁶ and the Convention to Prevent and Punish Acts of Terrorism taking the Form of Crimes against Persons and Related Extortion that are of International Significance, signed at Washington in February 1971,⁷ had developed from a concern to solve particular substantive problems rather than to deal with the question of extra-territorial jurisdiction as such and as a whole.

33. Chapter II of the Survey dealt extensively with the question of the peaceful settlement of disputes, and demonstrated the variety of solutions adopted in different cases, both in the Commission's own drafts and in the treaties concluded on the basis of such drafts. The 1949 decision not to include the item on the list of topics for codification was still valid.⁸ The difficulties encountered in the General Assembly by the Commission's draft on arbitral procedure⁹ showed that rules on the peaceful settlement of disputes were outside the realm of topics ripe for codification.

34. Chapter III, on the law relating to economic development, opened out a new field of the utmost importance; the time was bound to come when the Commission would study the problems connected with the activities of States in the field of trade and economic and technical assistance with a view to covering them in its future programme of work.

35. The conclusions set out in chapter IV, on State responsibility, and in chapter V, on succession of States and Governments, could only be assessed by the competent special rapporteurs.

36. Chapter VI, on diplomatic and consular law, dealt with a field most of which had been covered by the Commission; in fact there remained only the subject of "Questions concerning the implementation of certain rules of diplomatic and consular law" (paras. 240-249) to be taken up in due course.

37. With regard to the law of treaties, which was the subject of chapter VII, two reports by its special rapporteurs on the most-favoured-nations clause had still to be considered by the Commission. The question of participation in a treaty (paras. 269-274) had been considered by the Commission when preparing the draft articles on the law of treaties, and later by the Vienna Conference of 1968/69; further study of the question had been deferred by the General Assembly at its twenty-fifth session.

38. In chapter VIII, the Survey emphasized the difficulties with which the subject of unilateral acts was fraught and expressed doubts about the possibility of undertaking the formulation of draft rules on the subject. It recognized, however, the importance of unilateral acts and expressed the hope that the Commission would undertake an exploratory study of the subject.

39. He would not comment on chapter IX, since the subject of the law relating to international watercourses had only recently been discussed by the Commission, or on chapter X, on the law of the sea, and chapter XI, on the law of the air, which dealt with matters largely covered by existing international conventions.

40. Chapters XII and XIII drew attention to the law of outer space and the law relating to the environment, although those problems were under consideration by other United Nations bodies, because they might in the future require examination by the Commission under its long-term programme of work.

41. On the subject of the law relating to international organizations, the Survey suggested that the Commission should continue its present course of action, "namely to deal with specific aspects which have similarities to the parallel practices of States, after the relevant inter-State law has been examined", a course which "would appear to offer the best possibilities for the Commission to contribute to the codification and development of the law in this area" (para. 356). The general body of rules pertaining to the law of international organizations would not be ripe for codification in the foreseeable future, if at all.

42. Lastly, he found both reasonable and judicious the conclusions of the last two chapters, dealing with international law relating to individuals and with the law relating to armed conflicts.

43. There remained the problem of what action, if any, should be taken at the present session with regard to the Commission's long-term programme of work. In view of the lack of time for any thorough discussion at the present late stage and more particularly of the fact that the present membership was at the end of its mandate, he suggested that the question of a new programme of future work be left to the Commission in its new composition at the next session. The present

⁵ See *Yearbook of the International Law Commission, 1949*, p. 37.

⁶ ICAO document 8920.

⁷ OAS document AG/88/RW.I.

⁸ See *Yearbook of the International Law Commission, 1948*, p. 44.

⁹ *Ibid.*, 1953, vol. II, pp. 201-212.

exchange of views would undoubtedly be helpful to the new members.

44. Mr. AGO said that he had not had time for a detailed study of the Working Paper submitted by the Secretariat. He would therefore confine his remarks to a few statements in the excellent introduction, on which he congratulated the Legal Adviser and his staff. He might wish to offer some more extensive comments later.

45. First, he thought it was not correct to say, as was stated in paragraph 8, that the codification and progressive development of international law were a process whereby efforts were made to translate the fundamental principles relating to the conduct of States into specific legal obligations. The fact was that international obligations, whether the result of codification or a matter of customary, conventional or any other kind of rules, were always legal obligations, and what could affect the more or less specific nature of the obligation was not the process of codification but the manner in which the obligation was defined.

46. What characterized the process of codification was the fact that the law passed from unwritten form to written form. In any human society, codification generally took two forms; one related to the physiology, or structure of the law, and in the other to the pathology or state of the law. In normal circumstances, when the only defect of non-codified law was that it had become obscure or lost its homogeneity, codification consisted simply in clarifying it, in eliminating what was obsolete and removing the sources of confusion between rules which appeared to contradict each other. But when the law no longer reflected the exigencies of society, and when, as the result of far-reaching social changes, or even a revolution, it had not only to be clarified but also to have its quality of certainty restored by recasting and restating it, it was then that the task of codification took on a heightened significance. All the great codifications of history, the Code Napoléon, for example, had been produced immediately after a social upheaval. That was what was happening now; the world was undergoing the greatest revolution which international society had ever experienced, for two major continents which had never previously been anything more than the "object" of international relations had made their appearance in international society with a series of full subjects of international law, all with their aspirations, their genius, their traditions and their legal, religious, moral, social, economic and other ideas. Those new subjects of international law intended not only to question the rules they found there, but also to participate in the formulation of the rules that would constitute the international law of the future.

47. International law therefore had to be re-examined *in toto* and cast in a new mould which, it was to be hoped, would preserve everything that was valid in the old rules, but especially would attract the indispensable support of all the new States. In normal times theoretical codes might be a possibility, but in the world of today written rules had to be stated in the form of conventions. That was a point that should not be overlooked.

48. His second comment concerned over-systematization, which was something the authors of the paper seemed to be afraid of, since they stated in paragraph 16 that the adoption or endorsement of a conclusive definition of international law and its contents by the Commission might make it difficult to add new topics.

49. The content of international law could not be circumscribed. International law could be said to be the legal order in force in international society, yet its content was essentially fluid, and was a function of the time; it changed from age to age, either because new questions were added to those already covered, or because the rules governing old questions became firmly established, or because some institutions disappeared.

50. His third comment was that he would like to see a clearer expression of the idea advanced in paragraph 17, that a resolution adopted by a plenary organ, though not law-making, could nevertheless become part of State practice and be thereby transformed into a customary rule.

51. His fourth observation related to paragraph 19, where the authors of the paper seemed to be saying that the Commission, which up to the present had devoted itself to the codification and progressive development of traditional international law, should turn to new topics which needed to be regulated by international law. The idea should be expressed differently, in order to avoid giving the impression that future codification should be applied only to what was new. In point of fact, the Commission was far from having exhausted the topics of traditional international law, but its main task now was to recast the rules of traditional international law so as to secure their acceptance by all States, as it had done with the law of treaties. The topicality of a particular problem should not be allowed to obscure the fact that the Commission's essential function was to codify and illuminate the major aspects of traditional international law.

52. Next, he hoped the Secretariat would consider more closely the question of what happened to codifications. It would be wrong to think that codification ceased with the diplomatic conferences that were responsible for adopting the conventions, because there were still the formidable obstacles of ratification and accession to overcome. That was a point that should not be overlooked. At the same time, a codification convention should not be reviewed too soon, because if its achievements were questioned too hastily, the result would be to bring disorder rather than order into international society.

53. Finally, the Survey should include an analysis of the force of codification conventions irrespective of their contractual force, for if a convention attracted the support of a large majority of States, it thereby acquired weight regardless of the number of ratifications or accessions. If the Secretariat would look into those points, it could then round off a study on which he warmly congratulated it.

54. Mr. TABIBI said that since he had begun his career as an international lawyer, more than twenty-three

years ago, rapid changes had taken place in the field of international law and in the attitude of nations towards it. That change of attitude had been particularly marked in the emerging nations of Asia and Africa.

55. In the early days of the United Nations, no diplomat from his part of the world had been anxious to serve as a delegate to the Sixth Committee and it had been a novelty to find a student who wanted to go abroad to study international law. Even ten years ago some delegates to the General Assembly had been startled when he had proposed the adoption of measures for technical assistance in the field of international law.

56. Nevertheless, within a span of less than two decades, international law had caught the imagination of the world, mainly as a result of the work of codification carried out by the Commission and by the Secretariat, and of the success of the Vienna Conventions on diplomatic and consular relations, the four Geneva Conventions on the law of the sea and the Vienna Convention on the Law of Treaties. In that growing support of international law, the role of the emerging nations of Asia and Africa, which had doubled the membership of the United Nations and had also doubled the number of topics of international law, should not be underestimated.

57. With the participation and contribution of Asian and African jurists, international law was no longer just a legal institution of European chanceries and foreign offices; it was a part of the life and education of the new and emerging nations. The theory that international law was a product of Christian civilization had lost its force, and it was now recognized that international law was also to some extent a product of the ethics and morality of the oriental peoples who had produced the main religions of the world.

58. The two world wars, which had begun in Europe, had cast some doubt on the rules of international law. Since then, however, international law had undergone great changes, due to the common sense and imagination of the leaders of the Second World War, who had sought refuge in its principles when they had adopted the basic principles of the Charter at Yalta and later at San Francisco. During the last two decades, the rules of the Charter had not only served to maintain the integrity of States, which was an old concept, but had placed more emphasis on the interests and protection of the community of nations as a whole.

59. Those old rules of international law, based mainly on protection of the individual rights of aliens and the doctrine of minimum standards, had given way to the principles of self-determination and human rights and new norms of international law which had their roots in the interests of the masses and of the community of nations as a whole.

60. The new "Survey of international law" which had been prepared by the Secretariat bore witness to all the genuine efforts of the new community of nations in the last two decades to create a modern international law for the benefit of mankind as a whole. It was a

thoroughly up-to-date work and deserved a much wider circulation and greater publicity. It should be made available in printed form for the use of all legal institutes and juridical circles.

61. The new topics recommended for study in the Survey, such as the protection of diplomats abroad, the prevention of the hijacking of civil aircraft and the protection of the environment, were all worthy of consideration, since they concerned problems of vital interest to the present community of nations. But since the term of office of the present Commission was approaching its end, it was important not to tie the hands of the next Commission and of the General Assembly by making proposals for new topics. He proposed, therefore that the Commission should take note of the Survey and request the Sixth Committee to consider it carefully and make appropriate recommendations to the next Commission. Meanwhile, the Commission should request its successor to study the Survey and prepare a new list of topics for the next session as a matter of priority.

62. Mr. EL-ERIAN said he wished to associate himself with the expressions of appreciation of the Survey and the tributes paid to the Legal Counsel for his lucid introduction and to the Director of the Codification Division and his staff for their efforts in preparing that valuable document. The Survey presented a summary, which was both comprehensive and concise, of the activities not only of the International Law Commission but also of other United Nations bodies in the codification and progressive development of international law. It was richly documented and related the Commission's work to that of other organs of the United Nations and of the specialized agencies. It placed international law in its proper setting, which was the United Nations, and brought out clearly the impact of the Charter on traditional international law, which had transformed it into what was now generally considered the law of the United Nations.

63. Previous speakers had dwelt on general aspects and general trends; he would confine his own remarks to a few specific questions.

64. On the question of the utilization of the Survey, he agreed with earlier speakers that it should receive the widest possible distribution. He understood that it would be published in the next *Yearbook*, but the Commission's yearbooks were available only to a limited number of libraries and individual experts. In view of the importance of making it available to institutions of learning generally, he hoped the Secretariat would consider the possibility of publishing it as a separate edition possibly as part of the programme of technical assistance in the dissemination of the knowledge of international law.

65. Reference had been made during the present discussion to offences of international concern which threatened the peace and security of mankind and which undermined the foundations of international law. The gravest of all such offences was the war of aggression, because it struck at the very foundations of the contemporary international order.

66. The section of the Survey devoted to "Questions relating to modes of acquisition of territory" (paras. 42-48) contained a striking analysis of the consolidation of humanity's great achievement in the prohibition of the use of force and of the unlawful effects of the use of force, namely, the acquisition of territory. It mentioned most appropriately the relevant passages of the draft Declaration on the Rights and Duties of States prepared by the Commission in 1949¹⁰ and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, embodied in General Assembly resolution 2625 (XXV)¹¹ and other instruments, which proved that those rules had become part of positive international law and were now ripe for codification. He accordingly proposed the inclusion in the list of topics for the Commission's long-term programme of work of a new item entitled "The legal effects of an illegal presence in territory and of the seizure by force of territory".

67. Very pertinent to that position was the Advisory Opinion rendered on 21 June 1971 by the International Court of Justice in the Namibia Case, and he wished to pay tribute to the contributions made during the proceedings before the Court by the Legal Counsel of the United Nations and by two members of the Commission, Mr. Castrén and Mr. Elias. The Advisory Opinion stated *inter alia* that: "By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation"¹² and that the "member States of the United Nations are... under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia. They are also under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia...".¹³ It then went on to state that "member States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia"¹⁴ and that "Member States... should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia".¹⁵ Finally, it had stated: "The restraints which are implicit in the non-recognition of South Africa's presence in Namibia and the explicit provisions of paragraph 5 of (Security Council) resolution 276 (1970) impose upon member States the obligation

tion to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory".¹⁶

68. He hoped that the Secretariat would find some means of including those important passages of the Advisory Opinion in the relevant portion of the Survey before it was printed.

69. With regard to the Commission's future work of codification, he would suggest a number of criteria for the selection of topics. The first was that the Commission should concentrate on those topics already under consideration. The second was it should avoid duplicating work already being done by other bodies. The third was that it should adopt a flexible programme so as to be able to deal with urgent questions as they arose.

70. Finally, he would suggest, as Mr. Tabibi had already done,¹⁷ that for the time being the Commission should confine itself to taking note of the Survey and leave final decisions to its new membership at the next session.

The meeting rose at 6 p.m.

¹⁰ *Ibid.*, pp. 55-56, para. 124.

¹⁷ See para. 61 above.

1144th MEETING

Monday, 26 July at 3.15 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Alcívar, Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Ushakov, Sir Humphrey Waldoock, Mr. Yasseen.

Review of the Commission's long-term programme of work

(A/CN.4/245)

[Item 7 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue its consideration of item 7 of the agenda and of the Secretariat working paper, "Survey of international law" (A/CN.4/245).

2. Mr. EUSTATHIADES said he congratulated the Legal Adviser and his staff on the admirable working paper which they had submitted to the Commission; it

¹⁰ See *Yearbook of the International Law Commission, 1949*, pp. 286-290.

¹¹ See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 28*, p. 121.

¹² See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 118.

¹³ *Ibid.*, p. 54, para. 119.

¹⁴ *Ibid.*, p. 55, para. 122.

¹⁵ *Ibid.*, p. 55, para. 123.

surveyed not only what had been accomplished so far but what might be achieved in the future codification of international law. Since the document was of great value both for study and research purposes and from an educational point of view, he would request, like other members of the Commission, that it be given as wide a distribution as possible.

3. The evolution of international society, of which many new States had become members during the past twenty-five years, made it necessary to revise the Commission's programme of work. That was partly because the developments which had taken place had intensified relations between States, which it was the very purpose of the codification of international law to facilitate, and partly because the new States could now participate in the codification process. At present, however, bearing in mind the recommendations of the General Assembly and the needs of the international community, the Commission could do no more than have an exchange of views.

4. The needs of the international community were of two kinds: current, urgent needs, and permanent needs whose study could be deferred. The Commission had to consider not only the urgency of a topic but also whether it was ripe for codification. The ideal topics were those which fulfilled both conditions, but where that was not the case, the first consideration should be the needs of the international community, since the Commission had also to concern itself with the progressive development of international law. Any decision by the Commission to give priority to a particular topic should therefore be based primarily on the interests of the international community, as well as on the possibility of undertaking the codification.

5. Among the topics of immediate relevance, there was, first, the question of outer space; secondly, the question of the illicit seizure and diversion of aircraft; and thirdly, the question of acts of aggression against diplomatic agents and other representatives of States.

6. There was no pressing need to study the first question, despite its topicality, since it was already governed by general rules laid down in agreements adopted by the General Assembly, and there was a special committee responsible for particular aspects of it. Also, in some respects, the subject-matter was exceptionally technical.

7. The second question was already widely regulated by the Convention of 16 December 1970 for the Suppression of Unlawful Seizure of Aircraft,¹ and where the matter involved an element of political terrorism, by the abortive Geneva Convention of 16 November 1937 for the Prevention and Punishment of Terrorism.² The Institute of International Law was already studying the matter as well. Thus, it was not a suitable subject for the Commission.

8. With regard to the third question, on the other hand, rules needed to be formulated without delay governing

the prevention and suppression of acts of aggression against diplomatic agents and other representatives of States; despite its political content, that question ought to be examined by the Commission, as Mr. Kearney had proposed at the beginning of the session.³

9. Two topics which ought to be included in the Commission's long-term programme of work were unilateral acts and extradition.

10. With regard to unilateral acts, the Commission could explore the subject in due course without, however, feeling obliged to prepare a draft convention, since the lack of any codification of the topic had not caused any serious practical difficulties so far.

11. The question of extradition was ripe for codification. Parallel solutions and even standard clauses could be found in international conventions, and the question was of immediate relevance because it was related to the subject of international criminal acts. The Commission might therefore envisage its codification. The outcome of that process did not have to be a convention, but might be a text in the nature of a recommendation which States could take as a basis for their extradition treaties.

12. Two further topics which the Commission might place on its long-term programme of work were the jurisdictional immunities of States and recognition of States.

13. The question of the jurisdictional immunities of States was of practical day-to-day importance. The draft convention prepared on the subject by the Council of Europe,⁴ which reconciled divergent views and laid down certain principles, clearly suggested that codification could be extended beyond the regional framework. Also, the fact that the principle of reciprocity was accepted even in the law of the socialist States was a good omen for the conclusion of a universal international convention on the subject. Codification should be applied to general principles only, however, and not to specific aspects such as the immunity of Heads of State, foreign armed forces and foreign vessels.

14. The political element involved in the question of recognition of States should not deter the Commission from examining several other aspects of the topic, such as the conditions for and the forms and effects of recognition; those lent themselves to the formulation of international rules, since the political element mainly concerned the granting of recognition. Considerable developments had taken place during the past twenty-five years, particularly with regard to the effects of recognition, and especially of non-recognition, and the question of the relations of non-recognized States with other States was unexplored territory. The importance of the subject justified its inclusion amongst the topics for codification.

15. Furthermore, it would be appropriate to study the question of the relationship between international law and municipal law, with particular reference to the

¹ ICAO document 8920.

² League of Nations publication, V. Legal, 1937. V.10.

³ See 1087th meeting, para. 38.

⁴ See para. 37 below.

application of international law by municipal organs. Although the subject was not new, it had not yet been considered except from the standpoint of the penalties incurred under State responsibility. The Commission might thus settle a doctrinal dispute and dispel the confusion which bedevilled the practice on the subject.

16. Finally, he wished to draw attention to the fact that many codification conventions had not yet been ratified. The Commission ought to consider what measures could be taken to remedy that situation.

17. Mr. ELIAS said that he was glad to join in the tributes paid to the Survey, which was a remarkable piece of scholarship, and to the Legal Counsel and to the Director and staff of the Codification Division for their efforts. The Survey was bound to influence the work of law schools and writers of textbooks of international law, and ought therefore to be given as wide publicity and circulation as possible. It was not a document that should be subjected to critical analysis like a special rapporteur's report; it was simply intended to provide a general review of international law, not so much since 1949 as since 1960, so as to enable the Commission to discard from its 1949 list of topics⁵ those which were no longer appropriate for codification, and to add new ones. In bringing its long-term programme of work up to date, the Commission should take into account both General Assembly recommendations and the needs of the international community.

18. It was clear that the Commission could not, at that late stage in the session, embark on any lengthy discussion of the Survey, particularly as members were nearing the end of their term of office. In considering its programme of work, however, the Commission should take into account the period of time for which the work was being planned. The Commission had at present under consideration no less than five topics for which it had already appointed Special Rapporteurs: first, succession of States in respect of treaties; secondly, succession of States in respect of matters other than treaties; thirdly, State responsibility; fourthly, the most-favoured-nation clause, and, fifthly, the question of treaties concluded between States and international organizations or between two or more international organizations.

19. Looking back over the past ten years, he felt that the completion of work on three topics, namely, the law of treaties, special missions and relations between States and international organizations, represented a genuine achievement. The Commission should now therefore be content with a comparatively modest list of topics. The General Assembly might at any time request it to examine other topics in addition to the five already under consideration, and there was also the possibility that the Commission itself might suggest some new topic; for instance, Mr. Kearney had suggested the question of the protection and inviolability of diplomatic agents.⁶ Personally, he would strongly recommend that the Com-

mission confine its current list of topics to the five for which it had already appointed Special Rapporteurs, together with the question of the rules of international law relating to international watercourses—on which a good deal of work had already been done both by the Sixth Committee and by the Secretariat—and the question suggested by Mr. Kearney, which was of great importance. It would then be for the Commission in its new composition to draw up a list of topics for the long-term programme of work. Perhaps also, at the forthcoming session of the General Assembly, the Sixth Committee might have some recommendations to make on the subject.

20. The emphasis should be placed on accomplishment rather than on length in drawing up a list of topics, since the Commission would be unable to consider very many in anything like the near future. The seven topics which he had mentioned should engage the attention of the Commission for at least ten years, quite apart from any other topics which might be referred to it by the General Assembly or which the Commission itself might decide to take up. A long list of topics had been asked for in 1948 before the Commission had begun to function. The Commission has thus been provided with a wide range of topics from which to make a choice. The position was now quite different because the Commission had been in existence for over twenty years and any new list should be drawn up in the light of experience.

21. Mr. KEARNEY said that the Survey was an excellent working paper which offered a useful basis for determining the future work programme of the Commission. It was his impression that the intention was to plan ahead for a period of some twenty years. Bearing in mind the time-lag between the completion of the Commission's work on a topic and its final codification, that meant that the Commission should have in mind the needs of the international community at the end of the present century with regard to the codification and progressive development of international law. Members should therefore devote some time and thought to the question of the long-term programme of work and as many of them as possible should submit, after the end of the present session, written statements on the subject, as one or two had already promised. He would suggest that written statements be sent in time to reach the Secretariat well before the Commission's twenty-fourth session, so that they might be circulated to members ahead of the session. In that way, the Commission in its new composition would have a clearer view of what was recommended on the basis of past experience. At the next session, the Commission would then be able to concentrate on the selection of topics instead of having to indulge in a discussion of legal theories.

22. Examination of the long-term programme of work would involve more than drawing up a list of topics. The Commission would have to decide on a set of priorities and try to put it into effect. It would also have to consider whether, in order to complete its proposed programme of work, it ought not to adopt some new method of work. Looking back over the past five years, he had the impression that the Commission could

⁵ See *Yearbook of the International Law Commission, 1949*, p. 281.

⁶ See 1087th meeting, para. 38.

perhaps have accomplished more than it had done and it was for that reason that he felt it should give careful consideration to new methods of work.

23. It was his intention to submit a written statement, so for the moment he would confine his remarks to two points. The first related to a question which was not mentioned in the Survey, namely that of keeping international law up to date. Treaties, when they were applied in practice, often revealed faults, weaknesses and gaps. There appeared to be a need for some international machinery to obtain information on how treaties were working in practice and whether they needed revision. The Commission was well fitted to undertake that task, especially with regard to conventions based on its own work. For example, he could not help feeling that the Commission might be able to review the 1958 Conventions on the law of the sea more effectively than could an eighty-eight nation Committee.

24. His second remark related to the problem of the protection and inviolability of diplomatic agents, to which he had referred at the beginning of the present session in connexion with the adoption of the Commission's agenda.⁷ Several members had spoken of the urgency of that problem and he thought that the Commission should bring it to the attention of the General Assembly, either in its report on the work of the session or through its Chairman when he addressed the Assembly as the representative of the Commission. It should be made clear that, if the General Assembly felt the need for prompt action in the matter and if other efforts in that direction did not appear to be fruitful, the Commission was in a position to deal with the question expeditiously. For that purpose, the Commission would have to adopt a new working pattern and deal with the subject through a small working group, perhaps without any special rapporteur. It was essential to dispel the erroneous impression that the Commission needed five years to deal with a topic. The Commission could, if requested, produce a very acceptable draft convention on the subject at its next session and it should inform the General Assembly of that fact.

25. Mr. THIAM said he congratulated the Legal Adviser and his staff on the impressive achievement represented by the working paper before the Commission. It was more than a simple review of international law, it was a comprehensive survey which took account both of theoretical questions and of the needs of the international community, and modern international law could not be formulated without an understanding of those needs. In common with other members of the Commission, he asked that the Survey should be given the widest possible circulation.

26. Since the term of office of its present members was now expiring, the Commission would be unable to review its programme of work in detail until the next session, and it was too early to decide on methods of work. The Commission could, however, give consideration to a

long-term programme of work which reflected the state of international law and possible changes and trends. That programme could then be regarded as an over-all forecast; it would not interfere with the Commission's technical function of codification and yet it would take account of development. The Commission should therefore draw up a long-term programme of work at its next session and confine its immediate tasks to subjects which could be codified within five years. He might wish to indicate in due course the subjects he thought should receive priority.

27. Mr. USHAKOV said he congratulated the Legal Counsel on his admirable introduction of the Secretariat's working paper entitled "Survey of international law"; the document was a first-rate working tool.

28. The Commission must now reflect on the topics for its long-term programme of work. It was true that it was for the General Assembly, acting through the Sixth Committee, to draw up the list, but the Commission was also bound to make proposals to the General Assembly to help it to take its decisions. The Commission had not had time to do that at the present session, but members would find in the Secretariat's notable study a basis for reflection which would enable them to give their opinion at the next session with all the facts before them. At that stage, therefore, he would refrain from making specific proposals. The Commission might, however, promise the General Assembly that it would make its proposals at its next session, and thanks to the working paper prepared by the Secretariat, it would be in a position to keep its promise.

29. Sir Humphrey WALDOCK said that the Secretary-General's Survey was obviously not designed to suggest a particular programme of work but rather to give a perspective for the future. Since the term of office of the present members was drawing to a close, it would seem proper that the primary decisions concerning the future programme of work should be taken at the next session or even later.

30. There was already a formidable list of topics on the Commission's agenda, such as State succession in respect of treaties, State responsibility, treaties with international organizations, the most-favoured-nation clause, international watercourses, and the like. He himself had always taken the position that the Commission should for the most part undertake very substantial works of codification, primarily for the reason that there was no other qualified body which was prepared to do so. However, he did feel that it was in the interests of the Commission itself, particularly in its relations with States and the General Assembly, that it should also deal with smaller and more urgent topics as occasion might offer. A case in point was the subject of kidnapping of diplomats, which was closely connected with a topic on which the Commission had already made several reports, namely, that of diplomatic privileges and immunities. He thought, therefore, that that was the type of topic on which it was practicable to appoint a special rapporteur to produce a draft with a view to its adoption in the course of a single session.

⁷ *Ibid.*

31. He did not wish to comment in detail on the proposals contained in the Survey, many of which he found attractive, such as the topic of States immunity, which had already been made the subject of codification by the Council of Europe and which had also been considered by the Asian-African Legal Consultative Committee. There were also other topics, such as that of extra-territorial jurisdiction, which frequently gave rise to real difficulties and disputes and which undoubtedly deserved consideration by the Commission. In the end, however, the Commission would have to be practical in making its choice and therefore, as Mr. Kearney had suggested, it should reflect more carefully on the Secretary-General's memorandum between sessions.

32. He was in general agreement with what had been said about the Survey by other members, in particular by Mr. Elias and Mr. Kearney. Everybody must thank the Secretariat for producing that document, which he was sure would be of great value, not only to the Commission, but also to outside bodies such as faculties of international law.

33. The CHAIRMAN said that, if there were no more speakers, he would declare the debate on item 7 of the agenda closed.

Co-operation with other bodies

[Item 9 of the agenda]

(resumed from the 1136th meeting)

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

34. The CHAIRMAN welcomed Mr. Golsong, observer for the European Committee on Legal Co-operation, and invited him to address the Commission.

35. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said that as the work of the Commission on the one hand and the European Committee and its connected bodies within the Council of Europe on the other hand continued to progress, more and more points where their interests coincided came to light.

36. He had noticed that first when reading the various Commission documents which had been transmitted to him in his capacity as observer. Then the admirable report submitted by Sir Humphrey Waldock, in his capacity as observer for the International Law Commission, to the most recent session of the European Committee on Legal Co-operation had also revealed that community of interests, and his Committee hoped that the Commission would be represented at its meetings as often as possible, so that the number of mutually fruitful personal contacts might increase. And now the coincidence of interest had been disclosed once again in the notable survey of international law submitted to the Commission by the Secretariat (A/CN.4/245). The information it contained on points relating to the Committee's work was very accurate.

37. Among the matters of common interest he would cite first the European draft Convention on State Immunity, which he had mentioned the previous year.⁸ The draft convention was based on the system of a negative list, that was to say, a list of cases in which no immunity from jurisdiction was recognized, and it also contained provisions concerning the enforcement of judgments against a foreign State in cases not covered by immunity from jurisdiction. The intention had been to avoid the assimilation of such judgments to foreign judgments in ordinary civil cases and all mention of *exequatur*. For that purpose, stress had been laid on an obligation of the defendant State to "give effect to" a judgment rendered against it by a foreign court. That obligation might possibly give rise to a second court action. The draft detailed the conditions in which a defendant State might challenge the earlier judgment and refuse to comply with it. The institutor of the first proceedings might apply to the courts of the defendant State or, if the latter had acceded to the additional protocol setting up a European procedure, apply to a European court, of which the judges would be the same persons as the judges of the European Court of Human Rights. The convention had entered the final stage of preparation and would probably be opened for signature at the next Conference of European Ministers of Justice, to be held in Switzerland in May 1972. The draft convention did not, of course, make any reference to the rights and duties of States which were not parties to it.

38. With regard to action against pollution of the major international waterways of western Europe, a matter on which he had touched the previous year,⁹ the draft treaty now contained a comparatively limited clause on inter-State responsibility which perhaps would not even be retained in its present form when the final vote was taken. There were several technical difficulties, such as the equitable distribution of the costs of action against pollution between the countries upstream and the countries downstream.

39. Consideration of that matter had brought out the fact that there were very wide differences between the laws and practice of member States of the Council of Europe with regard to civil liability for acts of pollution. Apart from Switzerland, where legislation was now being drafted, and two or three other countries, the member States of the Council of Europe had no special laws on the matter. It was for that reason that the question of civil liability had been specifically broached, and the Committee would devote its first meetings next year to that question in the light of a study in comparative law, copies of which could be transmitted to the Commission, if it so wished.

40. The Consultative Assembly and the governments of the member States of the Council of Europe were also very much interested in the work of the Committee on the Peaceful Uses of the Sea-bed and the Ocean

⁸ See *Yearbook of the International Law Commission, 1970*, vol. I, p. 147, para. 92.

⁹ *Ibid.*, p. 147, para. 91.

Floor, and exchanges of views might take place on that subject early in 1972.

41. With regard to the protection of diplomats against kidnapping, a subject raised by Mr. Kearney, the competent bodies within the Council of Europe were well aware that the problem existed even in Europe, since no one was immune from such acts of terrorism. They had considered that member States should, as a first step, revise and supplement their criminal legislation to cope with that new form of crime.

42. The European bodies had also found that they were faced with the problem of the coexistence of several conventions, not so much regional conventions and a universal convention, as might be the case with regard to human rights, but European conventions dealing with the same subject from different points of view. That applied in particular to the existing conventions relating to criminal law, ranging from conventions relating to extradition and to legal assistance in criminal cases, to conventions for the recognition and enforcement of foreign judgments in criminal cases.

43. The Committee had also undertaken studies on assistance between States in matters of administrative law. It envisaged, first, facilitating the direct communication of information between administrations and, secondly, going on to a form of recognition of certain administrative acts. In the first case, that was already provided for by international courtesy and by practice, but in most countries such practice had no basis in law.

44. Another matter which might perhaps be mentioned was watching the application of the conventions. A meeting of representatives of governments and practising lawyers had been organized to consider the difficulties encountered in the application to international agreements relating to criminal law. A wealth of information had emerged from it, and it had become clear that some difficulties might be settled by harmonizing the position taken by each contracting State unilaterally.

45. The Diplomatic Conference for the preparation of a universal version of the European Convention on the International Classification of Patents had met at Strasbourg in March 1971. It had enabled States which were not members of the Council of Europe to participate on equal terms in the work on classification, for harmonization had become increasingly necessary now that 400,000 patents were issued every year by the patent offices of the world. That Diplomatic Conference had been of some technical interest because of the method adopted for the passage from a regional to a universal convention. It also testified to the fact that the member States of the Council of Europe were politically willing to go beyond the regional framework where the common interests of the members of the international community justified such a step.

46. At the previous session Mr. Ramangasoavina¹⁰ and Mr. Thiam¹¹ had expressed the wish that contact might

be established between the European Committee on Legal Co-operation and countries outside Europe. He could report that a system of fellowships had been instituted for lawyers from the developing countries to enable them to familiarize themselves with the work of the European Committee on Legal Co-operation and with the legal activities of member States. The system would come into force on 1 January 1972 and should be regarded as a contribution to the implementation of General Assembly resolution 2099 (XX) on technical assistance to promote the teaching, study, dissemination and wider appreciation of international law.¹²

47. The Committee was following the Commission's work on relations between States and international organizations of a universal character with the greatest attention. As the Commission already knew, the member States of the Council of Europe had adopted a different approach. He hoped, nevertheless, that the solution worked out by the Commission would attract a significant majority of ratifications. He hoped, too, that the Committee would be able to be of assistance in seeking the necessary compromises, in its capacity as observer at the diplomatic conference convened to adopt the convention.

48. Although it had not yet entered into force, the Vienna Convention on the Law of Treaties had already become a part of daily life and was referred to constantly. For example, in a judgment given by the European Court of Human Rights a week before, Mr. Verdross had referred to article 33, paragraph 4, of the Convention¹³ in connexion with a problem of interpretation. It was to be hoped that the Convention would be ratified by a significant majority of States.

49. In expressing the hope that all the present members of the Commission who were candidates would be re-elected, he wished to pay a tribute to Mr. Castrén, who was about to retire and whose authority, independence of mind, legal scrupulosity and modesty were a model for all who were working for a better organization of the international legal order. He also wished to pay a tribute to Mr. Tsuruoka, the Chairman of the Commission, and to observe that although Japan was geographically at the antipodes of Europe and although its legal system was based on different philosophic concepts from those of the member States of the Council of Europe, Japan and the European States shared the same faith in the rule of law.

50. The CHAIRMAN thanked the observer for the European Committee on Legal Co-operation for his very interesting report on the Committee's activities and for the kind words addressed to him personally.

51. Sir Humphrey WALDOCK said that he would like to thank Mr. Golsong for his *exposé*, which he had presented with his usual brilliance and clarity, as well as for

¹⁰ *Ibid.*, p. 148, para. 105.

¹¹ *Ibid.*, p. 149, para. 111.

¹² See *Official Records of the General Assembly, Twentieth Session, Supplement No. 14*, p. 89.

¹³ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 293.

the reception which had been given to him personally at the meeting of the European Committee on Legal Co-operation which he had attended in his capacity as an observer.

52. He would like now to ask Mr. Golsong if he could describe in a few words the normal technique followed by his Committee in preparing texts for codification. Were those texts prepared by his secretariat, by a special rapporteur appointed for that purpose, or by some other system?

53. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation), said that his Committee followed more or less the same method of work as that adopted in the Commission. In 1963, and again in 1969, a special committee had been convened to examine a set of documents prepared by the secretariat, which it was thought might be of interest to various member governments. Certain suggested topics had then been adopted on the basis of recommendations by faculties of law, and those topics had consequently been studied by the secretariat, with the assistance of expert consultants. The special committee had then considered what programme of work the European Committee should adopt for the next few years, and by a democratic process of voting, had agreed on a list of topics to be given priority treatment; the remaining topics would, of course, be dealt with at a later stage. With regard to the question who was responsible for preparing the material, he would say that there was no uniform practice as yet. The topic of State immunity, for example, had been initiated by a report prepared by the Austrian Ministry of Justice, while the topic of the privileges and immunities of international organizations had been initiated by the United Kingdom Government. The Consultative Assembly had produced a text on water pollution, but since it had proved unacceptable to governments, the secretariat had undertaken to produce a draft of its own.

54. Sir Humphrey WALDOCK asked whether the European Committee ever appointed a special rapporteur to be responsible for a particular topic.

55. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) replied that the European Committee did not use the special rapporteur system, although the chairman of a special committee often became an expert on a particular subject and submitted a draft. In any case, at the final stage of the work before the Committee of Ministers, it was always for the secretariat to defend and explain the proposals made by the European Committee.

56. Sir Humphrey WALDOCK and Mr. KEARNEY thanked Mr. Golsong for his explanations.

57. Mr. CASTRÉN said he had noted that the Council of Europe succeeded in preparing draft conventions in a relatively short time, whereas the Commission needed several years. One reason was obviously that the Commission met for only a few weeks each year

58. He wished to thank Mr. Golsong very much for his kind words about him; he must state that, although

he was sorry to leave the Commission, he would from now on be able to devote more time to following the work of the Council of Europe.

59. Mr. THIAM said that, on his own behalf and on behalf of Mr. Tabibi, he wished to thank the observer for the European Committee on Legal Co-operation for the information he had given about the establishment of a system of fellowships for lawyers from the African and Asian countries. He would not fail to transmit that information to his Government.

60. Although the African and Asian countries had, as a result of achieving independence, adapted legal systems originally based on European legal systems to the realities of their own situation, they remained attached to certain universal values which had been cradled in Europe.

61. Mr. ELIAS said that he had been glad to hear that there would be an opportunity for students from developing countries to go to Strasbourg to learn more about the work of the Council of Europe. That would be a necessary complement to the work of the Commission itself, which was enabling students from those areas to attend its sessions at Geneva and familiarize themselves with its work.

62. He was sure all members were grateful for Mr. Golsong's very interesting report on the work of the European Committee, although he personally had been a little disturbed by his mention of the possibility of a clash between the Commission's draft report on relations between States and international organizations and the approach taken by the European Committee. He hoped, however, that the observer for the European Committee would have an opportunity to express his views at the future plenipotentiary conference which would be held on that subject.

63. Mr. EL-ERIAN said that he wished to associate himself with Mr. Thiam and Mr. Elias in expressing his appreciation of the efforts made to familiarize African youth with the work of the Council of Europe. In particular, he personally wished to thank Mr. Golsong for the material which he had provided concerning the privileges and immunities of permanent missions.

64. He noted with regret that the Commission's draft appeared to have received harsh treatment at the hands of the European Committee, but he hoped it would be possible for the Commission to discuss points of difference with the Committee and soften its present, critical attitude. Like Mr. Elias, he also hoped that the Committee would be able to send an observer to the future plenipotentiary conference on relations between States and international organizations.

The meeting rose at 6.10 p.m

1145th MEETING

Tuesday, 27 July 1971, at 3.15 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Ushakov, Sir Humphrey Waldock.

Co-operation with other bodies

[Item 9 of the agenda]

(continued)

STATEMENT BY THE OBSERVER FOR THE EUROPEAN
COMMITTEE ON LEGAL CO-OPERATION

(continued)

1. The CHAIRMAN asked whether any further members wished to comment on the statement made at the previous meeting by the observer for the European Committee on Legal Co-operation.
2. Mr. AGO said he had been particularly struck by the observer's report on the progress made with the European draft Convention on State Immunity, a subject on which a convention was badly needed. The value of a draft convention on action against the pollution of the major international waterways of western Europe had also long been evident.
3. He welcomed the interest shown by the European Committee on Legal Co-operation in the peaceful uses of the sea-bed and the ocean floor and in the protection of diplomats; the latter was a topic which the Commission had very much to heart. Closer co-operation between the Committee, the Commission and the other United Nations bodies dealing with those matters would be fertile of results.
4. He had been glad to learn that the Vienna Convention on the Law of Treaties was being applied by certain organs of the Council of Europe and had been quoted in a recent judgment of the European Court of Human Rights.¹ The International Court of Justice had also relied on the Vienna Convention in the Namibia case,² so it was gratifying to see that it was already regarded as authoritative, even before it had come into force.
5. He congratulated the European Committee on Legal Co-operation on its achievements and wished it every success in its work.

¹ See 1144th meeting, para. 48.

² See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, para. 94.

6. Mr. EUSTATHIADES said he wished to associate himself with Mr. Ago's congratulations to the observer for the European Committee on Legal Co-operation on the work which he himself and his Committee had been performing for many years at the Council of Europe; every year it included fresh topics of great interest to the Commission. It would be very helpful if the documentation on the question of pollution prepared by the Council of Europe could be transmitted to the Commission in due course, perhaps at its next session.

7. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said he was grateful to the Commission for the interest it had displayed in his review of topics of mutual interest being studied by the European Committee on Legal Co-operation.

Draft report of the Commission on the work
of its twenty-third session

(A/CN.4/L.176; A/CN.4/L.178 and Add.1, 3, 4, 5, 7 and 8)

8. The CHAIRMAN invited the Commission to consider the draft report on the work of its twenty-third session.

Chapter I

ORGANIZATION OF THE SESSION (A/CN.4/L.176)

9. Mr. ROSENNE said he noted that, in the third sentence of paragraph 1, reference was made to "81 draft articles and commentaries thereon". Since there were more than eighty-one draft articles in all, that figure should be corrected.
10. In paragraph 7, which reproduced the Commission's agenda for the session, item 7, which read "Updating of the Commission's long-term programme of work" should be corrected to read "Review of the Commission's long-term programme of work", in accordance with the Commission's decision at the first meeting of the present session.³
11. The CHAIRMAN said that, if there were no objection, he would take it that the Commission accepted those corrections.

It was so agreed.

Chapter I, as amended, was approved.

Chapter II

RELATIONS BETWEEN STATES AND
INTERNATIONAL ORGANIZATIONS

- A. INTRODUCTION (Paragraphs 1 to 50 and 44 bis)
(A/CN.4/L.178 and Add.1)
12. Mr. ROSENNE said that in paragraph 7 the title of the Secretariat study referred to should be corrected

³ See 1087th meeting, para. 40.

in accordance with the edited version of that document.

13. In paragraph 15, he suggested that the words "the provisional draft of twenty-one articles" be amended to read "the provisional draft of those twenty-one articles", so as to establish a connexion with what preceded.

14. In paragraph 29, he suggested that operative paragraph 4 (a) of General Assembly resolution 2634 (XXV) be cited in full, because it referred to the debate in the Sixth Committee.

15. In the first sentence of paragraph 30, a number of documents were mentioned. Those documents contained the comments not only of Governments but also of the United Nations Secretariat and of a number of specialized agencies and of the IAEA; the sentence should therefore be corrected accordingly. In the following sentence, the reference to "the written comments of Governments" should be expanded so as to refer to the written comments not only of Governments but also of international organizations.

16. At the end of the paragraph, he suggested that a reference be added to the five papers which had been submitted by the Secretariat in response to the Commission's decision at its 1086th meeting at the previous session.⁴

17. In paragraph 31, he suggested that the first sentence be amended so as to indicate that the Commission had examined the Special Rapporteur's sixth report from its 1088th to its 1110th meeting, and had then considered the report of the Drafting Committee from its 1110th to its 1127th meeting; the following sentences, which referred to the establishment of the Working Group and to the consideration of the Working Group's report, would remain unchanged.

18. In the third sentence of paragraph 33, he suggested that the paraphrase of paragraph (5) of the commentary to articles 4 and 5 as adopted at the twentieth session, be replaced by the actual language of that paragraph (5).

19. In paragraph 34, he was not satisfied with the first sentence, which stated that "the Commission wishes to recall the reasons given by it in favour of the preparation of a convention in the case of the law of treaties". He felt that the Commission should base its decision to adopt the form of a draft convention on its merits. He therefore suggested that the words in question be replaced by some such wording as "The Commission continues to believe that the reasons given by it in favour of the preparation of a convention in the case of the law of treaties are equally applicable to the present case".

20. Finally, in the last sentence of paragraph 42, he suggested that the words "certain rules" be amended to read "certain new rules".

21. Mr. BARTOŠ suggested the insertion at the end of the last sentence of paragraph 49 of a passage reading "and also by States which are not members of the United Nations but are members of a specialized agency".

22. The CHAIRMAN said that, if there were no objection, he would take it that the Commission accepted the changes suggested by Mr. Rosenne and Mr. Bartoš.

It was so agreed.

The introduction to Chapter II, as amended, was approved.

COMMENTARIES TO ARTICLES 20 to 30 (A/CN.4/L.178/Add.3)

23. Mr. EL-ERIAN (Special Rapporteur) said that the commentaries to individual draft articles had been prepared on the assumption that the "General Comments" which preceded each of the three parts of the draft in the 1968, 1969 and 1970 reports of the Commission would be included in the present draft in the form of introductory comments.

Commentary to article 20 (General facilities)

The commentary to article 20 was approved.

Commentary to article 21 (Premises and accommodation)

The commentary to article 21 was approved.

Commentary to article 22 (Assistance by the Organization in respect of privileges and immunities)

The commentary to article 22 was approved.

Commentary to article 23 (Inviolability of the premises)

The commentary to article 23 was approved.

Commentary to article 24 (Exemption of the premises from taxation)

The commentary to article 24 was approved.

Commentary to article 25 (Inviolability of archives and documents)

The commentary to article 25 was approved.

Commentary to article 26 (Freedom of movement)

The commentary to article 26 was approved.

Commentary to article 27 (Freedom of communication)

The commentary to article 27 was approved.

Commentary to articles 28 (Personal inviolability) and 29 (Inviolability of residence and property)

The Commentary to articles 28 and 29 was approved.

Commentary to article 30 (Immunity from jurisdiction)

The commentary to article 30 was approved.

⁴ See *Yearbook of the International Law Commission, 1970*, vol. I, p. 259, 1086th meeting, paras. 31 and 32.

COMMENTARIES TO ARTICLES 31 to 39 (A/CN.4/L.178/Add.4) and to ARTICLE 40 (A/CN.4/L.178/Add.5)

Commentary to article 31 (Waiver of immunity)

24. Mr. ROSENNE said he noted that in paragraph (1) of the commentary to article 31 it was stated that paragraphs 1 to 4 of that article were based "on the provisions" of article 32 of the Vienna Convention on Diplomatic Relations, whereas in paragraph (1) of the commentary to article 32, however, it was stated that that article was "based on" article 33 of that same convention. Elsewhere, one or other of those two expressions was used. He suggested that a uniform formula be used throughout the commentaries unless there was some reason to the contrary.

25. Sir Humphrey WALDOCK said that the reason for the inconsistency to which Mr. Rosenne had drawn attention was that the Working Group had had no time to look over the texts once it had prepared them. They could all do with a little tidying up.

26. In some cases the commentary stated that the article to which it was appended "corresponded to" or "paralleled" a certain article of the Vienna Convention. The reason for using different expressions was that the variation from the Vienna model was not the same in all cases.

The commentary to article 31 was approved.

Commentary to article 32 (Exemption from social security legislation)

The commentary to article 32 was approved.

Commentary to article 33 (Exemption from dues and taxes)

The commentary to article 33 was approved.

Commentary to article 34 (Exemption from personal services)

The commentary to article 34 was approved.

Commentary to article 35 (Exemption from customs duties and inspection)

The commentary to article 35 was approved.

Commentary to article 36 (Privileges and immunities of other persons)

The commentary to article 36 was approved.

Commentary to article 37 (Nationals of the host State and persons permanently resident in the host State)

The commentary to article 37 was approved.

Commentary to article 38 (Duration of privileges and immunities)

The commentary to article 38 was approved.

Commentary to article 38 bis (Professional or commercial activity)

The commentary to article 38 bis was approved.

Commentary to article 39 (End of the functions of the head of mission or of a member of the diplomatic staff)

The commentary to article 39 was approved.

Commentary to article 40 (Protection of premises, property and archives)

The commentary to article 40 was approved.

COMMENTARIES TO ARTICLES 50 to 61 (A/CN.4/L.178/Add.7)

Commentary to article 50 (General facilities)

27. Mr. EUSTATHIADES said that the reason stated in paragraph (2) for the replacement of the expression "functions of the delegation" by the expression "tasks of the delegation" was the temporary nature of delegations, whereas the real reason was rather the diversity of their tasks. He hoped that the text of the commentary would be corrected accordingly.

28. Mr. ROSENNE said that he agreed with Mr. Eustathiades's observation, but would go even farther and suggest that the last sentence in paragraph (2) be made the first sentence, and that paragraph (2) as a whole be included as a part of the general introduction to the draft articles.

29. The CHAIRMAN said that those observations would be borne in mind when the text was given its final retouching.

The commentary to article 50 was approved.

Commentary to article 51 (Premises and accommodation)

The commentary to article 51 was approved.

Commentary to article 52 (Assistance in respect of privileges and immunities)

The commentary to article 52 was approved.

Commentary to article 53 (Inviolability of the premises)

The commentary to article 53 was approved.

Commentary to article 54 (Exemption of the premises from taxation)

The commentary to article 54 was approved.

Commentary to article 55 (Inviolability of archives and documents)

The commentary to article 55 was approved.

Commentary to article 56 (Freedom of movement)

The commentary to article 56 was approved.

Commentary to article 57 (Freedom of communication)

The commentary to article 57 was approved.

Commentary to articles 58 (Personal inviolability) and 59 (Inviolability of private accommodation and property)

The commentary to articles 58 and 59 was approved.

Commentary to article 60 (Immunity from jurisdiction)

The commentary to article 60 was approved.

Commentary to article 61 (Waiver of immunity)

The commentary to article 61 was approved.

COMMENTARIES TO ARTICLES 62 to 70 (A/CN.4/L.178/Add.8)**Commentary to article 62 (Exemption from social security legislation)**

The commentary to article 62 was approved.

Commentary to article 63 (Exemption from dues and taxes)

30. Mr. EUSTATHIADES said that he wondered whether it was necessary to retain the last sentence in paragraph (2).

31. Mr. EL-ERIAN (Special Rapporteur) said that his first reaction was that it might be useful.

The commentary to article 63 was approved.

Commentary to article 64 (Exemption from personal services)

The commentary to article 64 was approved.

Commentary to article 65 (Exemption from customs duties and inspection)

The commentary to article 65 was approved.

Commentary to article 66 (Privileges and immunities of other persons)

The commentary to article 66 was approved.

Commentary to article 67 (Nationals of the host State and persons permanently resident in the host State)

The commentary to article 67 was approved.

Commentary to article 68 (Duration of privileges and immunities)

The commentary to article 68 was approved.

Commentary to article 69 (End of the functions of the head of delegation or any other delegate or member of the diplomatic staff)

The commentary to article 69 was approved.

Commentary to article 70 (Protection of premises, property and archives)

The commentary to article 70 was approved.

ARTICLE 113 (Professional activity)

32. Mr. ROSENNE said he hoped that the commentary would include some mention of the fact that the Working Group had decided to drop article 113, on professional activity, and to limit that provision to article 38 *bis*.⁵

33. Mr. EL-ERIAN (Special Rapporteur) suggested that a reference to the deletion of article 113 might be made in a footnote to article 38 *bis*.⁶

The meeting rose at 5.10 p.m.

⁵ See 1127th meeting, paras. 18 and 19.

⁶ See 1135th meeting, paras. 49 to 63 and footnote 9.

1146th MEETING

Wednesday, 28 July 1971, at 10.20 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Ushakov, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 to 3; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.174/Add.6)

[Item 1 of the agenda]

(resumed from the 1142nd meeting)

FIFTH REPORT OF THE WORKING GROUP

(resumed from the 1142nd meeting)

1. The CHAIRMAN said that Mr. Ushakov had some further comments to make on the fifth report of the Working Group (A/CN.4/L.174/Add.6).

ARTICLE N (Inviolability of accommodation and property)¹ and ARTICLE L (Freedom of communication)²

2. Mr. USHAKOV said he detected two small mistakes, which should be corrected.

3. In article N, paragraph 4, the reservation which appeared in article 59, paragraph 2 (A/CN.4/L.181, p. 33), had been omitted, so that the inviolability of the property of observer delegates was broader than that accorded to delegates to an organ or to a conference. He therefore proposed that the words, "except as provided in paragraph 2 of article O," be inserted before the words "property of the observer delegates".

4. Secondly, in article L, paragraph 1, the word "permanent" should be inserted before "diplomatic missions".

5. Mr. CASTRÉN said he supported Mr. Ushakov's proposal concerning article N. The reference should, however, be not only to paragraph 2, but also to paragraph 1 of article O, which dealt with immunity from criminal jurisdiction, since paragraph 2 of article 59 referred to paragraph 1 of article 60 (A/CN.4/L.181, p. 34), which dealt with both immunity from criminal jurisdiction and immunity from civil and administrative jurisdiction.

6. Mr. ROSENNE said he did not think that the addition of the word "permanent" was necessary in article L, since it did not appear in the corresponding article 57. In any case, if a change was made in article L, the same change should also be made in articles 27 and 57.

7. Mr. USHAKOV said that article 1 (b) of the Convention on Special Missions defined a permanent diplomatic mission as "a diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations". He therefore thought that the word "permanent" should be added in paragraph 1 of article L, and that a consequential correction should be made in the corresponding article on permanent delegations.

8. The CHAIRMAN said that Mr. Ushakov's proposal concerning the addition of the word "permanent" in article L was a drafting point which should be dealt with during the final touching-up of the draft articles.

It was so agreed.

9. The CHAIRMAN suggested that the Commission accept the amendments proposed by Mr. Ushakov and Mr. Castrén to article N, paragraph 4, which would then read: "The papers, correspondence and, except as provided in paragraphs 1 and 2 of article O, property of the observer delegates shall likewise enjoy inviolability".

It was so agreed.

Draft report of the Commission on the work of its twenty-third session

(A/CN.4/L.179 and Add.1, 2 and 4; A/CN.4/L.180)

(resumed from the previous meeting)

Chapter III

PROGRESS OF WORK ON TOPICS CURRENTLY UNDER CONSIDERATION

10. The CHAIRMAN invited the Commission to continue its consideration of its draft report, beginning with chapter III.

11. Mr. ROSENNE said that he had some doubts about chapter III as a whole, since it seemed to represent a break with the practice traditionally followed by the Commission in its reports. The presentation of the various sections might be made more uniform by starting each section with a brief introductory paragraph. The name of the special rapporteur concerned should be mentioned in each section.

12. Either in chapter III or in chapter IV there should be two paragraphs on the lines of paragraphs 72 and 73 of the Commission's report on the work of its eighteenth session.³ The first would state that the Commission recognized that it was a permanent body and must make arrangements to ensure the continuation of the work on the topics selected for codification and progressive development, while the second would reaffirm the Commission's previous decisions that a Special Rapporteur who was re-elected as a member should continue his work on his topic, if not yet finally disposed of by the Commission, unless and until the Commission as newly constituted decided otherwise.

13. The General Rapporteur should be asked to draft those paragraphs and propose where they should be inserted.

14. Sir Humphrey WALDOCK said that some form of introduction to chapter III was necessary in order to make it clear that, when the reports in question had not been discussed by the Commission, the special rapporteurs were merely making statements on the progress of their work.

15. Mr. SETTE CÂMARA (Rapporteur) said he fully agreed that some sort of introductory paragraph was indispensable.

Section D. The Most-Favoured-Nation Clause

(A/CN.4/L.179)

16. Mr. ELIAS said that section D should be recast on the lines suggested by Sir Humphrey Waldock and the paragraphs should be numbered.

17. The CHAIRMAN suggested that the Commission approve section D, subject to the comments made by Mr. Elias.

Section D was approved on that understanding.

¹ See 1142nd meeting, paras. 69 to 72.

² *Ibid.*, para. 68.

³ See *Yearbook of the International Law Commission, 1966*, vol. II, p. 277.

Section E. The question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/L.179/Add.1)

18. Mr. ROSENNE proposed that paragraphs 5 to 14 of the Sub-Committee's report be inserted in paragraph 4 of section E in order to bring to the attention of the General Assembly the Commission's preliminary thinking about the substantive questions connected with that topic.

19. Sir Humphrey WALDOCK said that in his opinion the section, which was the result of a corporate effort, should either form a separate chapter or be presented as two separate sections.

20. Mr. ROSENNE said that it was the Commission's traditional practice to make each substantive topic the subject of a separate chapter, to which the report of the sub-committee concerned was annexed.

21. The CHAIRMAN suggested that the Commission adopt the proposals made by Mr. Rosenne and Sir Humphrey Waldock.

It was so agreed.

Section E was approved on that understanding.

Section C. State responsibility (A/CN.4/L.179/Add.2)

Section C was approved.

Section A. Succession in respect of treaties (A/CN.4/L.179/Add.4)

Section A was approved, subject to a minor correction to the English text.

Chapter IV

Section A. Progressive development and codification of the rules of international law relating to international watercourses (A/CN.4/L.180)

22. Mr. ROSENNE proposed that the words "It is the view of the Commission" in the last sentence of paragraph 3 be replaced by the words "It is the understanding of the Commission".

It was so agreed.

Section A, as amended, was approved.

Proposed institution of an annual Gilberto Amado memorial lecture

23. Mr. ELIAS said that members would recall that at the beginning of the present session he had informed them of the recommendation of the Sixth Committee that an annual lecture should be instituted in memory of

the late Mr. Gilberto Amado.⁴ As the suggestion had been welcomed by the Commission, he had asked Mr. Sette Câmara to ascertain the views of the Brazilian Government and, in particular, to ask whether it was prepared to provide some financial assistance towards the endowment of those lectures.

24. The Brazilian Government had given a very favourable reply and had offered to provide the sum of \$3,000 for 1972. That sum would be used for four purposes. First, it would be used to defray the cost of an annual dinner at which the memorial lecture would be delivered; the dinner would be attended by the members of the Commission, by the twenty-four students attending the United Nations seminar in international law, and by some twenty-five guests from Geneva. Secondly, it would be used, if necessary, to pay the travelling expenses of the lecturer, which would not amount to a large sum, since it was hoped that he would be a past or present member of the Commission who would already be in Europe. Thirdly, a small honorarium would be given to the lecturer. Lastly, a sum would be allocated to cover the cost of translating and publishing the lecture, with a view to giving it the widest possible publicity.

25. The lecture would of course be given during the annual seminar on international law at Geneva, so that the students would be able to attend it. A small advisory committee should be set up to choose the lecturers and supervise publication. He would suggest that that committee be selected on the basis of geographical distribution and that it might consist of the following members: Mr. Ago, Mr. Kearney, Mr. Tabibi, Mr. Ushakov, Sir Humphrey Waldock, Mr. Yasseen and himself. Mr. Raton could be secretary to the committee.

26. If the Commission accepted that proposal, the Chairman should write to the Brazilian Government through Mr. Sette Câmara, informing it of the Commission's decision and asking that the sum in question be remitted to the United Nations Office at Geneva through Mr. Raton.

27. Mr. SETTE CÂMARA said that his Government had been deeply moved by the initiative taken by Mr. Elias in the Sixth Committee and in the Commission, and would be happy to make a special contribution for the purpose of endowing an annual Gilberto Amado memorial lecture. His Government was prevented by Brazilian budgetary practice from entering into a long-term commitment, but would provide the sum in question for 1972 and would contribute again in future years.

28. Mr. TABIBI said that he wished to express his personal gratitude to Mr. Elias for the proposal he had made in the Sixth Committee and in the Commission, which he fully supported. The Brazilian Government's contribution would be used primarily for the benefit of the youth of Asia, Africa and Latin America. Since Gilberto Amado had always strongly advocated the provision of technical assistance for the teaching of inter-

⁴ See 1187th meeting, para. 9.

national law, the endowment of an annual lecture would be an appropriate tribute to his memory.

29. Arrangements might perhaps be made to bring out some small publication which would sum up the ideals and thoughts of Gilberto Amado himself.

30. Mr. ROSENNE said he supported that suggestion. He hoped that the publication would include, in addition to some account of Mr. Amado's work in the Sixth Committee and in the Commission, a reference to the fact that he had been a member of the Committee of Seventeen which had drawn up the Statute of the Commission.

31. Mr. ALCÍVAR said that he welcomed the offer by the Brazilian Government to honour the memory of a man who had belonged not only to Brazil but to Latin America as a whole.

32. The CHAIRMAN said it appeared to be generally agreed that the Commission should accept Mr. Elias's proposal and that he (the Chairman) should address a letter of thanks to the Brazilian Government through Mr. Sette Câmara.

The meeting rose at 11.15 a.m.

1147th MEETING

Thursday, 29 July 1971, at 10.15 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Ushakov, Sir Humphrey Waldock, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-third session

(A/CN.4/L.178/Add.9 to 13; A/CN.4/L.179/Add.3; A/CN.4/L.180/Add.1 and 2; A/CN.4/L.181)

(continued)

Chapter III

Section B. Succession of States in respect of matters other than treaties (A/CN.4/L.179/Add.3)

1. The CHAIRMAN invited the Commission to continue its consideration of its draft report.

2. Sir Humphrey WALDOCK said that the word "transferable", used in the English version of chapter III,

especially in the part under consideration, should be replaced by the term "transmissible", which was more appropriate in connexion with succession.

It was so agreed.

Section B, as amended, was approved.

Chapter III, as amended, was approved.

Chapter II

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

COMMENTARIES TO ARTICLES 71 to 78 (A/CN.4/L.178/Add.9)

Commentary to article 71 (Nationality of the members of the mission or the delegation)

The commentary to article 71 was approved.

Commentary to article 72 (Laws concerning acquisition of nationality)

The commentary to article 72 was approved.

Commentary to article 73 (Privileges and immunities in case of multiple functions)

The commentary to article 73 was approved.

Commentary to article 74 (Respect for the laws and regulations of the host State)

The commentary to article 74 was approved.

(Article 75: deleted)

Commentary to article 76 (Entry into the territory of the host State)

The commentary to article 76 was approved.

Commentary to article 77 (Facilities for departure)

The commentary to article 77 was approved.

Commentary to article 78 (Transit through the territory of a third State)

3. Mr. ROSENNE said that the words "with the necessary adjustments and drafting improvements" in paragraph (5) could be read as a criticism of the work of a diplomatic conference. He suggested that they be replaced by the words "with some adjustments and drafting changes".

It was so agreed.

The commentary to article 78, as amended, was approved.

COMMENTARIES TO ARTICLES 79 to 82 (A/CN.4/L.178/Add.10)

Commentary to article 79 (Non-recognition of States or governments or absence of diplomatic or consular relations)

4. Mr. ROSENNE suggested that a brief reference be inserted in paragraph (1) to the relevant passages of the reports of the Sixth Committee to the General Assembly at its twenty-fourth and twenty-fifth sessions (A/7746, para. 22, and A/8147, para. 17), in which specific reference was made to the question of exceptional situations.

It was so agreed.

5. Mr. ROSENNE said that the concluding words of paragraph (3) gave the impression that articles 63 and 74 of the Vienna Convention on the Law of Treaties both dealt with the conclusion, termination and suspension of the operation of treaties. In fact, article 63 was in Part V (Invalidity, termination and suspension of the operation of treaties) of that Convention, while article 74 was in Part VI (Miscellaneous provisions) and was one of the articles which applied to the Convention as a whole.

6. Sir Humphrey WALDOCK said he agreed with Mr. Rosenne. He suggested that the concluding words of paragraph (3) "in connexion with the conclusion, termination and suspension of the operation of treaties" be replaced by the words: "in the law of treaties".

It was so agreed.

The commentary to article 79, as amended, was approved.

Commentary to article 80 (Non-discrimination)

The commentary to article 80 was approved.

Commentary to articles 81 (Consultations between the sending State, the host State and the Organization) *and* *82* (Conciliation)

7. Mr. ROSENNE suggested that, in the penultimate sentence of paragraph (6), the words "at present" should be inserted after the word "could" and before the words "be found among governments". He also suggested that the sentence be moved to the end of the paragraph.

8. The words "is thought desirable" in the penultimate sentence of paragraph (8) should be corrected to read "is thought to be desirable".

9. In paragraph (13), the first sentence did not reflect the idea expressed in paragraph 8 of the article, which was intended to safeguard the procedures on the settlement of disputes contained in any agreement, not merely in existing bilateral or multilateral agreements on privileges and immunities. The words "established by existing bilateral or multilateral agreements" should be replaced by the words "by any other existing bilateral or multilateral agreements between the parties".

It was so agreed.

The commentary to articles 81 and 82, as amended, was approved.

COMMENTARIES TO ARTICLES 5 to 10 (A/CN.4/L.178/Add.11)

Commentary to article 5 (Establishment of missions)

10. Mr. ROSENNE suggested that, in the second sentence of paragraph (5), the words "vital interest" be replaced by the words "great interest".

It was so agreed.

The commentary to article 5, as amended, was approved.

Commentary to article 6 (Functions of the permanent mission)

11. Mr. ROSENNE suggested that, in the penultimate sentence of paragraph (5), the words "significant achievements" be replaced by a more suitable expression, such as "significant features" or "significant developments".

It was so agreed.

12. Mr. ROSENNE said that in the third sentence of paragraph (6), it was stated that, during the discussion of article 6 in the Commission, reference had been made to some exceptional cases in which "the function of diplomatic protection could be performed by the permanent mission". He suggested the deletion of the word "diplomatic" and the addition at the end of the sentence of the words "in connexion with the relations between one of its nationals and the Organization". The passage would then express more accurately the point he had raised during the discussion. It was, of course, true that the cases in which such protection was afforded were rare, as was stated in the fourth sentence of the paragraph.

13. Mr. KEARNEY said that he would prefer that the reference to exceptional cases be omitted. He therefore suggested that the third and fourth sentences of paragraph (6) be deleted.

It was so agreed.

The commentary to article 6, as amended, was approved.

Commentary to article 7 (Functions of the permanent observer mission)

The commentary to article 7 was approved.

Commentary to article 8 (Multiple accreditation or appointment)

The commentary to article 8 was approved.

Commentary to article 9 (Appointment of the members of the mission)

The commentary to article 9 was approved.

Commentary to article 10 (Credentials of the head of mission)

The commentary to article 10 was approved.

COMMENTARIES TO ARTICLES 11 to 15 (A/CN.4/L.178/Add.12)

Commentary to article 11 (Accreditation to organs of the Organization)

The commentary to article 11 was approved.

Commentary to article 12 (Full powers in the conclusion of a treaty with the Organization)

14. Mr. ROSENNE suggested that the definition of the term "full powers" given in article 2, paragraph 1 (c) of the Convention on the Law of Treaties be included in footnote 1.

It was so agreed.

The commentary to article 12, as amended, was approved.

Commentary to article 13 (Composition of the mission)

The commentary to article 13 was approved.

Commentary to article 14 (Size of the mission)

The commentary to article 14 was approved.

Commentary to article 15 (Notifications)

The commentary to article 15 was approved.

COMMENTARIES TO ARTICLES 16 to 19 (A/CN.4/L.178/Add.13)

Commentary to article 16 (Chargé d'affaires *ad interim*)

The commentary to article 16 was approved.

Commentary to article 17 (Precedence)

The commentary to article 17 was approved.

Commentary to article 18 (Office of the mission)

15. Mr. ROSENNE said it was his understanding that "an office of the Organization", referred to in the first sentence of paragraph (1), was not any office of the Organization but the kind of office referred to in paragraph 1 (12) (i) of article 1, on the use of terms.

16. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the commentary to article 18 on that understanding.

The commentary to article 18 was approved.

Commentary to article 19 (Use of flag and emblem)

The commentary to article 19 was approved.

17. Mr. EL-ERIAN (Special Rapporteur) said that reference was sometimes made in the commentaries to the "earlier draft" or the "previous draft". It was his intention to replace those expressions throughout the commentaries by the expression "preliminary draft".

Chapter IV

Section D. Co-operation with other bodies (A/CN.4/L.180/Add.1)

1. Asian-African Legal Consultative Committee

18. Mr. TABIBI suggested that some mention should be made of the report submitted by Mr. Elias on the last session of the Committee. It should also be made clear in paragraph 1 that Mr. Fernando was the Permanent Secretary-General of that Committee.

It was so agreed.

2. European Committee on Legal Co-operation

19. Sir Humphrey WALDOCK suggested that paragraph 1 should include a reference to the fact that he had attended the last session of the Committee as an observer.

It was so agreed.

3. Inter-American Juridical Committee

20. Mr. SETTE CÂMARA said that the words "intellectual property" in the first sentence of paragraph 22 should be replaced by the words "industrial property".

It was so agreed.

Section D, as amended, was approved.

Section E. Date and place of the twenty-fourth session (A/CN.4/L.180/Add.2)

21. Mr. ELIAS suggested that the next session should begin on 2 May 1972.

It was so agreed.

Section E was approved.

Section F. Representation at the twenty-sixth session of the General Assembly (A/CN.4/L.180/Add.2)

Section F was approved.

Section G. Seminar on International Law (A/CN.4/L.180/Add.2)

22. Mr. BARTOŠ suggested that a short sentence should be included in the section on the Seminar on International Law to explain that members of the Commission had delivered their lectures without receiving an honorarium. A few words of congratulation should also be addressed to the Secretariat.

It was so agreed.

23. Mr. TESLENKO (Deputy Secretary to the Commission) said that the second sentence in paragraph 8 should be corrected to read: "In accordance with the wishes expressed during the debates of the Sixth Committee, three young diplomats who had participated in the work of the Committee were admitted to this session of the Seminar".

Section G, as amended, was approved.

Relations between States and international organizations

(A/CN.4/221 and Add.1 and Corr.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 to 3; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.181)

[Item 1 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES ON THE REPRESENTATION OF STATES IN THEIR RELATIONS WITH INTERNATIONAL ORGANIZATIONS

24. The CHAIRMAN invited the Chairman of the Working Group to introduce the draft articles on the representation of States in their relations with international organizations (A/CN.4/L.181).

25. Mr. KEARNEY (Chairman of the Working Group) said that the Secretariat had made certain changes in the text of the draft articles as given in document A/CN.4/L.181 which it wished to bring to the Commission's attention.

26. In view of the new definition of "delegation to a conference" in article 1, paragraph 1 (10), it was proposed that paragraph 1 (19) should be amended to read: "delegate" means any person designated by a State to participate as its representative in the proceedings of an organ or in a conference". The words "... of a conference" would thus be replaced by the words "in a conference".

27. In article 11, paragraph 3, it was proposed to add the word "delegate" after the word "observer" in the phrase "to act as an observer".

28. In articles 17 and 48, it was proposed to replace the words "their States" by the words "the States", in order to bring the English version more closely into line with the French and Spanish versions.

29. In article 60, paragraph 1 (a), and article 63, sub-paragraph (b), it was proposed to replace the word "purpose" by the word "purposes".

30. Mr. ROSENNE said that sub-paragraph (b) of article 4 seemed to differ considerably from the text of that sub-paragraph adopted at the 1135th meeting. He asked why the words "of universal character or their representation at conferences convened by or under the auspices of such organizations" had been added after the words "international organizations".

31. Mr. KEARNEY (Chairman of the Working Group) said that the Working Group had decided to add those

words in order to make it clear that the draft articles also referred to conferences.

32. The CHAIRMAN put to the vote the draft articles on the representation of States in their relations with international organizations (A/CN.4/L.181).

The draft articles were adopted unanimously.

33. The CHAIRMAN said that he wished to express his most sincere thanks to the Special Rapporteur and to the members of the Working Group, without whose efforts that important item of the agenda could not have been successfully completed.

The meeting rose at 12.20 p.m.

1148th MEETING

Friday, 30 July 1971, at 10.20 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Ushakov, Sir Humphrey Waldock, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-third session

(A/CN.4/L.178/Add.2, 6, 14 and 15; A/CN.4/L.180/Add.3 to 5)

(continued)

Chapter II

(resumed from the previous meeting)

1. The CHAIRMAN invited the Commission to continue its consideration of chapter II of the draft report.

COMMENTARIES TO ARTICLES 1 to 4 (A/CN.4/L.178/Add.2)

Commentary to article 1 (Use of terms)

2. Mr. ROSENNE said that the word "used" in the first line of paragraph (6) should be replaced by the word "uses".

3. He suggested that paragraph (14) be amended to read: "Paragraph 2 is similar in purpose to paragraph 2 of article 2 of the Vienna Convention on the Law of Treaties".

It was so agreed.

The commentary to article 1, as amended, was approved.

Commentary to article 2 (Scope of the present articles)

The commentary to article 2 was approved.

Commentary to article 3 (Relationship between the present articles and the relevant rules of international organizations or conferences)

4. Mr. ROSENNE suggested that the word "all" in the expression "between the States concerned" in paragraph (6) be deleted.

It was so agreed.

5. Sir Humphrey WALDOCK suggested that the phrase "thus enabling participation of entities" in the last sentence of paragraph (3) be replaced by the phrase "thus permitting the participation of entities".

It was so agreed.

The commentary to article 3, as amended, was approved.

Commentary to article 4 (Relationship between the present articles and other international agreements)

The commentary to article 4 was approved.

COMMENTARIES TO ARTICLES 44 to 49 (A/CN.4/L.178/Add.6)

Commentary to article 44 (Composition of the delegation)

The commentary to article 44 was approved.

Commentary to article 45 (Size of the delegation)

The commentary to article 45 was approved.

Commentary to article 46 (Notifications)

The commentary to article 46 was approved.

Commentary to article 47 (Acting head of the delegation)

The commentary to article 47 was approved.

Commentary to article 48 (Precedence)

The commentary to article 48 was approved.

Commentary to article 49 (Status of the Head of State and persons of high rank)

The commentary to article 49 was approved.

COMMENTARIES TO ARTICLES 41 to 43 (A/CN.4/L.178/Add.14)

Commentary to article 41 (Sending of delegations)

The commentary to article 41 was approved.

Commentary to article 42 (Appointment of the members of the delegation)

The commentary to article 42 was approved.

Commentary to article 43 (Credentials of delegates)

6. Mr. ROSENNE suggested that the third sentence in paragraph (4) be amended to read: "The Commission, at its present session, re-examined this question in the light of these comments".

It was so agreed.

The commentary to article 43, as amended, was approved.

Annex

OBSERVER DELEGATIONS TO ORGANS AND TO CONFERENCES
(A/CN.4/L.178/Add.15)

7. Mr. ROSENNE suggested that paragraph 5 be broken up into a number of sub-paragraphs.

It was so agreed.

8. Mr. CASTRÉN suggested the addition of a new sentence in paragraph 1, between the existing second and third sentences, stating that several governments, in their written comments, had made requests similar to those of certain delegations in the Sixth Committee.

It was so agreed.

The Annex, as amended, was approved.

Chapter II, as amended, was approved.

Chapter IV

(resumed from the previous meeting)

Section B. Review of the Commission's long-term programme of work
(A/CN.4/L.180/Add.3)

9. Mr. SETTE CÂMARA suggested that a sentence be added to section B expressing the Commission's appreciation of the excellent work done by the Codification Division of the Office of Legal Affairs in producing the Survey of International Law (A/CN.4/245), which was a milestone in the history of the Commission.

It was so agreed.

Section B, as amended, was approved.

Section C. Organization of future work

Section C was approved.

*Section H. Gilberto Amado memorial lecture
(A/CN.4/L.180/Add.4)*

10. Mr. ELIAS suggested that the first sentence in paragraph 4 be amended to read: "The money offered by the Brazilian Government would be held in the trust fund established for the fellowships given to the Seminar and would be used to defray the cost of the implementation of the programme, including the publication in English, French and Spanish of the annual lecture."

It was so agreed.

11. M. ROSENNE suggested that the words "annual dinner" in paragraph 3 should be replaced by the words "annual commemoration".

12. He further suggested that section H be placed immediately before or after the section on the Seminar on International Law.

It was so agreed.

Section H, as amended, was approved.

*Section C bis. The problems of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law
(A/CN.4/L.180/Add.5)*

13. Sir Humphrey WALDOCK suggested that the word "should" be inserted before the word "consider" in the first sentence of paragraph 1, and the word "its" before the word "decision" in the second sentence.

It was so agreed.

14. Mr. ROSENNE pointed out that the word "twenty-seventh" should be inserted in the blank space in paragraph 2.

Section C bis, as amended, was approved.

Chapter IV, as amended, was approved.

The draft report of the Commission on the work of its twenty-third session as a whole, as amended, was adopted.

Closure of the Session

15. The CHAIRMAN said he wished to thank members for the harmonious way in which they had worked together, as a result of which the Commission had been able to complete the draft articles on the representation of States in their relations with international organizations within the time-limit it had set itself. He also wished to thank the Special Rapporteur, Mr. El-Erian, without whose devoted labours the Commission would have been unable to achieve that result, the Working Group, which had made an outstanding contribution to the success of the session, the Drafting Committee and every member of the secretariat, whose competence and efficiency could not be overstated.

16. Mr. KEARNEY (Chairman of the Working Group) thanked the Chairman for the outstanding leadership he had given to the Commission, thus enabling it to complete the work on the draft articles on the representation of States in their relations with international organizations. He himself, as Chairman of the Working Group, wished to pay a tribute to the Special Rapporteur and to thank the members of the Working Group for their efficient and friendly co-operation. Thanks were also due to the Secretariat for its valuable assistance.

17. He expressed his regret that the Commission would be losing the services of Mr. Castrén, who was voluntarily retiring.

18. Mr. ROSENNE said he associated himself with all those sentiments. Since he was not certain of returning to the Commission at the next session, he wished to place on record his sense of appreciation of the unfailing courtesy he had always encountered from all the Special Rapporteurs and from all the officers of the Secretariat, however difficult the circumstances might have been from time to time. He also wished to express his gratitude to all his colleagues for the great enrichment which the Commission had given him. The work of the present session, particularly because it had broken new ground, would be seen in the future as one of the landmarks in the Commission's contribution to the codification and progressive development of international law.

19. Mr. YASSEEN said that he wished in particular to express his gratitude to the Chairman for the success with which he had conducted the business of the Commission during a long and difficult session.

20. A special tribute was due to Mr. El-Erian, the Special Rapporteur, who, despite the many difficulties created by exceptional circumstances, had devoted his time and energy to helping the Commission to overcome the problems that had arisen in dealing with a topic which had proved extremely hard to codify.

21. He also wished to thank the Secretariat for its efficiency and for all the help it had given, and to express his regret at the retirement of Mr. Castrén, a great internationalist, whose acute intelligence had been appreciated by every member of the Commission.

22. Mr. BARTOŠ said that he fully supported the tributes paid by previous speakers to the Chairman, the Special Rapporteur, the Working Group and the Secretariat.

23. The Commission would be the poorer for the retirement of Mr. Castrén, who for ten years had placed his great knowledge at its service. His ideas had made a valuable contribution to the Commission's work, and he had unerringly drawn attention to any defects in the Commission's drafts and to the important points that it was essential to bear in mind. He would be greatly missed.

24. Mr. TABIBI, Mr. ELIAS, Sir Humphrey WALDOCK, Mr. USHAKOV, Mr. THIAM, Mr. EUSTATHIADES, Mr. SETTE CÂMARA, Mr. ALCÍVAR, Mr. CASTAÑEDA and Mr. AGO associated themselves

with the tributes paid to the Chairman and other officers of the Commission, the Special Rapporteur and the Secretariat, and with the expressions of regret at the retirement of Mr. Castrén.

25. Mr. CASTRÉN said that he had been deeply moved by the kind words spoken in connexion with his decision not to stand for re-election. He would cherish the memory of the ten years he had spent in the Commission.

26. The CHAIRMAN proposed that the Commission adopt the following draft resolution:

“The International Law Commission,

“*Having adopted* the draft articles on representation of States in their relations with international organizations,

“*Desires to express* to the Special Rapporteur, Mr. A. El-Erian, its deep appreciation of the outstanding contribution he has made to the treatment of the topic during the past years by his tireless devotion and scholarly research, thus enabling the Commission to bring to a successful conclusion the important task of completing, with this draft, the work on codification already carried out in connexion with diplomatic and consular relations and special missions.”

The draft resolution was adopted unanimously.

27. Mr. EL-ERIAN said that he associated himself with the tributes which had been paid to the Chairman and the other officers of the Commission.

28. As Special Rapporteur, he wished to express his gratitude to the members of the Commission who had held the office of Chairman or Chairman of the Drafting Committee during the last three sessions. He was also deeply indebted to the Chairman and members of the Working Group for their work on the draft articles.

29. He had been much touched by the sympathetic understanding of his difficulties shown by the members of the Commission, and was grateful for the help and encouragement he had received from the Codification Division. The adoption under difficult conditions of the draft articles on the representation of States in their relations with international organizations reflected the spirit of comradeship in the Commission.

30. He thanked the Commission for its generous expression of appreciation in the form of the draft resolution just adopted.

31. Mr. STAVROPOULOS (Legal Counsel of the United Nations, representing the Secretary-General) said that he was grateful for the kind words of appreciation of the work of the Secretariat, both at New York and at Geneva.

32. The present Director of the Codification Division, Mr. Movchan, might not be serving the Commission as Secretary at the next session, as it was possible that his period of secondment to the United Nations Secretariat would end before then. Mr. Movchan had proved himself an excellent international civil servant and had made an outstanding contribution to the work of the Office of Legal Affairs.

33. Mr. MOVCHAN (Secretary to the Commission) said he greatly valued his first experience as an international civil servant and thanked the members of the Commission for their kindness during the past five years. He had much appreciated what had been said about the work of the Codification Division.

34. The CHAIRMAN declared the twenty-third session of the International Law Commission closed.

The meeting rose at 1.5 p.m.

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